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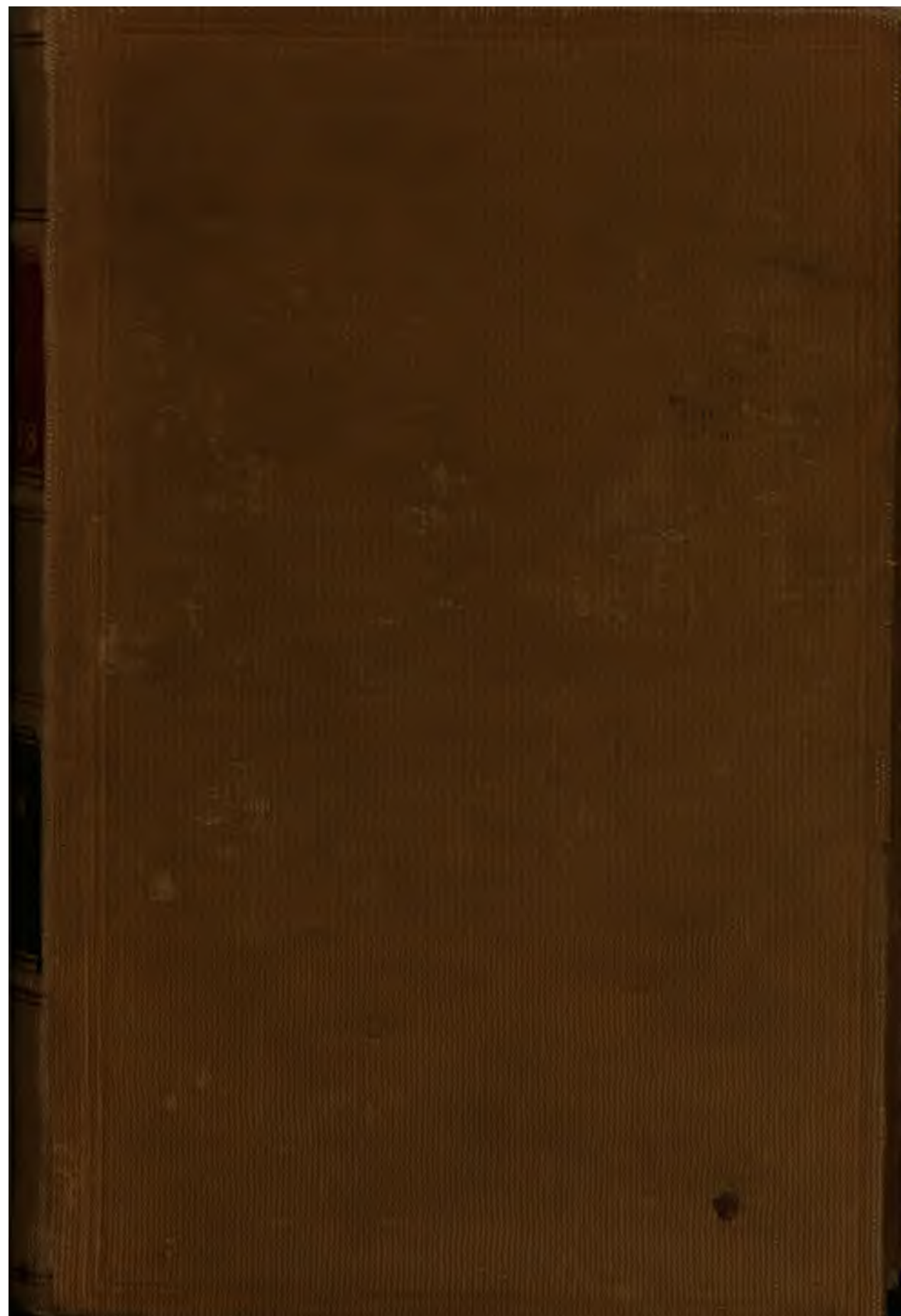
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A TREATISE
ON THE
LAW OF IRRIGATION
AND WATER RIGHTS

AND THE ARID REGION DOCTRINE OF
APPROPRIATION OF WATERS

**AS THE SAME IS IN FORCE IN THE STATES OF THE ARID AND SEMI-
ARID REGIONS OF THE UNITED STATES; AND ALSO INCLUDING
AN ABSTRACT OF THE STATUTES OF THE RESPECTIVE
STATES, AND THE DECISIONS OF THE COURTS
RELATING TO THOSE SUBJECTS.**

BY
CLESSON S. KINNEY
OF THE
SALT LAKE CITY BAR.

SECOND EDITION
IN FOUR VOLUMES.

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PART XI.

INTERNATIONAL, INTERSTATE, FEDERAL, STATE, AND MUNICIPAL CONTROL

CHAPTER 63.

INTERNATIONAL CONTROL

- § 1212. Scope of chapter.
- § 1213. Definition—Subject in general.
- § 1214. Treaty-making power—The establishment of commissions.
- § 1215. Treaties with Great Britain.
- § 1216. Treaties with Mexico, relative to international waters.
- § 1217. Treaties with Mexico—International boundary commission.
- § 1218. Condition leading to treaty of May 21, 1906, governing the division of the waters of the Rio Grande.
- § 1219. Text of treaty of May 21, 1906, relative to division of the waters of the Rio Grande.
- § 1220. Treaty of May 21, 1906, with Mexico—Effect of treaty.

§ 1212. **Scope of chapter.**—In this chapter we will discuss, in all its phases, the subject of the rights to waters flowing in what are known as international streams, or other bodies of waters, both as respecting the countries through which or adjoining which these streams or bodies of water flow or lie, and also as respecting the rights of citizens of the respective countries.

§ 1213. **Definition—Subject in general.**—International waters are those waters which flow through or bound two or more separate and independent countries.¹

As is the case with interstate waters, so it is with international waters, the most of the law upon the subject has been developed within the last few years. In the early history of this country, when

¹ For the appropriation of the waters of international streams, see Sec. 665.
(2195)

the waters of these international streams were sufficient for all the uses to which they were put, very little attention was paid to how much or how little was diverted from them by the citizens of the respective nations affected by them. But late years, with the constantly increasing use of these waters, and the growing demand for a still further use, questions have arisen respecting the division of the waters of these streams between the respective countries, which questions are of international importance. And when serious international questions arise between two countries they must be adjusted by the two nations or they lead to war. Two independent and sovereign nations have a different standing in respect to each other than have two States of the Union. A controversy between two States, as we have shown in the preceding chapter, can not lead to war between them, but may be settled by an original action brought in the Supreme Court of the United States.² While, upon the other hand, an independent and sovereign nation, for injuries committed by another sovereign nation, may seek a remedy by negotiation and treaty, and, failing in that, may resort to force.³ The usual method, however, in settling these controversies as to the rights of the respective countries in and to the waters of international streams, both with our neighbors on the north and on the south, has been, and, as we hope will long continue to be, by negotiations by those in authority leading up to treaties between the countries. It is against all principles of good morals, equity, and justice that there should be an unregulated scramble between the citizens of one nation to appropriate for themselves the greatest possible portion of the waters of international streams to the complete exclusion of the rights in and to those waters of the citizens of the adjoining nation. Each country must concede the rights of the other and of its citizens. These rights can be and should be determined by careful investigation, and should be finally fixed by treaties.

² See chapter on interstate waters, Secs. 1221-1234.

See, also, *Kansas v. Colorado*, on demurrer, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552; *Id.*, on final determination, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655; *Missouri v. Illinois*, 180 U. S. 203,

45 L. Ed. 497, 21 Sup. Ct. Rep. 331; *Id.*, on final determination, 200 U. S. 496, 50 L. Ed. 572, 16 Sup. Ct. Rep. 286, 202 U. S. 598, 50 L. Ed. 1160, 26 Sup. Ct. Rep. 713.

³ *Missouri v. Illinois*, *supra*; *Kansas v. Colorado*, *supra*.

§ 1214. **Treaty-making power**—The establishment of commissions.—It is within the treaty-making power of this and adjoining countries to adjust by treaty all controversies relating to the use of the waters of all international streams or other bodies of water, either by the countries themselves or by their citizens. This power, as far as this country is concerned, rests with the President, by and with the advice and consent of the Senate, provided two-thirds of the Senators present concur.¹ In order to carry out the provisions of a treaty it is within the treaty-making power to provide for a commission to be appointed for that purpose to make an equitable adjustment of the rights of the respective countries affected and of their citizens to appropriate and divert the waters of international streams or other bodies of water for the purpose of irrigation or for any other purpose. Upon such an apportionment the rights of each country and its citizens are limited to the amount of water awarded in the aggregate to each country. With the amount of water fixed which each country is entitled to, or its citizens, as between the citizens of the different countries, the right to appropriate the waters of an international stream depend upon the laws of the country where the appropriation is made and the rules and regulations established by the treaty between the two countries or those established by the commission appointed to make the apportionment.

§ 1215. **Treaties with Great Britain**.—By the treaty with Great Britain, proclaimed July 4, 1871,¹ relative to the maintenance of the navigation of the streams bounding the United States and Canada, it was provided: "Article XXVI. The navigation of the River St. Lawrence, ascending and descending from the forty-fifth parallel of north latitude, where it ceases to form the boundary between the two countries, from, to, and into the sea, shall forever remain free and open for the purposes of commerce to the citizens of the United States, subject to any laws and regulations of Great Britain or of the Dominion of Canada not inconsistent with such privilege of free navigation. The navigation of the Rivers Yukon, Porcupine, and Stikine, ascending and descending, from, to, and into the sea, shall

¹ Const., Art. 11, Sec. 2.

¹ 7 Fed. Stat. Ann., 1905, p. 599; Treaties and Conventions, 1899, p. 478.

See, also, the treaty of May 13, 1910, relative to the equal division of the waters of the St. Mary and Milk Rivers.

forever remain free and open for the purposes of commerce to the subjects of Her Britannic Majesty, and to the citizens of the United States, subject to any laws and regulations of either country within its own territory not inconsistent with such privilege of free navigation."

Already protests have been filed by the Dominion of Canada with the Secretary of War of the United States against the increasing of the diversion of the water from Lake Michigan through the great drainage canal from 4,000 cubic feet to 10,000 cubic feet per second. Undoubtedly as to whether the rights of Canada as to navigation and otherwise will be injured by this increased diversion of the amount of water from the lake will have to be determined by expert examination and finally adjusted by treaty between the two countries.

§ 1216. **Treaties with Mexico, relative to international waters.**—By the seventh article of the Treaty of Guadalupe Hidalgo, of February 2, 1848,¹ it is provided that "the River Gila and the part of the Rio Bravo del Norte (the Colorado) lying below the southern boundary of New Mexico being, agreeably to the fifth article, divided in the middle between the two republics, the navigation of the Gila and of the Bravo below said boundaries shall be free and common to the vessels and citizens of both countries, and neither shall, without the consent of the other, construct any work that may impede or interrupt, in whole or in part, the exercise of this right; not even for the purpose of favoring new methods of navigation. Nor shall any tax or contribution, under any denomination or title, be levied upon vessels or persons navigating the same or upon merchandise or effects transported thereon, except in the case of landing upon one of their shores. If, for the purpose of making said rivers navigable, or for maintaining them in such state, it should be necessary or advantageous to establish any tax or contribution, this shall not be done without the consent of both governments. The stipulations contained in the present article shall not impair the territorial rights of either republic within its established limits."

By the fourth article of the Gadsden Treaty of June 30, 1854,²

¹ 7 Fed. Stat. Ann., 1905, p. 694; ² 7 Fed. Stat. Ann., 1905, p. 704;
Treaties and Conventions, 1889, p. Treaties and Conventions, 1889, p.
681; 9 Stat. L. 948. 694; 10 Stat. L. 1034.

between the same countries, the provisions of the article above quoted were modified, owing to the fact that the boundary line between the two countries was changed by the latter treaty, Article IV of which provides: "The several provisions, stipulations, and restrictions contained in the seventh article of the Treaty of Guadalupe Hidalgo shall remain in force only so far as regards the Rio Bravo del Norte below the initial of said boundary provided in the first article of this treaty; that is to say, below the intersection of the 31° 47' 30" parallel of latitude with the boundary line by the late treaty dividing said river from its mouth upwards, according to the fifth article of the Treaty of Guadalupe."³

By the boundary convention of September 14, 1886,⁴ it is provided that the Rio Grande and Colorado Rivers, where designated, should remain the boundary, and subject to the provisions, as follows:

"Article I. The dividing line shall forever be that described in the aforesaid treaty, and follow the center of the normal channel of the rivers named, notwithstanding any alterations in the banks or in the course of those rivers, provided that such alterations be effected by natural causes through slow and gradual erosion and deposit of alluvium and not be the abandonment of an existing river and the opening of a new one.

"Article II. Any other change wrought by the force of the current, whether by the cutting of a new bed or when there is more than one channel by the deepening of another channel than that which marked the boundary at the time of the survey made under the aforesaid treaty, shall produce no change in the dividing line as fixed by the surveys of the International Boundary Commissions in 1852, but the line then fixed shall continue to follow the middle of the original channel bed, even though this should become wholly dry or be obstructed by deposits.

³ "It is apparent from these treaty stipulations that we may not, without the consent of Mexico, take any action on the Colorado River where it forms the boundary line between the United States and Mexico, which would impede or interrupt navigation in whole or in part, and this would necessarily be the ultimate effect of subjugating the river absolutely to the purposes of irrigation where it

forms such boundary line." Op. Atty. Gen., quoted in opinion, California Dev. Co., 33 Land Dec. 391.

See, also, *U. S. v. Rio Grande Dam & Irr. Co.*, 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770; *Id.*, 184 U. S. 416, 46 L. Ed. 619, 22 Sup. Ct. Rep. 428.

⁴ 7 Fed. Stat. Ann., 1905, p. 710; *Treaties and Conventions*, 1889, p. 721.

“Article III. No artificial change in the navigable course of the river by building jetties, piers, or obstructions which may tend to deflect the current or produce deposits of alluvium, or by dredging to deepen another than the original channel under the treaty when there is more than one channel, or by cutting waterways to shorten the navigable distance, shall be permitted to affect or alter the dividing line as determined by the aforesaid commissions in 1852, or as determined by Article I hereof and under the reservation therein contained; but the protection of the banks on either side from erosion by revetments of stone or other material not unduly projecting into the current shall not be deemed an artificial change.”

Article IV provides for and the marking of international bridges.

“Article V. Rights of property in respect to lands which may have become separated through the creation of new channels, as defined in Article II hereof, shall not be affected thereby, but such lands shall continue to be under the jurisdiction of the country to which they previously belonged.

“In no case, however, shall this retained jurisdictional right affect or control the right of navigation common to the two countries under the stipulations of Article VII of the aforesaid Treaty of Guadalupe Hidalgo; and such common right shall continue without prejudice throughout the actual navigable main channels of the said rivers from the mouth of the Rio Grande to the point where the Rio Colorado ceases to be the international boundary, even though any part of the channel of the said rivers, through the changes herein provided against, may be comprised within the territory of one of the two nations.”

§ 1217. Treaties with Mexico—International boundary commission.—Again, by a convention between the United States and Mexico, proclaimed December 26, 1890,¹ provision was made for an international boundary commission and their jurisdiction in the following terms:

“Article I. All differences or questions that may arise on that portion of the frontier between the United States of America and the United States of Mexico where the Rio Grande and the Colorado Rivers form the boundary line, whether such differences or questions grow out of alterations or changes in the bed of the aforesaid

¹ 7 Fed. Stat. Ann., 1907, p. 712; 26 Stat. L. 1512.

Rio Grande and that of the aforesaid Colorado River, or of works that may be constructed in said rivers, or any other cause affecting the boundary line, shall be submitted for examination and decision to an International Boundary Commission, which shall have exclusive jurisdiction in the case of said differences or questions."

Article II provides that the commission shall be composed of a commissioner appointed by the President of the United States of America and another appointed by the President of the United States of Mexico, of a consulting engineer, and of such secretaries and interpreters as each Government may see fit to add to its commission. "Each Government, separately, shall fix the salaries and emoluments of the members of its commission."

"Article III. The International Boundary Commission shall not transact any business unless both commissioners are present. It shall sit on the frontier of the two contracting countries, and shall establish itself at such places as it may determine upon; it shall, however, repair to places at which any of the difficulties or questions mentioned in this convention may arise, as soon as it shall have been duly notified thereof.

"Article IV. When, owing to natural causes, any change shall take place in the bed of the Rio Grande or in that of the Colorado River, in that portion thereof wherein those rivers form the boundary line between the two countries which may affect the boundary line, notice of that fact shall be given by the proper local authorities on both sides to their respective commissioners of the International Boundary Commission, on receiving which notice it shall be the duty of the said commission to repair to the place where the change has taken place, or the question has arisen, to make personal examination of such change, to compare it with the bed of the river as it was before the change took place, as shown by the surveys, and to decide whether it has occurred through avulsion or erosion, for the effects of Articles I and II of the convention of November 2, 1884; having done this, it shall make suitable annotations on the surveys of the boundary line.

"Article V. Whenever the local authorities on any point of the frontier between the United States of America and the United States of Mexico, in the portion in which the Rio Grande and the Colorado River form the boundary between the two countries, shall think that works are being constructed in either of those rivers, such as are

prohibited by Article III of the convention of November 12, 1834, or by Article VII of the Treaty of Guadalupe Hidalgo of February 2, 1848, they shall so notify their respective commissioners in order that the latter may at once submit the matter to the International Boundary Commission, and that said commission may proceed, in accordance with the provisions of the foregoing article, to examine the case, and that it may decide whether the work is among the number of those which are permitted, or of those which are prohibited by the stipulations of those treaties.

"The commission may provisionally suspend the construction of the works in question pending the investigation of the matter, and if it shall fail to agree on this point, the works shall be suspended, at the instance of one of the two Governments.

"Article VI. In either of these cases the commission shall make personal examination of the matter which occasions the change, the question, or the complaint, and shall give its decision in regard to the same, in doing which it shall comply with the requirements established by a body of regulations to be prepared by the said commission and approved by both Governments.

"Article VII. The International Boundary Commission shall have power to call for papers and information, and it shall be the duty of the authorities of each of the two countries to send it any papers that it may call for relating to any boundary question in which it may have jurisdiction in pursuance of this convention.

"The said commission shall have the power to summon any witnesses whose testimony it may think proper to take, and it shall be the duty of all persons thus summoned to appear before the same and to give their testimony, which shall be taken in accordance with such by-laws and regulations as may be adopted by the commission and approved by both Governments. In case of the refusal of a witness to appear, he shall be compelled to do so, and to this end the commission may make use of the same means that are used by the courts of the respective countries to compel the attendance of witnesses, in conformity with their respective laws.

"Article VIII. If both commissioners shall agree to a decision, their judgment shall be considered binding upon both Governments, unless one of them shall disapprove it within one month, reckoned from the day on which it shall have been pronounced. In the latter case both Governments shall take cognizance of the matter, and shall

decide it amicably, bearing constantly in mind the stipulation of Article XXI of the Treaty of Guadalupe Hidalgo of February 2, 1848.²

"The same shall be the case when the commissioners shall fail to agree concerning the point which occasions the question, the complaint, or the change, in which case each commissioner shall prepare a report, in writing, which he shall lay before his Government."

§ 1218. **Conditions leading to treaty of May 21, 1906, governing the division of the waters of the Rio Grande.**—For more than two centuries the Mexicans living along the lower part of the Rio Grande River have made extensive use of the waters of the river for the purpose of irrigating their lands. But in recent years private companies on the upper waters of the river, in the United States, have, by the construction of wing dams, diverted a large part of the water to this side of the river, where it is used for the same purpose. Furthermore, according to the plans of the Reclamation Service of the United States, if carried out, it was made certain that unless some equitable division of the waters of the river was made between the two countries, by the treaty-making powers, practically all of the waters would be diverted and used on this side, and that, too, regardless of the rights of the Mexicans upon the other side. The construction of the great dam across the Rio Grande River at Engle, New Mexico, brought the matter to a climax and led to negotiations, which finally culminated in a treaty between the two countries, which is the fundamental law governing the division of the waters of the river between Mexico and the United States.¹

² Article XXI of the treaty provides for the settlement of differences by friendly and pacific negotiations.

¹ See plans for irrigation of the Rio Grande Valley, 3d Annual Report of the Reclamation Service, pp. 395-426.

For the text of the treaty, see Sec. 1219.

See, also, *United States v. Rio Grande Dam & Irr. Co.*, 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep.

770; *Id.*, 184 U. S. 416, 46 L. Ed. 619, 22 Sup. Ct. Rep. 428; *California Dev. Co., Op. Atty. Gen.*, 33 Land Dec. 391.

See, also, for treaty between the United States and Mexico of March 1, 1889, providing for an international boundary commission to settle all international differences on the Rio Grande and Colorado Rivers, 7 Fed. Stat. Ann., 1905, p. 712; 26 Stat. L. 1512.

§ 1219. **Text of treaty of May 21, 1906, relative to division of the waters of the Rio Grande.**—The treaty of May 21, 1906, between the United States and the Republic of Mexico, relating to the distribution of the waters of the Rio Grande River, is as follows:

“THE UNITED STATES OF AMERICA AND THE UNITED STATES OF MEXICO, being desirous to provide for the equitable distribution of the waters of the Rio Grande for irrigation purposes, and to remove all causes of controversy between them in respect thereto, and being moved by considerations of international comity, have resolved to conclude a convention for these purposes, and have named as their Plenipotentiaries:

“The President of the United States of America, Elihu Root, Secretary of State of the United States; and

“The President of the United States of Mexico, His Excellency Senor Don Joaquin D. Casasus, Ambassador Extraordinary and Plenipotentiary of the United States of Mexico at Washington,

“Who, after having exhibited their respective full powers, which were found to be good and in due form, have agreed upon the following articles:

“ARTICLE I.

“After the completion of the proposed storage dam near Engle, New Mexico, and the distributing system auxiliary thereto, and as soon as water shall be available in said system for the purpose the United States shall deliver to Mexico a total of 60,000 acre-feet of water annually, in the bed of the Rio Grande at the point where the head works of the Acequia Madre, known as the Old Mexican Canal, now exists above the City of Juarez, Mexico.

“ARTICLE II.

“The delivery of the said amount of water shall be assured by the United States, and shall be distributed through the year in the same proportions as the water supply proposed to be furnished from the said irrigation system to lands in the United States in the vicinity of El Paso, Texas, according to the following schedule, as nearly as may be possible:

See, also, for the text of treaty of vision of the waters of the Rio Grande May 21, 1906, between Mexico and River, Sec. 1219.
the United States relative to the di-

	Acre feet per month	Corresponding cubic feet of water
January	0	0
February	1,090	47,480,400
March	5,460	237,837,600
April	12,000	522,720,000
May	12,000	522,720,000
June	12,000	522,720,000
July	8,180	356,320,000
August	4,370	190,357,200
September	3,270	142,441,200
October	1,090	47,480,400
November	540	23,522,400
December	0	0
Total	60,000	2,613,600,000

“In case, however, of extraordinary drought or serious accident to the irrigation system in the United States, the amount delivered to the Mexican canal shall be diminished in the same proportion as the water delivered to lands under said irrigation system in the United States.

“ARTICLE III.

“The said delivery shall be made without cost to Mexico, and the United States agrees to pay the whole cost of storing the said quantity of water to be delivered to Mexico, of conveying the same to the international line, of measuring the said water, and of delivering it in the river bed above the head of the Mexican Canal. It is understood that the United States assumes no obligation beyond the delivering of the water in the bed of the river above the head of the Mexican Canal.

“ARTICLE IV.

“The delivery of water as herein provided is not to be construed as a recognition by the United States of any claim on the part of Mexico to the said waters; and it is agreed that in consideration of such delivery of water Mexico waives any and all claims to the waters of the Rio Grande for any purpose whatever between the head of the present Mexican Canal and Fort Quitman, Texas, and also declares fully settled and disposed of, and hereby waives, all claims heretofore asserted or existing, or that may hereafter arise, or be asserted, against the United States on account of any damages

alleged to have been sustained by the owners of land in Mexico by reasons of the diversions by citizens of the United States of waters of the Rio Grande.

"ARTICLE V.

"The United States, in entering into this treaty, does not thereby concede, expressly or by implication, any legal basis for any claims heretofore asserted, or which may be hereafter asserted, by reason of any losses incurred by the owners of land in Mexico, due, or alleged to be due, to the diversion of the waters of the Rio Grande within the United States; nor does the United States in any way concede the establishment of any general principle or precedent by the concluding of this treaty. The understanding of both parties is that the arrangement contemplated by this treaty extends only to the portion of the Rio Grande which forms the international boundary, from the head of the Mexican Canal down to Fort Quitman, Texas, and in no other case.

"ARTICLE VI.

"The present convention shall be ratified by both contracting parties in accordance with their constitutional procedure, and the ratifications shall be exchanged at Washington as soon as possible.

"IN WITNESS WHEREOF, the respective plenipotentiaries have signed the convention both in English and Spanish languages, and hereunto affixed their seals.

"Done in duplicate at the City of Washington, this 21st day of May, one thousand nine hundred and six.

"ELIHU ROOT. (Seal.)

"JOAQUIN D. CASASUS." (Seal.)

§ 1220. Treaty of May 21, 1906, with Mexico—Effect of treaty.

—The effect of the treaty of May 21, 1905, with Mexico,¹ relative to the division of the waters of the Rio Grande River, is to bind the United States to build the project mentioned in the treaty and to annually deliver to Mexico at the point named 60,000 acre-feet named in accordance with the schedule as set forth in Article II. This is approximately the amount of water that has been used for about three hundred years in the old Mexican Canal

¹ For full text of treaty, see Sec. 1219.

prior to 1880, since which time irrigation by American citizens on the headwaters in Colorado has caused a deficiency in the low-water flow of the Rio Grande River at the head of the canal. Upon the other hand, in return for the United States furnishing to Mexico the 60,000 acre-feet of water, the Mexican Government has waived all other claims to the water in the Rio Grande above the town of Fort Quitman, Texas, and also all claims for past damages for the shortage of water. As the United States Government is put to the entire expense of constructing the irrigation project, the Mexican share is only a fractional part of the whole flow of the river. The lands for which the Government contemplates furnishing the water under this project are 180,000 acres—110,000 acres in New Mexico, 45,000 acres in Texas, and 25,000 acres in Mexico.²

The Secretary of the Interior holds that he may make withdrawals of public land from the operation of the Right of Way Act of March 3, 1891.³ This was upon the ground that whether the United States has a prior or superior and paramount claim to the waters of the Rio Grande River to the extent necessary to enable it to keep its obligations with the Republic of Mexico with reference to the delivery of such waters as provided for under the treaty of May 21, 1906,⁴ is a question not within the competency of the Land Department to determine. And the Secretary of the Interior will not embarrass the decision of such question, nor the fulfillment of the nation's obligations under such treaty by approving applications for rights of way under the Act of March 3, 1891, which rest upon the appropriation of such waters under State laws and their proposed diversion to other and adverse uses.⁵ And the Secretary, upon the subject, said: "After a most painstaking consideration of the entire subject with reference to the situation presented, the department can not see its way clear to approve this application. It may, for the purpose of this case, be admitted that under ordinary circumstances the Secretary of the Interior is without discretion to withhold his approval of an application filed conformably to the Act of March 3, 1891. But manifestly here is a situation unusual and

² See for Rio Grande Project, 3d Annual Report Reclamation Project, pp. 395-426; 6th Annual Report, *Id.*, pp. 220-224.

⁴ For the terms of the treaty, see Sec. 1219.

⁵ Francis W. Bosco, 39 Land Dec. 104.

³ For the Act of March 3, 1891, and its construction, see Secs. 937-950.

critical, which demands the exercise of such discretion. The paramount rights and interests of the United States are vitally involved in this proceeding. No question of the authority of the United States can well be urged in this proceeding. The power to make treaties with foreign nations has been delegated by the States to the Nation, and is exclusive; and it is well settled that where such a power has been delegated the grant carries with it all subsidiary powers necessary to its exercise. Moreover, the question is one not within the competency of the Land Department to determine, and this is sufficient reason to justify that department in refusing to take any action which might in any way embarrass the United States in fulfilling its treaty obligations or further complicate a question it is without right or jurisdiction to decide. It is not overlooked that the contention is made upon this record, and was presented at length at the oral hearing that the diversion of water necessary to carry the Wagon Wheel Gap Project to completion will in nowise interfere with the storage of the necessary waters by the United States Engle dam, to enable it to keep both its treaty obligations with the Republic of Mexico and its contractual obligations with the water users' associations above referred to. The department is by no means convinced that this is true, and in the absence of such conviction it is believed to be the duty of the Secretary of the Interior to exercise such discretion as is necessary to protect the interests of the United States."

In construing the scope of the National Reclamation Act,⁶ in connection with the treaty of May 21, 1906,⁷ the United States Circuit Court of Appeals recently said:⁸ "By the Act of February 25, 1905,⁹ the provisions of the Reclamation Act of June 17, 1902, were extended to the portion of the State of Texas bordering upon the Rio Grande which could be irrigated from a dam constructed near Engle in the Territory of New Mexico. This Act was passed for the purpose of enabling the United States to carry into effect the terms of a proposed treaty or convention with Mexico, which was afterward signed on May 21, 1906.¹⁰ This treaty, or convention, provided that: 'After the completion of the proposed storage dam

⁶ For the National Reclamation Act, see Sec. 1244.

⁷ For the text of treaty, see Sec. 1219.

⁸ *Burley v. United States*, 179 Fed. Rep. 1, 101 C. C. A. 429.

⁹ 33 Stat. 814.

¹⁰ 34 Stat. 2953.

near Engle, New Mexico, and the distributing system auxiliary thereto, and as soon as water shall be available in said system for the purpose, the United States shall deliver to Mexico a total of 60,000 acre-feet of water annually in the bed of the Rio Grande at the point where the head works of the Acequia Madre, known as the Old Mexican Canal, now exist above the City of Juarez, Mexico.'

"By the Act of March 4, 1907,¹¹ an appropriation of \$1,000,000 was made available as needed, and to be expended under the direction of the Secretary of the Interior, for the construction of the above-mentioned dam in connection with the irrigation project on the Rio Grande. By the Act of June 12, 1906,¹² the provisions of the Reclamation Act were extended so as to include and apply to the State of Texas, where there never has been any public lands of the United States, but where such streams as the Pecos and the Rio Grande, rising in New Mexico, a Territory of the United States, and flowing into Texas, have become important factors in the irrigation and reclamation of the arid lands of that State."

¹¹ 34 Stat. 1357.

¹² 34 Stat. 259; U. S. Comp. St. Supp., 1909, p. 603.

139—Kin. on Irr.

CHAPTER 64.

INTERSTATE CONTROL.

- § 1221. Scope of chapter.
- § 1222. Definition—Subject in general.
- § 1223. The equitable rights of respective States.
- § 1224. The Kansas-Colorado case.
- § 1225. Rights of appropriators—Adjoining States are not affected by State lines.
- § 1226. Rights of riparian owners in the respective States are not affected by State lines.
- § 1227. Effect of the conflict of laws of interstate streams.
- § 1228. The appropriation of the waters in one State for use in another—Interstate streams.
- § 1229. The appropriation of waters in one State for use in another—State streams.
- § 1230. The division of interstate waters involves no question of international law.
- § 1231. Late statutes relating to interstate waters.
- § 1232. The pollution of interstate streams by a State.
- § 1233. Jurisdiction of courts—Original jurisdiction of the Supreme Court of the United States.
- § 1234. Jurisdiction of courts—Federal and State.

§ 1221. **Scope of chapter.**—In this chapter we will discuss, in all its phases, the subject of the rights to waters flowing in what are known as interstate streams, and also the right to conduct the waters from the streams or other bodies from one State for the use in another.

§ 1222. **Definition—Subject in general.**—Interstate waters are those which flow through or bound two or more States.¹ When the first edition of this work was published in 1893, there was no law upon the subject of the application of the Arid Region Doctrine of appropriation, either statutory or case, as specially applied to interstate waters.² In fact, nearly all the law upon the subject has been developed within the last ten years. Owing to the fact that all of

¹ For the right to appropriate water from interstate streams, see Sec. 664. appropriation, see Chap. 31, Secs. 585-594.

² For the Arid Region Doctrine of

the important streams and other bodies of water of this country are not confined within the boundaries of any particular State, the conflicting interests of the respective States through which or adjoining which they flow have led to a number of interesting questions. These conflicts have arisen not only because of the physical fact of the situation of these waters in respect to the different States, but also on account of the difference in their laws governing waters flowing in the respective jurisdictions. This is true as relating to the claim of one State upon the upper reaches of a river to divert and use, if necessary, all of the water of the river, under its laws adopted in accordance with the Arid Region Doctrine of appropriation, before it reaches the boundary line of an adjoining State, which claims the right to the unimpaired flow of the water of the river under the common law of riparian rights, as was especially illustrated in the case of *Kansas v. Colorado*.²

§ 1223. **The equitable rights of respective States.**—It must be borne in mind that a river which takes its head in one State and flows down to and through another State does not end at the boundary line of the States, and a new river begin at that point, but it is one and the same stream throughout its entire course. As was said by Judge Hallett in *Hoge v. Eaton*,¹ "Water is essential to human life in the same degree as light and air, and no bounds can be set to its use for supplying the natural wants of man other than the mighty barriers which the Creator has made on the face of the earth." Therefore, regardless of the form of its laws governing the waters flowing within its boundaries, each State has rights in and to the waters of such a river which should be respected by the other State. And, while the upper State through which such a river flows has the undoubted right to make such a reasonable use of its waters, even to the extent that the State below may be somewhat damaged thereby, provided that the upper State does not take the waters in excess of what will give to it an equitable apportionment of the benefits of the river, it can not divert and use all of the water

² See Sec. 1224.

¹ 135 Fed. Rep. 411, 141 Fed. Rep. 64, 72 C. C. A. 74.

See, also, *Kansas v. Colorado*, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct.

Rep. 665, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552, and the portion of the opinion cited in the next section.

of the river, and thereby deprive the lower State of its entire benefits. In fact, the law upon this subject, as it stands today, is that the right to the use of the waters of an interstate river, by the respective States through which it flows, is analogous to the right of individuals to the use of the waters of a stream flowing by or through their respective lands, under the common law doctrine of riparian rights, as modified by some of the Western States, and discussed in a previous portion of this work.² While the upper owner on the stream may take out a considerable portion of the water for irrigation, or for other beneficial uses, even to the extent of considerable injury to the rights of the lower owner, he has no right to take all of the water, and thus deprive the lower proprietor of all the benefits of the stream. And, upon the other hand, the lower proprietor, although his rights may be injured to a considerable extent by such a use of the water by the upper owner, must look for relief by way of an action for damages against the upper owner, and his claim to the right of the undiminished flow of the stream will not be sustained by the courts by way of injunctive relief against any diversion at all by the upper owner.³

It must not be understood that the equitable division of the waters of an interstate stream means the equal division of the natural flow of the stream between the States through which it runs. The lower States may not need as much of its waters as the upper States for the reason that the upper States are more arid and have less rainfall than the lower States. Then, again, the lower States may be benefited more by the subterranean waters which flow under the surface of the soil, and caused to a great extent by the use of the water by the upper States for irrigation. This is illustrated in the Kansas-Colorado case. Colorado has an arid climate, the land is of a much higher altitude than that of Kansas, and the rainfall is much less than Kansas, and what little rainfall there is in Colorado, on account of the slope of the lands, runs off rapidly to the lower lands in Kansas; and, again, by the use of the water for irrigation in Colorado, the lands in Kansas are greatly benefited by the underflow caused thereby. Hence, to say that the waters of the natural flow of the Arkansas River should be equally divided between the two States would not be an equitable division of its waters.

² For the modified doctrine of riparian rights, see Secs. 505-515.

³ For right to injunctive relief, see Chap. 81.

§ 1224. **The Kansas-Colorado case.**—In the history of water right litigation, no case has created more interest or has been of so great importance, from a Western standpoint, as the decision handed down on May 13, 1907, in the original action brought in the Supreme Court of the United States in the case of *State of Kansas v. the State of Colorado*.¹ While that decision bore directly on that particular case, and also involved a number of questions under which it has been already cited in previous portions of this work, being decided by the highest court of the land, it established a precedent that will be followed in all future controversies as to the rights of States to use the waters of an interstate stream in the reclamation of arid land. This action was brought by the State of Kansas against the State of Colorado and a large number of private corporations, to prevent such a use of the waters of the Arkansas River in Colorado as would cause such a depletion of the flow of the waters of the river through the State of Kansas that it would be an injury to the interests of the State of Kansas and her people. The right of the United States to intervene on the ground of the superior right of the National Government to control the flow of the river as a part of the system or scheme for the reclamation of arid lands, under the National Reclamation Act,² was denied by the Court without prejudice to the right of intervention only if necessary to preserve or improve the navigability of the river. The right of the State of Kansas to bring the suit was sustained on the ground that the question involved was a matter of State interest, affecting the general welfare of the State, and that in bringing such an action the State was not merely representing individual citizens. Also, that it does not follow that because Congress can not determine the rule of law which shall control the waters flowing through the respective States, or because neither State can enforce its own policy upon the other, that the controversy ceases to be one of a justiciable nature, or that there is no power which can take cognizance of the controversy and determine the relative rights of the two States. Indeed, the dis-

¹ 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 665; *Id.*, on demurrer, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552.

² For the National Reclamation Act, see Chap. 65, Secs. 1235, 1236; 7 Fed. Stat. Ann., 1905, p. 1098; 32 Stat.

L. 388. See Sec. 8, wherein it is provided, "and nothing herein shall in any way affect any right of any State or of the Federal Government, or of any land owner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof."

agreement, coupled with its effect upon the stream passing through the two States, made the matter in controversy a subject for investigation and determination by the Supreme Court. And, referring to the case of *Missouri v. Illinois*, which case involved the question of the pollution by one State of an interstate stream, the Court said. "In other words, through these successive disputes and decisions this Court is practically building up what may not improperly be called interstate common law."

A very original and somewhat unique contention upon the part of Colorado was that the Arkansas River in that State terminated at the State line, and that the Arkansas River in Kansas was a new river, beginning below the State line. But upon this subject Mr. Justice Brewer, in speaking for the unanimous Court, said: "Equally untenable is the contention of Colorado that there are really two rivers, one commencing in the mountains of Colorado and terminating at or near the State line, and the other commencing at or near the place where the former ends, and from springs and branches starting a new stream to flow onward through Kansas and Oklahoma toward the Gulf of Mexico. From time immemorial the existence of a single continuous river has been recognized by geographers, explorers, and travelers. That there is a great variance in the amount of water flowing down the channel at different seasons of the year and in different years is undoubted; that at times the entire bed of the channel has been in places dry is evident from the testimony. In that way it may be called a broken river. But this is a fact common to all streams having their origin in a mountainous region, and whose volume is largely affected by the melting of the mountain snows."

But the great question involved in the case was that of the right of the people of Colorado to take the water from this interstate river for the purpose of irrigating arid lands to such an extent that it would thereby diminish the flow of the river through the State of Kansas, and so cause some injury to the riparian owners in the State of Kansas. This question involved, first, the question whether the common law rule of riparian rights or the rule under the Arid Region Doctrine of appropriation should govern; and, second, if the use of the waters for irrigation by the State of Colorado was lawful, to what extent might that State go in such a use. Upon this question the Court held that it was for each State to determine for

itself whether the common law rule or the doctrine of appropriation should govern the waters within its territory, and that Congress can not enforce either rule upon any State. Neither can either State legislate for or impose its own policy upon the other. But the decision also held that since Kansas itself recognized the right of appropriation of the waters of the natural streams for the purpose of irrigation, she could not complain of the adoption of that doctrine by the State of Colorado. Upon the second phase of the question as to the extent to which the appropriation and use might be made, the Court held that there is one cardinal rule underlying all the relations of the States to each other, and that is equality of right, and that the Court must "so adjust the dispute upon the basis of equality of rights as to secure, as far as possible, to Colorado the benefits of irrigation, without depriving Kansas of the like beneficial effect of a flowing stream." That the Court is called upon to settle the dispute in such a way as will recognize the equal rights of both and at the same time to establish justice between them. The Court then found directly that, owing to the diversion of the waters of the river in Colorado, there had been a perceptible injury to the portions of the Arkansas Valley in the State of Kansas, and particularly to those portions closest to the Colorado line; that the result of that appropriation, upon the other hand, had been the reclamation of large areas in Colorado, and the transforming of thousands of acres of arid lands into fertile fields, and rendering possible their occupation and cultivation when otherwise they would have continued barren and unoccupied. And, as previously stated in the opinion, "When we compare the amount of this detriment with the great benefit which has obviously resulted to the counties in Colorado, it would seem that the equality of right between the two States forbids any interference with the present withdrawal of water in Colorado for the purposes of irrigation." The Court further held that at the same time it was obvious that if the depletion of the waters of the river in the State of Colorado continues to increase, there will come a time when Kansas may justly say that there is no longer an equitable division of the benefits, and may rightfully call for relief against the action of Colorado, its corporations and citizens, in appropriating the waters of the Arkansas River for irrigation purposes. The decree accordingly dismissed the bill of the State of Kansas as against all defendants without prejudice to the

right of Kansas to institute new proceedings whenever it shall appear that, through a material increase in the depletion of the waters of the Arkansas by Colorado, its corporations or citizens, the substantial interests of Kansas are being injured to the extent of destroying the equitable apportionment of benefits between the two States resulting from the flow of the river.

Therefore, as to the rights in and to the waters of interstate streams the law of this case, summed up in a concise statement, seems to be that each State through which an interstate river runs is entitled to make reasonable use of its waters, even to the extent that the State below may be damaged to a considerable extent thereby, provided the upper State does not divert the waters in excess of what will give it an equitable apportionment, all facts considered, of the benefits of the river, which apportionment is not confined to an equal division between the two States, or the respective States, of the entire natural flow of the stream.

§ 1225. Rights of appropriators—Adjoining States are not affected by State lines.—The rights of the respective States and of the citizens thereof in and to the use of waters of an interstate stream depend somewhat upon the laws of those States governing waters. If the common law is the only law of waters governing two adjoining States through which an interstate river flows, or if both States have adopted the Arid Region Doctrine of appropriation, the right to the use of the waters of an interstate stream is not affected by the boundary line which divides the States. But where there is conflict of the laws relative to the subject of water, that is to say, the lower State upon the stream having only the common law of riparian rights, and the upper State having adopted the Arid Region Doctrine of appropriation, the rule is different, and will be discussed in a subsequent section of this chapter.¹

The rights as between appropriators of the waters of an interstate stream are not affected by the boundary line between the two States. As was said by a Wyoming case:² "The separation of lands capable of irrigation from such streams is of no consequence."³

¹ For effect of conflict on interstate streams, see Sec. 1227.

² *Willey v. Decker*, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939.

³ See, also, *Howell v. Johnson*, 89 Fed. Rep. 556.

As was said in a recent Idaho case:⁴ "The relative rights, therefore, of appropriators of waters of an interstate stream are the same, whether the appropriations are all in the same State or some in one State and the balance in another State."⁵ "The right to divert running waters for irrigating lands in an arid country is not controlled or affected by political divisions. It is the same in all States through which the streams may pass."⁶

⁴ *Taylor v. Hulett*, 15 Idaho 265, 97 Pac. Rep. 37, 19 L. R. A., N. S., 535.

⁵ See *Anderson v. Bassman*, 140 Fed. Rep. 10, 140 Fed. Rep. 14, where a decree was rendered in California settling the rights of the respective appropriators both in California and Nevada.

Cline v. Stock, 71 Neb. 70, 98 N. W. Rep. 454, 102 N. W. Rep. 265, where in a case tried in Nebraska and where the plaintiff's mill where he used the water was in Kansas, the Court said that this fact "ought not to deprive him of any rights which the laws of our State give to a lower riparian owner. Any attempt of our legislature to discriminate against him as compared with the resident mill owners would be promptly declared unconstitutional by the Federal courts. Any such determination by the courts would seem to be equally obnoxious to the Federal Constitution. It seems clear that the plaintiff should be allowed the same standing as one of our own citizens with a mill on this side of the State line."

See, also, *Conant v. Deep Creek etc. Irr. Co.*, 23 Utah 627, 66 Pac. Rep. 188, 90 Am. St. Rep. 721, where it is said: "It is a recognized rule of law that a person who has appropriated water at a certain point in a stream is entitled to have so much of the waters of said stream as he has appropriated flow down to him to the point of his diversion; and, if the set-

tlers higher up on the stream, in another State, whose appropriations are subsequent, divert any of the waters of the stream which have been so first appropriated, then the courts of the latter state will protect the first settler in his rights. The Idaho courts, therefore, have ample and complete jurisdiction to protect the rights of respondents to have the waters which they have appropriated, and which they divert in Utah, flow through the channel of the stream, and to limit and determine the rights of the Idaho appropriators with reference thereto."

"The fact of a State line intersecting the stream does not, within itself, impinge upon the right." *Rickey etc. Co. v. Miller & Lux*, 152 Fed. Rep. 11, 81 C. C. A. 207; affirming *Id.*, 146 Fed. Rep. 574; affirmed, 218 U. S. 258, 54 L. Ed. 1032, 11 Sup. Ct. Rep. 11.

See, also, *Rickey Land etc. Co. v. Wood*, 152 Fed. Rep. 22, 81 C. C. A. 218; affirmed, 218 U. S. 258, 54 L. Ed. 1032, 31 Sup. Ct. Rep. 11; *Bigelow v. Draper*, 6 N. D. 152, 69 N. W. Rep. 570; *Turley v. Furman*, — N. M. —, 114 Pac. Rep. 278; *Lamson v. Valies*, 27 Colo. 201, 61 Pac. Rep. 231; *Taylor v. Hulett*, 15 Idaho 265, 97 Pac. Rep. 37, 19 L. R. A., N. S., 535.

⁶ *Hoge v. Eaton*, 135 Fed. Rep. 411, 141 Fed. Rep. 64, 72 C. C. A. 74.

It was also held in the Kansas-Colorado case ⁷ that the determination of the respective rights of the States of Kansas and Colorado to the benefit of the waters of the Arkansas River can not be affected by any theory that, because at times and in some places the entire bed of the channel was dry, there were two rivers, one commencing in the mountains of Colorado and terminating at or near the State line, and the other commencing at or near the place where the former ends, and from springs and branches starting as a new stream to flow onward through Kansas and Oklahoma toward the Gulf of Mexico, the Court holding that the equitable division of the waters of an interstate stream between the respective States through which or adjoining which the stream flows was the only true rule.⁸

The Supreme Court of the United States, in a decision rendered in 1911,⁹ held that that Court, in the absence of Montana legislation to the contrary, will assume that prior appropriators of the waters of an interstate stream at a point in Wyoming could acquire rights as against subsequent or junior appropriators of the waters of the same stream in Montana, enforceable in the latter State. And Mr. Justice Holmes, in rendering the decision of the Court upon this subject, after referring to the common law rule, said: "There is even stronger reason for the same assumption here. Montana can not be presumed to be intent on suicide, and there are as many, if not more, cases in which it would lose as there are in which it would gain, if it invoked a trial of strength with its neighbors. In this very instance, as has been said, the Big Horn, after it has received the waters of Sage Creek, flows back into that State. But this is the least consideration. The doctrine of appropriation has prevailed in these regions probably from the first moment that they knew of any law, and has continued since they became territory of the United States. It was recognized by the statutes of the United States, while Montana and Wyoming were such territory,¹⁰ and is recognized by both States now. Before the State lines were drawn, of course, the principles prevailed between the lands that were

⁷ 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552.

⁸ See Sec. 1223.

⁹ *Bean v. Morris*, 221 U. S. 485, 55 L. Ed. 821, 31 Sup. Ct. Rep. 703;

affirming same case below, 159 Fed. Rep. 651, 86 C. C. A. 519.

¹⁰ Rev. Stat., Secs. 2339, 2340; U. S. Comp. Stat., 1901, p. 1437; Act of March 3, 1877, Chap. 107; 19 Stat. L. 377, U. S. Comp. Stat., 1901, p. 1548.

destined to be thus artificially divided. Indeed, Morris had made his appropriation before either State was admitted to the Union. The only reasonable presumption is that the States, upon their incorporation, continued the system that had prevailed theretofore, and made no changes other than those necessarily implied or expressed."

§ 1226. Rights of riparian owners in the respective States are not affected by State lines.—As is the case with the rights of appropriators only in different States taking water from an interstate stream not being affected by State lines as to their respective rights, so also it is the case in those States which only have the common law of riparian rights by governing the waters of the streams. In a recent case decided by the Supreme Court of the United States¹ Mr. Justice Holmes referred to the common law rule in the following language: "But with regard to such rights as came into question in the older States, we believe that it always was assumed, in the absence of legislation to the contrary, that the States were willing to ignore boundaries, and allowed the same rights to be acquired from outside the State that could be acquired from within."² It therefore follows that where there is but one rule of law governing the waters of the respective States through which an interstate stream flows, the right to the use of the waters of such stream is not affected by the boundary line which divided the States. Where, however, there is a conflict of laws, the rule is somewhat different, as will be discussed in the next section.

A decision pertinent to the subject under discussion was rendered by the United States Circuit Court of Appeals for the second circuit

¹ *Bean v. Morris*, 121 U. S. 485, 55 L. Ed. 821, 31 Sup. Ct. Rep. 703; affirming same case below, 159 Fed. Rep. 651, 86 C. C. A. 519.

² Citing *Mannville etc. Co. v. Worcester*, 138 Mass. 91, 52 Am. Rep. 261; *Thayer v. Brooks*, 17 Ohio 489, 49 Am. Dec. 474; *Slack v. Walcott*, 3 Mason 508, 516, Fed. Cas. No. 12,932; *Stillman v. White Rock Mfg. Co.*, 3 Woodb. & M. 538, Fed. Cas. No. 13,446; *Rundell v. Delaware & R.*

Canal Co., 1 Wall. Jr. 275, Fed. Cas. No. 12,139, 14 How. 80, 14 L. Ed. 335; *Foot v. Edwards*, 3 Blatchf. 310, Fed. Cas. No. 4,908; *Wooster v. Great Falls Mfg. Co.*, 39 Me. 246, 253; *Armendiaz v. Stillman*, 54 Tex. 623; *State v. Lord*, 16 N. H. 357; *Howard v. Ingersoll*, 17 Ala. 780, 793; reversed, 54 U. S. 13 How. 381, 14 L. Ed. 189; *Ruckman v. Green*, 9 Hun, 225.

in the case of *Pine v. Mayor etc. of the City of New York*.³ The Court held that the State of New York could not, under its power of eminent domain, authorize water to be taken from a non-navigable stream having its source in New York for the purpose of supplying a municipal corporation at a distance therefrom if the effect would be to materially diminish the flow of the stream to the injury of the rights of riparian owners on the same stream in the State of Connecticut. It is further held that a Connecticut riparian owner might maintain a suit in equity to enjoin the diversion of the water from the stream in New York State to his injury, although the diversion was made under an attempted exercise of the right of eminent domain, and that he was not bound to seek his remedy in compensation in the eminent domain proceedings. This decision was rendered by two of the judges of the Court, with one dissenting. The effect of the decision, however, is left in considerable doubt by reason of the fact that the case was appealed to the Supreme Court of the United States, and there the decision was reversed on other grounds.⁴ The Supreme Court of the United States withheld any opinion as to the right as to the diversion of the water, but held that the decree of the lower court was erroneous in the measure of relief given, even if it were assumed that the diversion of the water violated a legal right of the complainant. Therefore, as far as the decision of the lower court is concerned, it is not of much weight as an authority.

§ 1227. Effect of the conflict of laws on interstate streams.—

The equitable division of the waters of interstate streams between the States through which or adjoining which such streams flow being the rule of law adopted by the Supreme Court of the United States as governing the subject, in what that Court terms the "practically building up what may not be improperly called interstate common law,"¹ as discussed in the preceding sections,² it must therefore follow that this rule is not affected by the conflict of the laws of the respective States governing the waters flowing within

³ 112 Fed. Rep. 98, 50 C. C. A. 552; *Id.*, 206 U. S. 46, 51 L. Ed. 956, 145. 27 Sup. Ct. Rep. 665.

⁴ 185 U. S. 93, 46 L. Ed. 820, 23 Sup. Ct. Rep. 592.

¹ *Kansas v. Colorado*, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep.

See, also, *Rickey Land and Cattle Co. v. Miller & Lux*, 218 U. S. 258, 54 L. Ed. 1032, 31 Sup. Ct. Rep. 11.

² See Secs. 1225, 1226.

their respective jurisdictions. Although each State has the power to adopt such laws as it sees fit to govern the waters within its own territory, no State has the power to enact such laws for another State. As said by Mr. Justice Brewer in rendering the opinion of the unanimous Court in the Kansas-Colorado case: "Neither State can legislate for nor impose its own policy upon the other." So, as far as this rule of equitable division of the waters of an interstate stream is concerned, it makes no difference as to whether or not one of the States has utterly repudiated the common law of riparian rights and adopted the Arid Region Doctrine of appropriation and another State relies wholly upon the common law of riparian rights. The rule of equitable division between the two States must prevail in any event. This rule of law is illustrated by the Kansas-Colorado case, where the Arkansas River takes its rise in the mountains of Colorado, where the rule of law governing the waters of the State is that of the Arid Region Doctrine of appropriation only, and where the stream flows into the State of Kansas, where it was contended that the prevailing rule of law was the common law doctrine of riparian rights, but which State, in fact, had both systems of laws governing waters.

Again, the rule is illustrated in the case of *Anderson v. Bassman*, where the stream in question takes its rise in the high Sierras in California, which State has both rules of law governing its waters, the doctrine of appropriation and the common law of riparian rights, and where the stream flows into the State of Nevada, which State has utterly repudiated the common law of riparian rights and has adopted the Arid Region Doctrine of appropriation as its only rule of law governing the waters flowing within its boundaries.³

Neither does the fact that one of the States has dedicated all the waters flowing within its boundaries, either by constitutional provisions or by statutory enactment,⁴ to the State and to its citizens affect the right of the division of the waters of interstate streams

³ *Anderson v. Bassman*, 140 Fed. Rep. 14, where it was held that riparian owners of lands on an interstate stream in California and appropriators of the waters from the same stream in Nevada were equally protected in the rights given them by the

laws of the respective States, both subject to the limitation that a reasonable quantity of water only for the beneficial use to which it was devoted should be taken.

⁴ For the dedication of its waters to the State, see Secs. 372-389.

upon an equitable basis.⁵ As was stated by Judge Hallett in the case of *Hoge v. Eaton*:⁶ "The idea of an exclusive right in the people of a State to divert its running waters, to the injury of riparian owners in another State, must be equally untenable. Indeed, the doctrine of riparian ownership and the use of running water is not subject to political boundaries. Between hostile States the doctrine may not be recognized, but any such repudiation would be simply *vis major*. Between States dwelling in peace and concord, as are the States of our Union, the equal right of the inhabitants of each State must always be recognized."⁷

The validity of an appropriation or other use of the waters of an interstate stream is governed by the laws of the State where the appropriation or use is made.⁸ A valid appropriation once made in one State will be so recognized and upheld by the courts of another State.⁹

§ 1228. **The appropriation of the waters in one State for use in another—Interstate streams.**—It often happens that, while the use of the waters of an interstate stream is in one State, in order to obtain the necessary fall to conduct the water to the place of use, the diversion must be made in another State. Where this is the case no distinction can be made. The drawing water through a canal from one State for use in another from a stream which naturally flows from the former to the latter is not necessarily a violation

⁵ Drawing water through a canal from one State into another for the purpose of irrigating lands in the latter State is not necessarily a violation of the constitution, laws, or policy of the former State, although the State reserves all the waters for itself and its citizens, so far as they are necessary for the beneficial uses to which the State and its citizens apply them. Judge Sanborn, speaking for the Circuit Court of Appeals, Eighth Circuit, in *Perkins County, Nebraska v. Graff*, 114 Fed. Rep. 441, 52 C. C. A. 243.

⁶ 135 Fed. Rep. 411, 141 Fed. Rep. 64, 72 C. C. A. 74.

⁷ See, also, *Anderson v. Bassman*, 140 Fed. Rep. 10, 14; *Willey v. Decker*, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939, where upon streams flowing from a State which recognized riparian rights into a State which denied them, the riparian rights in the former State were upheld.

⁸ *Willey v. Decker*, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939; *Morris v. Bean*, 146 Fed. Rep. 432; affirming *Id.*, 159 Fed. Rep. 651, 86 C. C. A. 519; affirmed, 221 U. S. 485, 55 L. Ed. 821, 31 Sup. Ct. Rep. 703; *Anderson v. Bassman*, 140 Fed. Rep. 14.

⁹ *Id.*

of the constitution, laws, or policy of the former State, although that State reserves all its waters for itself and citizens.¹

There is a rather anomalous condition of affairs between Colorado and New Mexico involving appropriations from interstate streams where the point of diversion was in Colorado and the lands to be irrigated in New Mexico. In a case decided in 1900 by the Supreme Court of Colorado,² it was held that the statute of Colorado providing for the statutory adjudications of water rights for irrigation purposes had no application to cases where the point of diversion is within the State but the lands to be irrigated lie without the territorial limits, and hence in a proceeding under such statutes water will not be decreed to irrigate New Mexico lands. Again, in a case decided in 1911 by the Supreme Court of New Mexico,³ after citing the Colorado case above referred to, it was held that a project to irrigate lands in New Mexico from the waters of a natural stream running from Colorado into New Mexico, when the point of diversion, the headgate, and about six miles of the canal are in Colorado, is not within the jurisdiction of the Territorial Engineer of New Mexico, and that he is without authority to issue a permit for such project.

§ 1229. **The appropriation of waters in one State for use in another—State streams.**—The right to divert the waters of a stream or other body of water which is not interstate, but wholly confined within the boundaries of a State, for use in another State by the citizens of either, presents a different phase of interstate control from that discussed in the preceding sections of this chapter respecting the waters of interstate streams. All authority seems to be against the proposition that this may be done, even where there is not a statute of the State wherein the stream or other body of water flows or lies, prohibiting such a diversion and use.¹ This right of ownership and control of all the waters of a State is in the State itself.² This is true either with or without a statutory enactment by the State either dedicating its waters to the State or making it

¹ Perkins County v. Graff, 114 Fed. Rep. 441, 52 C. C. A. 243.

But see Biglow v. Draper, 6 N. D. 152, 69 N. W. Rep. 570.

² Lamson v. Vailes, 27 Colo. 201, 61 Pac. Rep. 231.

³ Turley v. Furman, — N. M. —, 114 Pac. Rep. 278.

¹ For the dedication of the waters of a State to the State or the public, see Secs. 372-389.

² See Secs. 507, 593.

unlawful for any person or corporation to divert and carry its waters into another State for use therein. But where such a statutory enactment is provided, it makes the case so much the stronger, and such a diversion, transportation, and use can not be made. This law, as it seems to us, has been settled by the Supreme Court of the United States in the recent case of *Hudson County Water Company v. McCarter*,³ and although it is stated by Mr. Justice Holmes in rendering the opinion of the Court that "the problems of irrigation have no place here," the principles laid down in the case apply as much to cases where the diversion and use is made for the purpose of irrigation as for culinary and domestic purposes of a great city, as was the fact in the case at bar.

The facts in that case were that the legislature of the State of New Jersey in 1905 enacted among other provisions of the Act the following: "It shall be unlawful for any person or corporation to transport or carry, through pipes, conduits, ditches, or canals, the waters of any fresh-water lake, pond, brook, creek, river, or stream of this State into any other State for use therein."⁴ After the passage of this statute the defendant made a contract with the City of New York to furnish adequate water for the burrough of Richmond, and of not less than three million gallons a day. Thereupon the action was brought praying that, pursuant to the above Act and otherwise, the defendant be enjoined from carrying the waters of the Passaic River out of the State. An injunction was issued by the chancellor,⁵ the decree was affirmed by the court of errors and appeals,⁶ and the defendant company, upon constitutional grounds, then appealed the case to the Supreme Court of the United States, and the decree was affirmed by that Court on all grounds. It was held by the latter Court that a State, even without statutory enactment, "as quasi-sovereign and representative of the interests of the public, has a standing in court to protect the atmosphere, the water, and the forests within its territory, irrespective of the private own-

³ 209 U. S. 349, 52 L. Ed. 828, 28 Sup. Ct. Rep. 529, 4 Ann. Cas. 560; affirming *Id.*, 70 N. J. Eq. 695, 65 Atl. Rep. 489, 14 L. R. A., N. S., 197, 118 Am. St. Rep. 754, 10 Am. & Eng. Ann. Cas. 116; affirmed, 209 U. S. 349, 52 L. Ed. 828, 28 Sup. Ct. Rep. 529. See, also, *Walbridge v. Robinson*,

⁴ Laws New Jersey, 1905, Chap. 288, p. 461.

— *Idaho* —, 125 Pac. Rep. 812.

⁶ *Id.*, 70 N. J. Eq. 695, 65 Atl. Rep.

⁵ *McCarter v. Hudson County W.* 489.

ers of the land most immediately concerned." Therefore, no agreement of private owners can sanction the diversion of an important stream outside of the boundaries of the State in which it flows. The Court further held that the police power of a State justifies the enactment forbidding such a diversion and use, and that a riparian owner under the same may be prevented from diverting the waters of a stream of such State into any other State for use therein; that neither due process of law nor the equal protection of the laws is denied by such a statutory enactment; that the obligations of a contract to divert the waters of such a stream into another State, for use therein, are not unconstitutionally impaired by the enactment of such a statute; that the commerce between different States is not unlawfully interfered with thereby, and that the privileges of the citizens of the State owning such waters are not denied to the citizens of other States by such an enactment.

There is no principle of law, as far as we are able to distinguish, why the same principles as laid down in the above case should not equally apply to a case where the diversion and use of the water was made for the purpose of the irrigation of land as well as to a case where they were for municipal purposes.

§ 1230. The division of interstate waters involves no question of international law.—The equitable division of the waters of interstate streams between the respective States through or by which they flow involves no question of international law, as is the case of the division of the waters of streams which flow through or bound different independent countries. Under Article I, Section 10 of the Constitution of the United States, it is provided: "No State shall, without the consent of Congress, . . . enter into any agreement or compact with another State," etc. Therefore, "they can not enter upon diplomatic relations, and make treaties."¹ "Bound hand and foot by the prohibition of the Constitution, a complaining State can neither treat, agree, nor fight with its adversary, without the consent of Congress."² Therefore, a resort to the judicial power is the only means for adjusting the rights to the waters of

¹ *Kansas v. Colorado*, on demurrer, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552; *Id.*, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655.

² *Rhode Island v. Massachusetts*, 37 U. S. 12 Pet. 657, 9 L. Ed. 1233.

interstate streams between the different States entitled thereto. And, again, the idea that there can arise any international question in the case of the use of the waters of an interstate stream by the different States of this country, through which or adjoining which such a stream flows, can not be maintained.³

§ 1231. **Late statutes relating to interstate waters.**—Section 8 of the National Reclamation Act provides: "And nothing herein shall in any way affect any right of any State or of the Federal Government, or of any land owner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof."¹

The legislatures of a number of the States in 1911 evidently fearing that their rights were not being sufficiently protected in the waters of interstate streams, passed a number of Acts and resolutions regarding the same.

The legislature of California, by the Act of April 8, 1911, amending Section 1410 of the Civil Code,² provided that: "All water or the use of water within the State of California is the property of the people of the State of California." And by the Act approved March 3, 1911,³ it was further provided: "It shall be unlawful for any person, firm, association, or corporation to transport or carry through pipes, conduits, ditches, tunnels, or canals, the waters of any fresh water lake, pond, brook, creek, river, or stream of this State into any other State, for use therein." Again, by the joint resolution, No. 8,⁴ the State of California claimed to own the major portion of the waters of Lake Tahoe, lying on the boundary of California and Nevada, and protested against the diversion of said waters by the United States Reclamation Service for use in the State of Nevada.⁵

¹ Howell v. Johnson, 89 Fed. Rep. 556; Kansas v. Colorado, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552; *Id.*, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 665.

For the international control of waters, see Chap. 63, Secs. 1212-1220.

² 17 Fed. Stat. Ann., 1905, p. 1100; Supp. U. S. Comp. Stat., 1905, p. 349; 32 Stat. L. 388.

For copy of the National Reclamation Act, and construction thereof, see Chap. 65, Secs. 1244-1280.

³ Stats. & Amdts., 1911, p. 421; Kerr's Bien. Supp. Ann., 1911, p. 584.

⁴ Stats. & Amdts., 1911, p. 271; Kerr's Bien. Supp. Ann., 1911, p. 1474.

⁵ Stats. & Amdts., 1911, Chap. 18, p. 1550.

⁶ See, also, on this subject, the laws of California—An Act to prevent the waters of the State from being carried into other States.

During the same year the legislature of Nevada, by a retaliatory resolution, denied the claim of California above set forth, and laid claim to the waters in question, for use in that State.⁶

The State of Oregon the same year passed an Act to the effect that the State Engineer may reject all applications for water for use in the State which did not allow diversions for use in Oregon.⁷

The legislature of Wyoming in the year 1911 passed an Act authorizing the Attorney General of that State to take all steps necessary to protect the rights of Wyoming in and to the waters of interstate streams.⁸

§ 1232. The pollution of interstate streams by a State.—There is another subject kindred to that of the diversion and use of waters of interstate streams, by the respective States thereon, which needs a short discussion in this place, and that is the right of an upper State to the use of such streams as will pollute the waters thereof to such an extent that they will remain polluted, when they reach the boundaries of the States below, and to their injury. The rule of law upon this subject, as laid down by the Supreme Court of the United States, is that the threatened daily transportation by one State, by artificial means and through an unnatural channel, of large quantities of sewage and of accumulated deposits which will poison the water supply of the inhabitants of a lower State, and injuriously affect that portion of the bed or soil of the river which lies within its territory, entitles a lower State to maintain a suit for equitable relief, in advance of any actual injury sustained thereby.¹ But it was further held that, at the hearing of such a case the nuisance must be made out upon determinate and satisfactory evidence, that it must not be doubtful, and that the danger must be shown to be real and immediate. Therefore, at the determination of the case of the State of Missouri v. State of Illinois it was held that the discharge into the Mississippi River through an artificial drainage channel of the sewage of the City of Chicago, mixed with a large

⁶ Nevada Laws, 1911, p. 453.

⁷ See, also, the Laws of Oregon, Part XIV, Chap. 97.

⁸ Laws of Wyoming, 1911, Chap. 43, p. 57.

¹ Missouri v. Illinois, original, on demurrer, 180 U. S. 208, 45 L. Ed.

497, 21 Sup. Ct. Rep. 331; 200 U. S.

496, 50 L. Ed. 572, 26 Sup. Ct. Rep.

268, 202 U. S. 598, 50 L. Ed. 1160,

26 Sup. Ct. Rep. 713.

For the pollution of waters, see Secs. 1129-1147.

volume of pure water from Lake Michigan, will not be enjoined by the Federal Supreme Court on complaint by the State of Missouri that the result of such an action is to poison the water supply of its inhabitants, though disclosing an increase in deaths from typhoid fever in St. Louis, leaves it doubtful whether the typhoid bacillus can and does survive the journey and reach the intake of St. Louis in the Mississippi, and shows other possible sources of infection in the discharge of sewage above the St. Louis intake from other towns and cities, some of which are situated in Missouri.²

§ 1233. Jurisdiction of courts—Original jurisdiction of the Supreme Court of the United States.—The United States Supreme Court has original jurisdiction in a controversy between States, both situated upon an interstate stream, which is presented by a bill filed by one State against another State, the averments of which bill raise the question whether the latter State has the power to wholly deprive the lower State of the benefit of the waters of such river.¹

The original jurisdiction of the Supreme Court of the United States extends to a controversy between the State of Kansas and the State of Colorado and the United States, presenting the questions whether Kansas has a right to the continuous flow of the waters of the Arkansas River as that flow existed before any human interference therewith, or whether Colorado has the right to appropriate the waters of that stream so as to prevent that continuous flow, or whether the amount of the flow is subject to the superior authority and supervisory control of the United States. See *Kansas v. Colorado* upon determination of the case,² where it is said: "Force, under our system of government, is eliminated. The clear language of the Constitution vests in this Court the power to settle those disputes."

So, too, the construction by a public corporation, as an agency

² *Missouri v. Illinois*, 180 U. S. 208, 45 L. Ed. 497, 21 Sup. Ct. Rep. 331; 200 U. S. 496, 50 L. Ed. 572, 26 Sup. Ct. Rep. 268; 202 U. S. 598, 50 L. Ed. 1160, 26 Sup. Ct. Rep. 713.

¹ *Kansas v. Colorado*, on demurrer, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552, where it is said: "The States of this Union can not

make war upon each other. 'They can not grant letters of marque and reprisal.' They can not make reprisal upon each other by embargo. They can not enter into diplomatic relations, and make treaties."

² 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655.

of the State, of a system of public works to promote the health and prosperity of its inhabitants, but which endangers the health and prosperity of the inhabitants of another State below upon an interstate stream, furnishes a sufficient basis for a controversy between the States, of which the Supreme Court of the United States can take original jurisdiction.³ This is upon the theory that the right to the use of water is real property; ⁴ and, therefore, a suit to quiet title to a water right for irrigation purposes, and to determine the land owner's right to divert the waters from the stream for such a purpose, is in the nature to quiet title to real estate. Therefore, the suit must be brought to quiet title to the land in the State court having the proper jurisdiction where the land is situated, or where the water is used.⁵ However, the courts of one State in ascertaining, decreeing, and protecting property rights in water appropriations within the jurisdiction of that State, may at the same time and for that purpose inquire into and determine rights and priorities on the same stream that are located and situated higher up on the stream and beyond the State line, in order to fairly and finally judicially determine the relative rights of the parties and decree the extent of title and the right of possession of the subject matter located and situated within the State.⁶

³ *Missouri v. Illinois*, on demurrer, 180 U. S. 208, 45 L. Ed. 497, 21 Sup. Ct. Rep. 331, where it is said: "If Missouri were an independent and sovereign State, all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the General Government, it was to be expected that upon the latter would be devolved the duty of providing a remedy, and that remedy, we think, is found in the constitutional provisions we are considering." See, also, *Id.*, on the determination of the case, 200 U. S. 496, 50 L. Ed. 572, 26 Sup. Ct. Rep. 713.

⁴ See Secs. 768, 769.

⁵ Where the defendant claimed title by prior appropriation to a certain part of the flow of an interstate river

to irrigate its lands in Nevada, and alleged that such rights were being interfered with by defendant, an appropriator of the waters of the same stream in California, of which State the defendant was a resident, complainant was entitled to sue to quiet its title to such water right in the Federal courts sitting in Nevada, and such jurisdiction will be maintained as against subsequent similar actions brought by defendant for the same purpose in the California State courts. *Rickey etc. Co. v. Miller & Lux* (Nev.), 152 Fed. Rep. 11, 81 C. A. 207; affirming *Id.*, 146 Fed. Rep. 547.

See, also, *Taylor v. Hulett*, 15 Idaho 265, 97 Pac. Rep. 37, 19 L. R. A., N. S., 535.

⁶ *Taylor v. Hulett*, 15 Idaho 265, 97 Pac. Rep. 37, 19 L. R. A., N. S., 535.

In a case decided in 1910 by the Supreme Court of the United States ⁷ it was held that the Federal Circuit Court for the District of Nevada and the California State courts have concurrent jurisdiction to determine the relative rights of parties claiming, the one in Nevada and the other in California, to be entitled to appropriate, as against each other, the waters of an interstate stream, and whichever court first acquired jurisdiction is entitled to proceed to final determination without interference from the other. And Mr. Justice Holmes, in rendering the opinion of the Court upon the subject, said: "We are of the opinion, therefore, that there was concurrent jurisdiction in the two courts, and that the substantive issues in the Nevada and California suits were so far the same that the Court first seised should proceed to the determination without interference, on the principles now well settled as between the courts of the United States and of the States."

§ 1234. Jurisdiction of courts—Federal and State.—In suits between individuals concerning the waters of interstate streams, no different rule prevails governing the jurisdiction of the Federal Courts than that which prevails in the matter of the jurisdiction of the same courts in other suits. There must be the diversity of citizenship, the requisite amount involved, and the other requisites necessary to confer jurisdiction upon the Federal courts.¹

⁷ *Rickey Land & Cattle Co. v. Miller & Lux*, 218 U. S. 258, 54 L. Ed. 1032, 31 Sup. Ct. Rep. 11; affirming the same case below, 152 Fed. Rep. 11, 81 C. C. A. 207.

¹ The incorporation in the State of Nevada by direction of a California corporation for the sole purpose of having the matters in dispute between such California corporation and another corporation of that State determined by a Federal rather than in the State Court, where they were pending and undetermined, must be regarded as an attempt collusively to make a party plaintiff simply for the purpose of creating a case cognizable by the Federal Court, which, under

the Act of March 3, 1875 (18 Stat. L. 470, 472, Chap. 137; U. S. Comp. Stat., 1901, pp. 508, 511), Sec. 5, requires the dismissal of the suit, where the new corporation assumes to be the owner of the property rights which the old company had asserted only that it may have a standing in the Federal Court as a litigant in respect of those rights, and the old corporation can not control the conduct of the suit brought by the new corporation at any time up to the date of the decree, and can require the new corporation, in the event of a decree in its favor, to transfer the benefit of such decree to the old corporation without any new or valuable consideration. *Miller & Lux v. East Side*

In all other cases the State courts where the diversion is made have full and complete jurisdiction to determine all questions, with the exception of that of the right to quiet title to the use of water where a stream rises in one State and flows into an adjoining State and is there diverted and used for irrigation. In such a case the courts of the former State have no jurisdiction to try and determine the right to the use of the water in the latter State.²

Canal & Irr. Co., 211 U. S. 293, 53 L. Ed. 189, 29 Sup. Ct. Rep. 111.

² Conant v. Deep Creek etc. Irr. Co., 23 Utah 627, 66 Pac. Rep. 188, 90 Am. St. Rep. 721, where it is held that, where a stream rises in the State of Idaho, and flows into the State of Utah, a Court of the former State has no jurisdiction to try and determine the right to the use of water flowing in that portion of the stream which is situated in Utah, and there diverted and used for irrigation of lands therein.

Lamson v. Valies, 27 Colo. 201, 61 Pac. Rep. 231, where the same rule was adhered to where the point of diversion was within the first State, but the lands to be irrigated were without its territorial limits.

The District Court of Wyoming has jurisdiction to adjudicate the rights of the owners of land in Montana to the water of the stream so far as may be necessary to protect their rights, though the Court may not have jurisdiction to enter a decree for quieting the title of such owners to the water claimed. Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939, and where it is said: "If, therefore, a decree adjudicating the various priorities of the parties would operate as a decree quieting title to the lands of plaintiffs Willey and Ellison in another State, it is quite obvious that it would be beyond the jurisdiction of the Court."

CHAPTER 65.

THE NATIONAL RECLAMATION ACT.

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- § 1236. General scope of the law.
- § 1237. Conditions leading to its enactment.
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- § 1252. Acts amendatory to the National Reclamation Act—Relating to subdivisions—The farm unit—Act of June 27, 1906.
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- § 1260. Acts amendatory—Act authorizing the Secretary of the Interior to withdraw public notices—Act of February 13, 1911.
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- § 1284. Water users' associations—By-laws.
- § 1285. Water users' associations—Contract with the Government.
- § 1286. Water users' associations—And our conclusions.

§ 1235. Scope of chapter.—As is the case with the Carey Law, discussed in another chapter, so it is with the National Reclamation Act, the subjects of the acquisition of both the land and water rights are so interwoven that they must be discussed together. In this chapter, therefore, we will discuss the "National Reclamation Act," or "the National Irrigation Act," as it is sometimes called, in all its phases.¹

¹ For the Carey Act, see Chap. 67, Secs. 1312-1336.

§ 1236. **General scope of the law.**—The National Reclamation Act of June 17, 1902, is the first Act of Congress which provides for the disposal of both lands and a water right therefor by the Federal Government to individuals.¹ In fact, this was the first attempt upon the part of the Government to provide National projects for the construction of irrigation works for the reclamation of its arid public lands, and to dispose of both its lands and a water right to settlers.

The Act authorizes the Secretary of the Interior at or immediately prior to the time of the beginning of the surveys for any contemplated reclamation project to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works: *Provided*, that all lands entered and entries made under the homestead laws within the areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of the Act. If after a complete survey and estimates the project should be deemed impracticable or unadvisable, the lands withdrawn must be restored to entry; if, however, it is decided that the irrigation project is practicable, the public lands which it is proposed to irrigate by means of any contemplated works shall be subject to entry only under the provisions of the homestead laws in tracts of not less than 40 nor more than 160 acres, and shall be subject to the limitations, charges, terms, and conditions as in the Act provided; *Provided*, that the commutation provisions of the homestead laws shall not apply to entries made under the Act.² Upon the completion of the works the Secretary of the Interior shall give public notice of the lands irrigable under any project, and the limit of the area per entry; also of the charges which shall be made per acre upon said entries, and upon lands already in private ownership which may be irrigated by the water of said project, and the number of annual installments, not exceeding ten, in which such charges shall be paid, and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the

¹ For the full text of the Act, see Sec. 1244.

For the full text of the amendatory Acts to the National Reclamation Act, see Secs. 1245-1260.

For the regulations of the Secretary of the Interior, under the Act and its amendments, see Secs. 1271-1280.

² See, for homestead laws, Sec. 435.

estimated cost of the construction of the project, and shall be apportioned equitably. The entryman upon the lands to be irrigated by such works shall, in addition to the compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry, and shall pay to the Government the charges apportioned against such tract, and then he will be entitled to a patent. An actual and *bona fide* residence upon the land is required,³ and no right to the use of water for land already held in private ownership shall be sold for a tract exceeding 160 acres to any one land owner, and no such sale shall be made to any land owner unless he be an actual *bona fide* resident on such lands, or occupant thereof residing in the neighborhood of said land, and no right shall permanently attach until all payments therefor are made. The annual installments shall be paid to the receiver of the local land office, and a failure to make any two payments when due shall render the entry subject to cancellation, with the forfeiture of all rights under the Act, as well as any moneys already paid thereon.

Such in effect are the general provisions of the National Reclamation Act providing for the disposal of both lands and waters therefor by the Government to settlers. The other provisions of the Act will be discussed in the future sections of this chapter.

§ 1237. *Conditions leading to its enactment.*—In Section 34 of the first edition of this work, published in 1893, in discussing how the natural water supply of the country which was then not utilized might be made available for irrigation and reclamation of the vast tracts of the then arid and barren lands, we said: “The last method for adding to our supply of water, in order to increase the acreage that may be cultivated by its artificial application, is the construction of large and expensive works to divert the water from large rivers upon the lands. Although in the arid region there are a great number of small canals which take the waters from the inferior streams, there are no large canals that take the waters from the large rivers. These works can only be constructed at immense cost, and eventually the Government will either have to undertake them or offer some special advantage to induce private enterprise to do so. Although we have no such rivers in the arid region as the Ganges, in India, still a few, such as the Columbia, Missouri, Rio

³ For actual and *bona fide* residence, see Secs. 1271, 1274.

Grande, and Sacramento, discharge large volumes of water, much of which may at some future time be utilized. There is no doubt but in the matter of irrigation we are behind Europe, Asia, and even Africa, not only in the extent of our works, but in their cost and engineering features. We are not only behind the marvelous nations of antiquity, but also behind the people of modern India, Algeria, Italy, and Spain. The explanation of this is, as before stated, that the time has not yet arrived when the subject of irrigation has become a great national question or national necessity, as it has in the more densely populated countries of the old world."

Our prediction as set forth in the above paragraph has become true, and sooner than expected. As this Western country has become more thickly settled, the demand for available water has become greater and greater for the irrigation of the lands settled upon. In fact, in order to have the arid lands settled and made inhabitable for man, it was oftentimes necessary that the water for their reclamation should be first made available. In order to do this the waters from the larger sources of supply must be utilized. Therefore, greater diverting works and longer and larger canals must be constructed than was the former need in order that the waters may be made to reach the lands lying further back from the rivers or other sources of supply. This, of course, requires a great amount of capital in order that these great reclamation works may be properly and safely constructed. The General Government, since the writing of the above paragraph, has taken both of the steps suggested therein. By the provisions of the Carey Act it has given special advantages so that private enterprise, backed by private capital, has been induced to undertake the construction of these irrigation works for the reclamation of these lands; and by the National Reclamation Act, the Government itself has undertaken to construct works even greater than those which would be undertaken by private enterprise, or, at least, those of such great magnitude, that private capital for many years to come would be loth to undertake. These Acts were passed not so much due to the present necessities as they were looking to the future prosperity of the country. As was said by the United States Circuit Court of Appeals in a recent case,¹ in speaking of the unlimited power of Congress to dispose of the public lands of the United States: "In pursuance

¹ United States v. Hanson, 167 Fed. Rep. 881.

of that power Congress passed the Reclamation Act to make marketable and habitable large areas of desert land within the public domain, which lands are valueless and uninhabitable unless reclaimed by irrigation, and the irrigation whereof is impracticable except upon expenditure of large sums of money in the construction of a system of reservoirs and distributing canals. All previous efforts to make these arid lands available for settlement had resulted in failure. By the Desert Land Act of March 3, 1875,² Congress made provision for their use by individual settlers, and on March 3, 1877,³ had enacted further legislation to facilitate the reclamation of such lands by private entrymen, and in 1894,⁴ to provide for the irrigation of the arid public lands, had passed the Carey Act, by which it proposed to donate to the States in which such lands were located so much thereof not exceeding 1,000,000 acres in each State, as the State would cause to be reclaimed. These efforts having failed to accomplish the desired end, the Reclamation Act was passed."

We are not prepared to go to the extent that the Circuit Court of Appeals went in the above quotation, and designate the Desert Lands Acts and the Carey Law as failures, because in their workings they have accomplished great results, but even in their operation the more accessible lands were taken up. The National Reclamation Act was designed to reclaim those lands lying further back from the streams, or which were more inaccessible to the source of supply of water for their reclamation.⁵ It is possible for all of these laws to work in perfect harmony with each other, and all of them are needed. This great country, rapidly nearing its hundred millions of population, is approaching a period when the subject of the reclamation and cultivation of the now arid lands of the West is becoming more and more each year "a great National question, or a National necessity, as it has in the more densely populated countries of the Old World."

§ 1238. Conditions leading to its enactment—President Roosevelt's message to Congress.—The causes and conditions leading up

² 18 Stat. L., Vol. 3, 497.

³ Act March 3, 1877, 19 Stat. L. 377; U. S. Comp. Stat., 1901, p. 1548.

⁴ Act Aug. 18, 1894, Chap. 301, 304; 28 Stat. L. 422; U. S. Comp. Stat., 1901, p. 1554.

⁵ For the comparison as to the results as between the Carey Act and the National Reclamation Act, see Secs. 1239, 1240.

to the passage of the National Reclamation Act can not be better stated than as given in a portion of President Roosevelt's first message to Congress, delivered December 3, 1901. This portion of the message has become a classic upon the subject, and undoubtedly was the first definite step taken by one in authority, which led in the following year to the National Reclamation Act, which became a law on June 17, 1902.¹ Upon this subject he said:

"In the arid region it is water, not land, which measures production. The Western half of the United States would sustain a population greater than that of our whole country today if the waters that now run to waste were saved and used for irrigation. The forest and water problems are perhaps the most vital internal questions of the United States.

"The forests are natural reservoirs. By restraining the streams in flood and replenishing them in drought they make possible the use of waters otherwise wasted. They prevent the soil from wasting, and so protect the storage reservoirs from filling up with silt. Forest conservation is therefore an essential condition of water conservation.

"The forests alone can not, however, fully regulate and conserve the waters of the arid region. Great storage works are necessary to equalize the flow of streams and to save the flood waters. Their construction has been conclusively shown to be an undertaking too vast for private effort. Nor can it be best accomplished by the individual States acting alone. Far-reaching interstate problems are involved; and the resources of single States would often be inadequate. It is properly a National function, at least, in some of its features. It is as right for the National Government to make the streams and rivers of the arid region useful by engineering works for water storage as to make useful the rivers and harbors of the humid region by engineering works of another kind. The storage of the floods at the headwaters of our rivers is but an enlargement of our present policy of river control, under which levees are built on the lower reaches of the same stream.

"The Government should construct and maintain there reservoirs as it does other public works. Where their purpose is to regulate the flow of streams, the water should be turned freely into the chan-

¹ For the full text of the Act and its amendments, see Sec. 1244.

nels in the dry season to take the same course under the same laws as the natural flow.

"The reclamation of the unsettled arid public lands presents a different problem. Here it is not enough to regulate the flow of the streams. The object of the Government is to dispose of the land to settlers who will build homes upon it. To accomplish this object water must be brought within their reach.

"The pioneer settlers on the arid public domain chose their homes along streams from which they could themselves divert the water to reclaim their holdings. Such opportunities are practically gone. There remain, however, vast areas of public land which can be made available for homestead settlement, but only by reservoirs and main-line canals, impracticable for private enterprise. These irrigation works should be built by the Government for actual settlers, and the cost of construction should, so far as possible, be repaid by the land reclaimed. The distribution of the water, the divisions of the streams among irrigators, should be left to the settlers themselves, in conformity with the state laws, and without interference with those laws or with vested rights. The policy of the National Government should be to aid irrigation in the several States and Territories in such a manner as will enable the people in the local communities to help themselves, and as will stimulate needed reforms in the State laws and regulations governing irrigation.

"The reclamation and settlement of the arid lands will enrich every portion of our country, just as the settlement of Ohio and Mississippi Valleys brought prosperity to the Atlantic States. The increased demand for manufactured articles will stimulate industrial production, while wider home markets and the trade with Asia will consume the larger home supplies and effectually prevent competition with Eastern agriculture. Indeed, the products of irrigation will be consumed chiefly in upbuilding local centers of mining and other industries, which would otherwise not come into existence at all. Our people as a whole will profit, for successful home-making is but another name for the upbuilding of the nation.

"The necessary foundation has already been laid for the inauguration of the policy just described. It would be unwise to begin by doing too much, for a great deal will doubtless be learned, both as to what can and what can not be safely attempted, by the early efforts, which must of necessity be partly experimental in character.

At the very beginning the Government should make clear, beyond shadow of doubt, its intention to pursue this policy on lines of the broadest public interest. No reservoir or canal should ever be built to satisfy selfish personal or local interests, but only in accordance with the advice of trained experts, after long investigation has shown the locality where all the conditions combine to make the work most needed and fraught with the greatest usefulness to the community as a whole. There should be no extravagance, and the believers in the need of irrigation will most benefit their cause by seeing to it that it is free from the least taint of excessive or reckless expenditure of the public moneys."

§ 1239. Its operation as compared to that of the Carey Law from the standpoint of the State and private enterprise.—As to the true merits of the workings of the National Reclamation Act, as compared with those of the Carey Act,¹ it is yet too early to attempt to decide. However, in this and the following section² we shall attempt to draw some comparisons between the operations of these two laws, as at present they appear to us, and as they affect those most interested.

The National Reclamation Act is, in a way, a rival of the Carey Act, discussed in another chapter.³ By the withdrawal of vast tracts of lands irrigable from certain sources of water supply in nearly every State and Territory throughout the West by the Secretary of the Interior, for the purposes of the Reclamation Act, it has greatly hampered the future operations under the Carey Act, and thereby has also hampered the projection of private projects in the reclamation of large tracts of arid lands. Some law should be enacted by Congress whereby, when the Secretary of the Interior was satisfied that a certain project would be taken up and prosecuted to its conclusion by a private company, that the Government would relinquish its right to the lands segregated and set apart for the purposes of the National Reclamation Act, and thus permit the works to be taken up by the State and private enterprise under the provisions of the Carey Law in the States where that law applies and which have accepted its provisions. From experience during

¹ For the Carey Act, see Chap. 67, Secs. 1312-1336.

³ For the Carey Act, see Chap. 67, Secs. 1312-1336.

² See Sec. 1240.

the ten years' operation under the National Reclamation Act, it has been ascertained that the Government moves with great deliberation in these matters. Many projects begun a number of years ago are still unfinished. Many other contemplated projects, where vast tracts of land have been reserved from entry or from the operation of private enterprise under the Carey Law, have not yet been commenced. The reclamation fund has been exhausted, and money from other sources has been appropriated by the General Government in order to finish the projects already commenced. As the Federal Government has left the subject as to what laws should govern the waters to the respective States within which they flow, so also should the Government leave to the States and to private enterprise, under State control, as far as possible, the subject of the reclamation of the arid lands within their respective boundaries, especially where the State is willing to undertake the burden thereof.

Upon the other hand, the operations under the Carey Law under wise State control has been such as to give the utmost satisfaction. The lands have been set aside to the State for the purposes of the law, the works have been prosecuted in many cases with the utmost diligence to completion, the water conducted to the land as required by the law, and the land thus been reclaimed and made ready for settlers, who are now enjoying the benefits of the law. The progress of the country has been very rapid, and towns and cities have sprung up under its influence. As soon as the settler secures title to his land, which may be done as soon as he complies with the law, and under this system not have to wait through a long series of years as is the case with the National Reclamation Act, it becomes private property, and is taxable, and thus another benefit accrues to the State.

According to the report of the preliminary results of the thirteenth census of the United States, 1910, in 1909 there were under actual irrigation from water furnished by National Reclamation projects 395,646 acres. The acreage irrigation projects were capable of irrigating, in 1910, is given as 786,190 acres. The acreage included in enterprises completed or under construction in 1910 were 1,973,016 acres.

§ 1240. Its operation as compared to that of the Carey Law from the standpoint of the settler.—But those most interested in the operations of these two laws are the settlers who go upon the

lands segregated under the respective Acts to make homes for themselves and their families. The National Reclamation Act provides that the amount of land to be taken by any one settler must not exceed 160 acres; but this amount may be cut down, at the option of the Secretary of the Interior, to a small acreage, as in his judgment might reasonably be required for the support of a family. In order to acquire title to the land filed upon by him, he must reside upon it for the full period of five years, and fully comply with the other provisions of the homestead law, in order to make his final proof, and also prior to his obtaining patent to the land covered by his entry he must pay to the Government the charges for water apportioned against his tract. The law also provides for not to exceed ten annual installments, and in practice the Reclamation Service has provided a ten-year period. So that in addition to five years of residence, there must be an additional five years of residence during which the installments on the water right must be paid before the patent is issued by the Government. In order to make final proof it is necessary for the settler to reclaim at least one-half of the total irrigable entry for agricultural purposes.

One feature of the National Reclamation Act which is liable to cause considerable trouble lies in the applying of the homestead law to the conditions existing necessary for the reclamation of these lands. In the enactment of the National Reclamation Act the homestead law was attached to and made a part of the same. The original place of operation of the homestead law was in that portion of our country where there was annually an ample rainfall, and it was easy the first year to bring a considerable portion of the land entered under cultivation. It needed only fencing, plowing, and cultivation. In fact, under the homestead law the Government practically donated a farm to any settler who would cultivate and improve the same and reside upon the land for a period of five years. If the settler got ahead, he might commute his entry by paying the Government the sum of \$1.25 per acre, and receive his patent before the expiration of the five-year period. But under the National Reclamation Act the donation feature of the original homestead law is practically removed. To be sure, he gets title to the land without charge, but this is absolutely worthless to him without the water right, and for this he pays the Government full value, or his proportion of the full cost of the works. "The said charges shall

be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably." The only ostensible advantage in the Act to the settler is the freedom of an interest charge on the cost of his water right, but this is more than counterbalanced by the additional burdens imposed upon him by way of additional residence, annual payments for the water right, and necessary cultivation of one-half of the land covered by his entry. Even the old commutation clause, originally an attractive feature of the homestead law, is made not to apply to entries made under the Reclamation Act.

In short, as the law stands today, the settler under a reclamation project is confronted with all the so-called safeguards which a banker might take in order to obtain security for a loan of money. Or, by way of a better illustration, the precautions which are taken by those who sell merchandise upon the partial-payment plan and reserve the title in the vendor until the property is fully paid for, and providing, in case the payments are not made when due that the vendor is entitled to the recovery of the property so sold, and that all moneys paid under the contract shall be forfeited as liquidated damages. The Reclamation Act also provides that "a failure to make any two payments when due shall render the entry subject to cancellation, with a forfeiture of all rights under the Act, as well as of any moneys already paid thereon." From many years of experience it has been ascertained that where a settler attempts to make a home upon the arid lands of the West, even under the most favorable conditions, without considerable ready money, which the average settler does not possess, for the first few years it is a hard proposition to make a bare living for himself and family, even with the greatest industry and economy. And as the National Reclamation Act now stands, with its drastic forfeiture clause, an additional burden is imposed upon the settler, which, we predict, he will not always be able to meet.

In contradistinction to the National Reclamation Act the requirements of the Carey Act affecting the settlers are as follows: The settler may take any portion of 160 acres, by legal subdivisions, which he may choose to enter. He may reside on the entry for a period of three years before making his final proof, but if he so desires he may prove up in a much shorter period. No payment on his water contract with the construction company is necessary in

order to obtain title to the land. As soon as he makes his final proof as required by the law, the State issues the final certificate or the patent, as the case may be, and the land is then subject to the lien of the construction company for the deferred payments. Another advantage of the Carey Law is the knowledge by the settler as to the exact amount of charges against the land for the water furnished. These are fixed and settled in advance by the specific terms of the contract. The construction company even guarantees the maximum cost of the maintenance, this maintenance being oftentimes fixed as low as thirty-five cents per acre, while on National Reclamation projects the price of the water right is not fixed until after settlement, nor is it fixed until construction is well under way. In order to make final proof the settler under the Carey Law is required to cultivate and reclaim an eighth of the land covered by his entry. This is the same requirement as under the Desert Land Act.¹

There is another thing which should be mentioned in comparing the workings of these two laws as they now exist, and that is the credit of the settlers under the respective laws. The average settler has but little ready money to live upon during the first few years. Therefore, he must depend largely upon the credit which he can obtain from those with whom he deals. Credit, as much as the fact is to be deplored, is the absolute necessity of the pioneer. The settler under a National Reclamation project, with all his rights subject to the drastic forfeiture clause above quoted, goes to his country store for credit and finds that it is practically limited to the value of his team, wagon, and harness. At the bank it is also curtailed to the same extent. Upon the other hand, the settler under the Carey Law project can assign or transfer his entry as soon as it is made; he can obtain credit thereon, and oftentimes it is so arranged that the construction company, or a company organized for that purpose, will advance the necessary credit for the first few years until the settler gets a start. Under the former Act the holdings of the settler is but a prospect, which, if his health continues good, by the utmost economy he may develop to maturity in the dim future, while the holdings of a settler under the Carey Law project become at once property, a titled asset available for use as credit. The patent is promptly issued and again the settler's credit is strength-

¹ For the provisions of the Desert Land Acts, see Chap. 66, Secs. 1287-1311.

ened to the full capacity of his acreage. He may thus tide over the first few years of hardship until he has got a start, while under the National Reclamation Act, as it now exists, in case of a failure of crops, sickness, or financial distress or from other sources, only forfeiture of all of his rights faces the failure to make "any two payments when due." It will be ascertained shortly, when the payments of the settlers under National Reclamation Act projects become due, that extensions will have to be granted by Congress, otherwise more failures will be recorded than successes.

§ 1241. **Criticism of the Act—The opinion of Elwood Mead.**—Mr. Elwood Mead, now chairman of the Water Supply Commission of Victoria, Australia, formerly State Engineer of Wyoming, and Chief of Irrigation Investigations under the Department of Agriculture of the United States, visited this country in 1911 and examined a number of reclamation projects constructed and controlled by the National Reclamation Service under the provisions of the Act in question.

Although the preceding sections ¹ were written long before the letter quoted herein from Mr. Mead was written, it will be seen that his criticism is somewhat in accord with our own views upon the subject. Mr. Mead said: "I do not think either the settlers or the Government are doing as well as they should under a number of the National projects. The reasons for this seem to be the poverty of the settlers and the severe conditions of payment exacted by the Government. When these projects were inaugurated settlers with little or no capital were allowed to file on the land, and in some instances encouraged to do so before there was water for irrigation or any means for productive employment. Before the settler was in a position to grow crops all his money had been dissipated in living expenses and erecting a habitation, and now, when there is water to use and an obligation to pay for it, the settler lacks seed, teams, tools, and money to live on, all of which are essential to growing a crop or utilizing the land and water.

"This distressing situation is made worse by the Government requiring these settlers to repay the cost of the works in ten years. In some cases this payment reaches \$5 an acre, or \$400 for an eighty-acre farm. There are few cases where the first crop is a success.

¹ See Secs. 1239, 1240.

It is rare that it repays the cost of cultivation; hence the settler, if he pays the Government charge, must pay it from money he brought with him. Those who did not have considerable money to start with are not paying. Worse than this, they are living under hard conditions, and are not developing the land in a way to pay in the future.

"The remedy or remedies would seem to be: Extend the terms of payment. Make the period thirty years, charging nothing but interest for the first five years. Failure to charge interest on deferred payments is a fundamental mistake of the Act. It is an incentive to men to defer payments. It was one of the causes for making the time of repayment so short. Better results will come to both settlers and the Government by giving ample time and charging a low rate of interest on deferred payments.

"More than this is needed to enable many settlers to cultivate their farms and make any payments to the Government in the near future. They must have money to enable them to prepare the land, plant, cultivate, and harvest crops."

§ 1242. The Act is constitutional—Doubts expressed in *Kansas-Colorado* case.—In rendering the opinion in the case of *Kansas v. Colorado*,¹ Mr. Justice Brewer made use of some expressions which have led some to the belief that the National Reclamation Act was unconstitutional. He said: "At the time of the adoption of the Constitution, within the known and conceded limits of the United States there were no large tracts of arid land, and nothing which called for any further action than that which might be taken by the legislature of the State in which any particular tract of such land was to be found; and the Constitution, therefore, makes no provision for a National control of the arid regions or their reclamation. But as our National territory has been enlarged we have within our borders extensive tracts of arid lands which ought to be reclaimed, and it may be well that no power is adequate for their reclamation other than that of the National Government. But if no such power has been granted, none can be exercised." It will be noticed that in the language used it was not held that no such power was granted. In fact, there was nothing in the case which called for a decision upon this point. The language quoted had reference

¹ 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655.

solely to the question of the power of Congress to interfere with the State control over the flow of waters within its limits, which control, subject to the power of Congress to regulate commerce, is vested wholly in the State. Further along in the opinion the Justice said: "As to those lands within the limits of the States, the National Government is the most considerable owner, and has the power to dispose of and make all needful rules and regulations respecting its property." This is expressly granted to Congress by Section 3 of Article IV of the Federal Constitution, which provides as follows: "The Congress shall have the power to dispose of and made all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State."

Therefore, the United States being the owner of these arid lands, Congress is vested with the unlimited authority over the same. It may dispose of these lands without improving them, or, upon the other hand, it has the unquestioned right to expend money thereon for their improvement by reclaiming them, and afterward dispose of the lands so reclaimed as it sees fit;² provided, that it does not interfere with the right of the State legislation controlling the waters flowing within the respective jurisdictions. And in this respect the National Reclamation Act itself in Section 8 recognizes the right of the States to regulate the control, appropriation, use, and distribution of water, wherein it is said: "That nothing in this Act shall be construed as affecting or intending to affect or to any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State, or of the Federal Government, or

² "This power has been vested in Congress without limitation." *United States v. Gratiot*, 39 U. S. 14 Pet. 526, 10 L. Ed. 573.

"That power is subject to no limitations. Congress has the absolute right to prescribe the times, the con-

ditions, and the modes of transferring this property or any part of it, and to designate the persons to whom the transfer shall be made." *Gibson v. Chouteau*, 80 U. S. 13 Wall. 92, 20 L. Ed. 534.

of any land owner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof."

§ 1243. **The Act is constitutional—Decisions and conclusion.**—The United States Supreme Court has not yet decided the question of the constitutionality of the National Reclamation Act; and other than the expressions used by Mr. Justice Brewer in the case of *Kansas v. Colorado*, we find no statement by that Court tending to hold that the law is either valid or invalid. But the United States Circuit Court of Appeals, the Court next in authority to that of the Supreme Court of the United States, has held that the Act was constitutional in a case decided in 1909¹ wherein it is held that the Act providing for the irrigation by the United States of arid public lands is within the power of Congress as to lands within the States, as well as in the Territories, under the Federal Constitution, Article IV, Section 3, giving it power to dispose of and to make all needful rules and regulations respecting the territory or other property belonging to the United States, and is not in violation of the Constitution on the ground that it authorizes the expenditure of public money without an appropriation, since it is in itself an appropriation of the proceeds of the land sold, nor as delegating legislative authority to the Secretary of the Interior. In performing the duty imposed by the Act the Secretary of the Interior only executes the clearly expressed will of Congress, and will not, in any true sense, exert legislative or judicial power.²

In a still later case decided by the same Court³ the same conclusions were reached, that the Act was constitutional, and the Court said: "We come now to the consideration of the real question in this case, which is presented as a constitutional question, and may be stated in the following terms: Can the United States, owning arid lands within a State, organize and maintain a scheme or project whereby it will associate with itself other owners of arid lands for the purpose of reclaiming and improving such lands, and in that behalf exercise the right of eminent domain against another land

¹ *United States v. Hanson*, 167 U. S. 881.

² See *Union Bridge Co. v. United States*, 204 U. S. 364, 51 L. Ed. 523, 27 Sup. Ct. Rep. 367.

³ *Burley v. United States*, 179 Fed. Rep. 1, 102 C. C. A. 429; affirming *Id.*, 172 Fed. Rep. 615.

owner for the purpose of obtaining the title and possession of land absolutely necessary in carrying the proposed scheme or project into effect? . . . It would be strange if the National Government could enter the territory of a State where there were no public lands of the United States requiring irrigation, and no public lands through which water flows necessary for the irrigation of arid lands, and by legislation provide a system of irrigation for the private lands within the State and control its administration. It would indeed be a strange proceeding, and obviously wholly outside of the authority of Congress. But in this case the United States is the owner of large tracts of land within the States named in the Act of June 17, 1902. The public welfare requires that these lands, as well as those held in private ownership, should be reclaimed and made productive. To do this effectively and economically with the available water supply, large tracts must be brought into relation with a single system or project. . . . The Act of June 17, 1902, not only recognizes the Constitution and laws of the State providing for the appropriation of its waters and the reclamation of its arid lands, but it requires that the Secretary of the Interior, in carrying out the provisions of the Act, shall proceed in conformity with such laws. In what respect does such a proceeding contravene the Constitution of the United States? Has not the United States as a land owner the same rights within the State that any other land owner has? And when the land is of such a character that, to be useful, it must be irrigated and reclaimed in large tracts, may not the United States, co-operating with such other land owners, organize and establish an effective and economical system or project for such irrigation and reclamation? And, finally, if the necessary use of lands for such a purpose is made a public use by the State, is there any reason why the United States should not exercise its right of eminent domain to acquire title to lands absolutely necessary to such public use? We can think of no constitutional objection to such a proceeding when it is clearly established that with respect to surrounding circumstances and conditions the use is a public use; and while it has been held that the law of the State is not conclusive upon this subject, the Supreme Court of the United States in numerous cases has determined that such a use as here described in the project under consideration is a public use."

As we view the law upon the subject, there can be no doubt but that the National Reclamation Act is constitutional as to all objections which may be raised against it, and clearly within the power granted by the Federal Constitution to dispose of and make all needful rules and regulations respecting the arid lands of which the United States is the proprietor. And it is to be remembered that the questions raised in the Kansas-Colorado case do not involve Government irrigation projects, and neither do they in any way involve the construction of the National Reclamation Act, but the Court, in rendering its decision, merely indulged in a wide field of speculation, and by indirection intimated a doubt, to put it in the strongest manner possible, as to the validity of the law. But to date there has been no decision by the Supreme Court of the United States upon the direct question as to the constitutionality of the Act.

As held by the Federal Court in two recent cases, one decided in Idaho in 1911,⁴ and the other in Oregon,⁵ the Reclamation Act is not a "revenue law of the United States" within the meaning of Section 643 of the Revised Statutes⁶ authorizing the removal of any suit brought in any State court against any officer appointed under or acting by authority of any revenue officer of the United States, and such section does not apply to a suit against the officer in charge of a reclamation project because of acts done under the color of his office.

§ 1244. The full text of the National Reclamation Act of June 17, 1902.—The full text of the National Reclamation Act, approved June 17, 1902,¹ and the amendments since enacted thereto, is as follows:

TITLE—"*An Act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands.*"

"Section 1. That all moneys received from the sale and disposal of the public lands in Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma,

⁴ *Twin Falls Canal Co. v. Foots*, 192 Fed. Rep. 583.

⁵ *City of Stanfield v. Umatilla River Water Users' Assn.*, 192 Fed. Rep. 596.

⁶ *United States Compiled Statutes*, 1901, p. 521.

¹ 17 Fed. Stat. Ann., 1905, p. 1098; Supp. U. S. Comp. Stat., 1905, p. 349; 32 Stat. L. 388.

Oregon, South Dakota, Utah, Washington, and Wyoming,² beginning with the fiscal year ending June 30, 1901, including the surplus of fees and commissions in excess of allowance to registers and receivers, and excepting the five per centum of the proceeds of the sales of public lands in the above States set aside for educational and other purposes, shall be, and the same are hereby, reserved, set aside, and appropriated as a special fund in the Treasury, to be known as the 'reclamation fund,' to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semi-arid lands in the said States and Territories, and for the payment of all other expenditures provided for in this Act: *Provided*, that in case the receipts from the sale and disposal of lands other than those realized from the sale and disposal of lands referred to in this section are insufficient to meet the requirements for the support of agricultural colleges in the several States and Territories, under the Act of August 30, 1890, entitled, 'An Act to apply a portion of the proceeds of the public lands to the more competent endowment and support of the colleges for the benefit of agriculture and the mechanic arts, established under the provisions of an Act of Congress approved July 2, 1862,' the deficiency, if any, in the sum necessary for the support of said colleges shall be provided for from any moneys in the treasury not otherwise appropriated.

"Sec. 2. That the Secretary of the Interior is hereby authorized and directed to make examinations and surveys for, and to locate and construct, as herein provided, irrigation works for the storage, diversion, and development of waters, including artesian wells, and to report to Congress at the beginning of each regular session as to the results of such examinations and surveys, giving estimates of cost of all contemplated works, the quantity and location of the lands which can be irrigated therefrom, and all facts relative to the practicability of each irrigation project; also the cost of works in process of construction, as well as of those which have been completed.

"Sec. 3. That the Secretary of the Interior shall, before giving

² By the Act of June 12, 1906, the provisions of the Reclamation Act were thereby extended so as to in- clude and apply to the State of Texas. Supp. Fed. Stat. Ann., 1909, p. 705, 34 Stat. L. 259.

the public notice provided for in Section 4 of this Act, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this Act, and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of this Act; and the Secretary of the Interior is hereby authorized, at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works: *Provided*, that all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of this Act; that said surveys shall be prosecuted diligently to completion, and upon the completion thereof, and of the necessary maps, plans, and estimates of cost, the Secretary of the Interior shall determine whether or not said project is practicable and advisable, and if determined to be impracticable or unadvisable he shall thereupon restore said lands to entry; that public lands which it is proposed to irrigate by means of any contemplated works shall be subject to entry only under the provisions of the homestead laws in tracts of not less than forty nor more than one hundred and sixty acres, and shall be subject to the limitations, charges, terms, and conditions herein provided: *Provided*, that the commutation provisions of the homestead laws shall not apply to entries made under this Act.

"Sec. 4. That upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole projects, providing the necessary funds for such portions or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments, not exceeding ten, in which such charges

shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably: *Provided*, that in all construction work eight hours shall constitute a day's work, and no Mongolian labor shall be employed thereon.

"Sec. 5. That the entryman upon lands to be irrigated by such works shall, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay to the Government the charges apportioned against such tract as provided in Section 4. No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one land owner, and no such sale shall be made to any land owner unless he be an actual *bona fide* resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made. The annual installments shall be paid to the receiver of the local land office of the district in which the land is situated, and a failure to make any two payments when due shall render the entry subject to cancellation, with the forfeiture of all rights under this Act, as well as any moneys already paid thereon. All moneys received from the above sources shall be paid into the reclamation fund. Registers and receivers shall be allowed the usual commissions on all moneys paid for lands under this Act.

"Sec. 6. That the Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this Act: *Provided*, that when the payments required by this Act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the land irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided*, that the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress.

"Sec. 7. That where in carrying out the provisions of this Act it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney-General of the United States upon every application of the Secretary of the Interior, under this Act, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice.

"Sec. 8. That nothing in this Act shall be construed as affecting or intending to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested rights acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any land owner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, that the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limitation of the right.

"Sec. 9. That it is hereby declared to be the duty of the Secretary of the Interior in carrying out the provisions of this Act, so far as the same may be practicable and subject to the existence of feasible irrigation projects, to expend the major portion of the funds arising from the sale of public lands within each State and Territory hereinbefore named for the benefit of arid and semi-arid lands within the limits of such State or Territory: *Provided*, that the Secretary may temporarily use such portion of said funds for the benefit of arid or semi-arid lands in any particular State or Territory hereinbefore named as he may deem advisable, but when so used the excess shall be restored to the fund as soon as practicable, to the end that ultimately, and in any event, within each ten-year period after the passage of this Act, the expenditures for the benefit of the said States and Territories shall be equalized according to the proportions and subject to the conditions as to practicability and feasibility aforesaid.

"Sec. 10. That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purposes of carrying the provisions of this Act into full force and effect."

§ 1245. Acts amendatory—Indian reservations and lands—Acts of April 21, 1904, April 27, 1904, March 6, 1906, June 21, 1906, March 1, 1907.—As a rule, ceded Indian lands are subject to disposition under certain specific Acts mentioned in the treaty or the Act of Congress providing for the cession, and hence would not be subject to withdrawal under the provisions of the Reclamation Act. Specific decisions will be made by the Secretary of the Interior in each case.¹

The original National Reclamation Act has been added to by several amendatory Acts of Congress enacted from time to time. Several of these amendatory Acts relate to Indian reservations and to Indian lands, and are as follows:

By Sections 25 and 26 of the Indian Department appropriation Act of April 21, 1904,² it was provided that "in carrying out any irrigation enterprise which may be undertaken under the provisions of the Reclamation Act of June 17, 1902, and which may make possible and provide for, in connection with the reclamation of other lands, the reclamation of all or any portion of the irrigable lands on the Yuma and Colorado River Indian Reservations, in California and Arizona, the Secretary of the Interior is hereby authorized to divert the waters of the Colorado River and to reclaim, utilize, and dispose of any lands in said reservations which may be irrigable by such works in like manner as though the same were a part of the public domain: *Provided*, that there shall be reserved for and allotted to each of the Indians belonging to the said reservations five acres of the irrigable lands. The remainder of the lands irrigable in said reservations shall be disposed of to settlers under the provision of the Reclamation Act: *Provided further*, that there shall be added to the charges required to be paid under said Act by settlers upon unallotted Indian lands such sum per acre as in the opinion of the Secretary of the Interior shall fairly represent the value of the unallotted lands in said reservation before reclama-

¹ 4th Report Reclamation Service, p. 29.

² 10 Fed. Stat. Ann., 1906, p. 435; 33 Stat. L. 224, 226, Secs. 25, 26.

tion; said sum to be paid in annual installments in the same manner as the charges under the Reclamation Act. Such additional sum per acre, when paid, shall be used to pay into the reclamation fund the charges for the reclamation of the said allotted lands, and the remainder thereof to be placed to the credit of said Indians, and shall be expended from time to time, under the direction of the Secretary of the Interior, for their benefit."

Section 26 of the same Act provides in similar terms to the above for the reclamation of the irrigable lands of the Pyramid Lake Indian Reservation, in the State of Nevada.

In Article II of the Act approved April 27, 1904, entitled, "An Act to ratify and amend an agreement with the Indians of the Crow Reservation, in Montana, and making appropriations to carry the same into effect," it is provided that, in consideration of the land ceded, the United States agrees to dispose of the same under the provisions of the Reclamation Act, the homestead, townsite, and mineral land laws, except Sections 16 and 36, or an equivalent of two sections in each township, at not less than \$4 per acre. And Section 5 of said article provides:

"Sec. 5. That before any of the lands by this agreement ceded are open to settlement or entry, the Commissioner of Indian Affairs shall cause the allotments to be made and the schedule to be prepared, as provided for in Section 4 of this Act, and a duplicate of said schedule shall be filed with the Commissioner of the General Land Office. Upon the completion of such allotments and the filing of such schedule and after the sale or removal of such improvements the residue of such ceded lands, except Sections 16 and 36, or lands in lieu thereof, which shall be reserved for common school purposes, and are hereby granted to the State of Montana for such purposes, shall be subject to withdrawal and disposition under the Reclamation Act of June 17, 1902, so far as feasible irrigation projects may be found therein. The charges provided for by said Reclamation Act shall be in addition to the charge of \$4 per acre for the land, and shall be paid in annual installments as required under the Reclamation Act; and the amounts to be paid for the land shall be credited to the funds herein established for the benefit of the Crow Indians. If any lands in Sections 16 and 36 are included in an irrigation project under the Reclamation Act, the State of Montana may select in lieu thereof, as herein provided, other lands not in-

cluded in any such project, in accordance with the provisions of existing law concerning school land selections. In any construction work upon ceded lands performed directly by the United States under the Reclamation Act preference shall be given to the employment of Crow Indians, or whites intermarried with them, so far as may be practicable: *Provided, however*, that if the lands withdrawn under the Reclamation Act are not disposed of within five years after the passage of this Act, then all of said lands so withdrawn shall be disposed of as other lands provided for in this Act.”³

One of the most extensive Acts of Congress relative to Indian reservations and lands is the Act of March 6, 1906, relative to the Yakima Indian Reservation, in the State of Washington, and entitled, “An Act authorizing the disposition of surplus and allotted lands in the Yakima Indian Reservation, in the State of Washington, which can be irrigated under the Act of Congress approved June 17, 1902, known as the Reclamation Act, and for other purposes.”⁴ Said Act provides as follows:

“Sec. 1. That if within the Yakima Indian Reservation, in the State of Washington, as described in the Act approved December 21, 1904, entitled, ‘An Act to authorize the sale and disposition of surplus and unallotted lands of the Yakima Indian Reservation, in the State of Washington,’ there shall be found surplus or unallotted lands under irrigation projects deemed practicable and undertaken under the provisions of the Act of Congress approved June 17, 1902, known as the Reclamation Act, the Secretary of the Interior is hereby authorized to exclude from the provisions of said Act of December 21, 1904, such surplus or unallotted lands which can be irrigated under such project and to dispose of the same in the manner hereinafter provided, and he is further authorized to make withdrawals of such lands for the purpose provided in said Reclamation Act.

“Sec 2. That the irrigable surplus and unallotted lands in any such project shall be subject to homestead entry under all the provisions of the Reclamation Act at such time as may be fixed by the Secretary of the Interior and at the price determined by appraisal

³ 33 Stat. L. 352.

For proclamation of President opening Crow Reservation, see 34 Land Dec. 632, 35 Land Dec. 684.

142—Kin. on Irr.

⁴ 34 Stat. L. 53; see, also, 5th Annual Report Reclamation Service, p. 22.

as provided in said Act of December 21, 1904. Payments for the land shall be made in annual installments, the number and time of beginning being fixed by the Secretary of the Interior, and shall be deposited in the Treasury of the United States and credited to the Yakima Indian fund, and disposed of as provided by Section 4 of the said Act of December 21, 1904. Such payments shall be in addition to the charges for construction and maintenance of the irrigation system made payable to the reclamation fund by the provisions of the Reclamation Act. In case of failure to make any payment for such lands when due, the Secretary of the Interior shall have the power to cancel the entry and the corresponding water right and declare forfeited to the said Yakima Indian fund and the reclamation fund, respectively, the amounts paid on such entry and water rights. The lands embraced within such canceled entry shall be subject to further entry under the Reclamation Act at the appraised value until otherwise directed by the President, who may, by proclamation, as provided by said Act of December 21, 1904, from time to time fix such price as he may deem most advantageous upon all the lands within such projects not disposed of.

"Sec. 3. That if any lands heretofore allotted or patented to Indians on said Yakima Indian Reservation shall be found irrigable under any project, the Secretary of the Interior is hereby authorized, upon the request or with the consent of such allottee or patentee, to dispose of all land in excess of twenty acres in each case, in tracts of an area approved by him and subject to all the provisions of the Reclamation Act to any person qualified to acquire water rights under the provisions of the Reclamation Act at a price satisfactory to the allottee or patentee and approved by the Secretary of the Interior, or at public sale to the highest bidder. The payments shall be made in annual installments, the number and terms being approved by the Secretary of the Interior. Such payments shall be in addition to the charges for construction and maintenance of the irrigation system made payable to the reclamation fund by the provisions of the Reclamation Act. In case of failure to make any payment for such lands when due or the charges under the Reclamation Act, the Secretary of the Interior shall have the power to cancel the entry and the corresponding water right and again dispose of the land in the manner hereinbefore provided.

"Sec. 4. That from the payments received from the sale of such individual Indian lands there shall be covered into the reclamation fund the amounts fixed by the Secretary of the Interior as the annual charges on account of the land retained by such Indian for the construction and maintenance of the irrigation system as required under the Reclamation Act. The balance, if any, shall be deposited in the Treasury of the United States to the credit of the individual Indians, and may be paid to any of them if, in the opinion of the Secretary of the Interior, such payment will tend to improve the condition and advance the progress of said Indians, but not otherwise.

"Sec. 5. That the Secretary of the Interior is hereby authorized to cover into the reclamation fund from the money of any such Indian, either from his individual credit or from the general Yakima Indian fund, for the payment of such charges for construction and maintenance for the water rights appurtenant to the land retained by him or for the annual maintenance charges payable on account of such water rights after the construction charge thereon has been paid in full. After unconditional title in fee has passed from the United States for any lands retained by such Indians, the water for irrigating such lands shall be furnished under the same conditions in all respects as for other lands under the project: *Provided*, that any Indian taking advantage of this Act shall have a perpetual water right so long as the maintenance charges are paid, whether he uses the water or not, and the Secretary of the Interior is hereby authorized to use the funds of the tribe to pay such maintenance charges, when, in his discretion, it is necessary to preserve said water right: *Provided further*, that he may, in his discretion, use said funds to pay for water rights and maintenance charges on twenty acres of any Indian allotment if the sum obtained from the sale of the allottee's land is in excess of twenty acres and his interest in the tribal funds be insufficient for those purposes.

"Sec. 6. That the Secretary of the Interior shall be authorized, upon compliance with the provisions of this Act and of the Reclamation Act, by any party having purchased such allotted or patented lands as herein provided, to issue patent passing unconditional title in fee by the United States as trustee for the allottee or patentee, and shall cancel any allotment as to the lands disposed of under this Act.

"Sec. 7. That the irrigation works heretofore constructed for the Yakima Indian Reservation may be at a cost to be determined by the Secretary of the Interior included in any project developed under the provisions of the Reclamation Act and of this Act, and become a part of said project for all purposes of the Reclamation Act, and the cost of the same shall be included in the cost of such project and be paid into the Yakima Indian fund out of the proceeds arising from the sale of water rights from time to time as payments on account thereof are received. The provisions of this Act may be construed as superseding or amending any provisions of the said Act of December 21, 1904, so far as any conflict may appear.

"Sec. 8. That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect."

Under the authority of the above Act, and the Act of June 27, 1906, authorizing the Secretary of the Interior to fix a lesser area than forty acres as the minimum entry,⁵ twenty acres is fixed as the unit for Indian ownership to be irrigated by the waters of any such project.⁶

The Act of June 21, 1906, providing for the contingent expenses of the Indian Department for the fiscal year ending June 30, 1907, provides:⁷ "That any Indian allotted lands under any law or treaty without the power of alienation, and within a reclamation project approved by the Secretary of the Interior, may sell and convey any part thereof, under the rules and regulations prescribed by the Secretary of the Interior, but such conveyance shall be subject to his approval, and when so approved shall convey full title to the purchaser the same as if final patent without restrictions had been issued to the allottee: *Provided*, that the consideration shall be placed in the Treasury of the United States and used by the Commissioner of Indian Affairs to pay the construction charges that may be assessed against the unsold parts of the allotment, and to pay the maintenance charges thereon during the trust period, and any sur-

⁵ For Act of June 27, 1906, see Sec. 1252.

⁷ See Supp. Fed. Stat. Ann., 1909, p. 208; 34 Stat. L. 327.

⁶ Opinion Atty. Gen., 34 Land Dec. 110.

plus shall be a benefit running with the water right to be paid to the holder thereof." ⁸

The Indian Appropriation Act approved March 1, 1907,⁹ contains the following provision relative to the employment of Indian labor on reclamation projects:

"That as far as practicable Indian labor shall be employed and purchase in the open market made from Indians, under the directions of the Secretary of the Interior. And the employment of such Indians and the hiring of their property, in connection with the construction of any irrigation project under the Reclamation Service, shall be exempt from the provisions of Sections 3709 and 3744, Revised Statutes."

The same Act also contains the following provision in regard to the disposition of lands opened to settlement in the Blackfeet Indian Reservation:

"That if, after the approval of the classification and appraisal, as provided herein, there shall be found lands within the limits of the reservation under irrigation projects deemed practicable under the provisions of the Act of Congress approved June 17, 1902, known as the Reclamation Act, said lands shall be subject to withdrawal and be disposed of under the provisions of said Act, and settlers shall pay in addition to the cost of construction and maintenance provided therein the appraised value, as provided in this Act, to the proper officers, to be covered into the Treasury of the United States to the credit of the Indians: *Provided, however*, that all lands hereby opened to settlement remaining undisposed of at the end of five years from the taking effect of this Act shall be sold to the highest bidder for cash, at not less than \$1.25 per acre, under rules and regulations prescribed by the Secretary of the Interior, and any lands remaining unsold ten years after said lands shall have been opened to entry shall be sold to the highest bidder, for cash, without regard to the minimum limit above stated: *Provided*, that not more than 640 acres of land shall be sold to any one person or company." ¹⁰

The same Act also contains the following provision authorizing the

⁸ A right of way for a canal may be conveyed over allotted Indian lands. *Lucy Hawk Shively*, 36 Land Dec. 135.

⁹ 34 Stat. L. 1015-1052; Supp. Fed. Stat. Ann., 1909, p. 226.

¹⁰ 34 Stat. L. 1037.

Secretary of the Interior to use part of the sum appropriated for an irrigation system for the Pima Indians in payment of their proportion of the cost of constructing the Salt River project, in Arizona: "That the Secretary of the Interior may, in his discretion, use such part of the \$300,000 heretofore appropriated for an irrigation system for the Pima Indians in the payment of such Indians' proportionate part of the construction of the Salt River project, and such funds may be transferred to the reclamation fund, to be expended by that service in accordance with its rules and regulations, the Indians to receive a credit upon the reclamation charge assessed against their lands under the Salt River project for the amount so transferred." ¹¹

§ 1246. Acts amendatory—Military reservations—Act of June 9, 1906.—Lands included within military reservations are not subject to withdrawal and disposition under the Reclamation Act, without a specific Act of Congress authorizing the same. By the Act of June 9, 1906,¹ entitled, "An Act to provide for the disposition under the public land laws of the lands in the abandoned Fort Shaw Military Reservation, Montana," such reservation was opened for such disposal, said Act being as follows:

"That the Secretary of the Interior is hereby authorized to dispose of the lands in the abandoned Fort Shaw Military Reservation, in Montana, under the provisions of the public land laws, and the public surveys shall be extended over the lands therein: *Provided*, that he may reserve for Indian school purposes the following-described lands" (describing lands): "*Provided further*, that before opening the reservation to entry the Secretary of the Interior may withdraw any other lands needed in connection with an irrigation project under the provisions of the Act of June 17, 1902, known as the Reclamation Act, for use or disposition thereunder." ²

§ 1247. Acts amendatory—Construction of Rio Grande dam.—The Act making appropriations for the sundry civil expenses of the Government for the fiscal year ending June 30, 1908, contains the

¹¹ 34 Stat. L. 1022.

¹ 34 Stat. L. 228.

² The Secretary of the Interior is without authority to segregate lands

in abandoned military reservations for use as reservoir sites in connection with reclamation projects. Instructions, 33 Land Dec. 130.

following provision in pursuance of a convention between the United States and Mexico, proclaimed January 16, 1907:

Convention With Mexico: Toward the construction of a dam for storing and delivering 60,000 acre-feet of water annually in the bed of the Rio Grande at the point where the headworks of the Acequia Madre now exists, above the City of Juarez, Mexico, as provided by a convention between the United States and Mexico, proclaimed January 16, 1907, one million dollars, to be available as needed and to be expended under the direction of the Secretary of the Interior in connection with the irrigation project on the Rio Grande: *Provided*, that the balance of the cost of said irrigation project over and above the amount herein appropriated shall be allotted by the Secretary of the Interior as may be needed and as may be available from time to time from the reclamation fund and collected from the settlers and owners of the land benefited under the provisions of the Reclamation Act approved June 17, 1902, and Acts supplemental thereto or amendatory thereof.”¹

§ 1248. Acts amendatory to the National Reclamation Act—The use of materials from the public lands—Act of February 8, 1905.—The Act of February 8, 1905,¹ provides: “That in carrying out the provisions of the National irrigation law, approved June 17, 1902, and in constructing works thereunder, the Secretary of the Interior is hereby authorized to use and to permit the use by those engaged in the construction of works under said law, under the rules and regulations to be prescribed by him, such earth, stone, and timber from the public lands of the United States as may be required in the construction of such works, and the Secretary of Agriculture is hereby authorized to permit the use of earth, stone, and timber from the forest reserves of the United States for the same purpose under rules and regulations to be prescribed by him.”²

§ 1249. Acts amendatory to the National Reclamation Act—As relating to certain lakes—Act of February 9, 1905.—By the Act of

¹ 34 Stat. L. 1357.

For the treaty with Mexico relative to the above, see Secs. 1218-1220.

¹ 10 Fed. Stat. Ann., 1906, p. 433; 33 Stat. L. 706.

² By the Act of Feb. 1, 1905, 10 Fed. Stat. Ann., 1906, p. 404, 33 Stat. L. 628, the control of the forest reserves was transferred to the Agricultural Department.

February 9, 1905,¹ the Secretary of the Interior was authorized in carrying out any irrigation project that may be undertaken by him under the terms and conditions of the National Reclamation Act and which may involve the character of the levels of Lower or Little Klamath Lake, Tule or Rhett Lake, and Goose Lake, or any river or other body of water connected therewith, in the States of Oregon and California, to raise or lower the level of said lakes as may be necessary and to dispose of any lands which may come into the possession of the United States as a result thereof by cession of any State or otherwise under the terms and conditions of the National Reclamation Act.

§ 1250. **Acts amendatory to the National Reclamation Act—As relating to the sale of material used—Act of March 3, 1905.**—The Act of March 3, 1905,¹ provides: "That there shall be covered into the reclamation fund established under the Act of June 17, 1902, known as the Reclamation Act, the proceeds of the sales or material utilized for temporary work and structures in connection with the operations under the Act, as well as of the sales of all other condemned property which had been purchased under the provisions thereof, and also any moneys refunded in connection with the operations under said Reclamation Act."

§ 1251. **Acts amendatory to the National Reclamation Act—As relating to townsites—Acts of April 16, 1906, June 11, 1910, February 24, 1911.**—The Act of April 16, 1906,¹ providing for the withdrawal from public entry of lands needed for townsite purposes in connection with projects under the Reclamation Act of June 17, 1902, and for other purposes provides:

"Sec. 1. That the Secretary of the Interior may withdraw from public entry any lands needed for townsite purposes in connection with irrigation projects under the Reclamation Act of June 17, 1902, not exceeding 160 acres in each case, and survey and subdivide the same into town lots, with appropriate reservations for public purposes."

Section 2 provides for the appraisalment and sale of such town

¹ 33 Stat. L. 714.

¹ Supp. Fed. Stat. Ann., 1909, p.

¹ 10 Fed. Stat. Ann., 1906, p. 433; 539, 34 Stat. L. 116.

33 Stat. L. 1032.

lots to the highest bidder for cash, and that the "reclamation funds may be used to defray the necessary expense of appraisal and sale, and the proceeds of such sale shall be covered into the reclamation fund."

Section 3 provides for the improvement of public reservations and that the use of the same shall forever be for public purposes.

"Sec. 4. That the Secretary of the Interior shall, in accordance with the provisions of the Reclamation Act, provide for water rights in amount he may deem necessary for the towns established as herein provided, and may enter into contract with the proper authorities of such towns, and other towns or cities in the immediate vicinity of irrigation projects, which shall have a water right from the same source as that of said project for the delivery of such water supply to some convenient point, and for the payment into the reclamation fund of charges for the same to be paid by such towns or cities, which charges shall not be less nor upon terms more favorable than those fixed by the Secretary of the Interior for irrigation projects from which water is taken.

"Sec. 5. That whenever a development of power is necessary for the irrigation of lands, under any project undertaken under the said Reclamation Act, or an opportunity is afforded for the development of power under any such project, the Secretary of the Interior is authorized to lease for a period not exceeding ten years, giving preference to municipal purposes, any surplus power or power privilege, and the money derived from such leases shall be covered into the reclamation fund and be placed to the credit of the project from which such power is derived: *Provided*, that no lease shall be made of such surplus power or power privileges as will impair the efficiency of the irrigation project: *Provided further*, that the Secretary of the Interior is authorized, in his discretion, to make such a lease in connection with Rio Grande project in Texas and New Mexico for a longer period not exceeding fifty years, with the approval of the water users' association or associations under any such project, organized in conformity with the rules and regulations prescribed by the Secretary of the Interior in pursuance of Section 6 of the Reclamation Act approved June 17, 1902."

As amended by the Act approved February 24, 1911,² it was provided as follows:

² Public, No. 417.

Applications for water rights under

the Reclamation Act by individual lot owners, for lands which have been

"Sec. 3. That any townsite heretofore set apart or established by the proclamation of the President, under the provisions of Sections 2380 and 2381 of the Revised Statutes of the United States, within or in the vicinity of any reclamation project may be appraised and disposed of in accordance with the provisions of the Act of Congress approved April 16, 1906, entitled,³ 'An Act providing for the withdrawal from public entry of lands needed for townsite purposes in connection with irrigation projects under the Reclamation Act of June 17, 1902, and for other purposes,' and all necessary expenses incurred in the appraisal and sale of lands embraced within any such townsite shall be paid from the reclamation fund, and the proceeds of the sales of such lands shall be covered into the reclamation fund.

"Sec. 4. That in the townsites of Heyburn and Rupert, in Idaho, created and surveyed by the Government, on which townsite settlers have been allowed to establish themselves, and had actually established themselves prior to March 5, 1906, in permanent buildings not easily moved, the said settlers shall be given the right to purchase the lots so built upon at an appraised valuation for cash, such appraisement to be made under the rules prescribed by the Secretary of the Interior. Providing that the limitation on the size of townsites contained in the Act of April 16, 1906,⁴ . . . shall not apply to the townsites named in this section; and whenever, in the opinion of the Secretary of the Interior, it shall be advisable for the public interest, he may withdraw and dispose of townsites in excess of 160 acres under the provisions of the aforesaid Act, approved April 16, 1906, and reclamation funds shall be available for the payment of all expenses incurred in executing the provisions of this Act, and the aforesaid Act of April 16, 1906, and the proceeds of all sales of townsites shall be covered into the reclamation fund."

subdivided into town lots, will not be allowed; but water may be supplied to towns from reclamation projects by delivery to some convenient point to be handled and distributed to the inhabitants of the town by the municipal authorities in accordance with the provisions of the Act of April 16, 1906. Instructions of March 21, 1911, 39 Land Dec. 591.

Also, by Secs. 3 and 4 of the Act of June 27, 1906, Supp. Fed. Stat. Ann., 1909, p. 543; 34 Stat. L. 519.

For the balance of the Act of June 27, 1906, relating to subdivisions which may be entered, and to desert land entries, see Sec. 1253.

³ See *supra*.

⁴ See *supra*.

Again, by the Act of June 11, 1910, it was further provided, relative to the sale of town lots, as follows: "That the Secretary of the Interior is hereby authorized, whenever he may deem it necessary, to reappraise all unsold lots within townsites on projects under the Reclamation Act heretofore or hereafter appraised under the provisions of the Act approved April 16, 1906, entitled 'An Act providing for the withdrawal from public entry of lands needed for townsite purposes in connection with irrigation projects under the Reclamation Act of June 17, 1902, and for other purposes,' and the Act approved June 27, 1906, entitled 'An Act providing for the subdivision of lands entered under the Reclamation Act, and for other purposes'; and thereafter to proceed with the sale of such town lots in accordance with said Acts.

"Sec. 2. That in the sale of town lots under the provision of the said Acts of April 16 and June 27, 1906, the Secretary of the Interior may, in his discretion, require payment for such town lots in full at time of sale or in annual installments, not exceeding five, with interest at the rate of 6 per centum per annum on deferred payments.⁵

"In all cases where the Secretary of the Interior shall direct the reappraisement of unsold lots under the first section of the above quoted Act, the reappraisement will be conducted under the regulations provided for under the original appraisement of lots in townsites created under the laws in said Act mentioned. The lots to be reappraised will not, from the date of the order therefor, be subject to disposal until offered at public sale at the reappraised value, which offering will be conducted under the regulations providing for the public sale of lots in such townsites. The lots so offered at public sale will then become subject to private sale at the reappraised price. Whenever the Secretary of the Interior, in the exercise of the discretion conferred upon him by Section 2 of said Act, shall order the payment of the purchase price of lots, sold in townsites created under the laws in said Act mentioned, to be made in annual installments, the same will be done under such regulations as may be issued in each particular instance."⁶

⁵ Session Laws, 1910, Chap. 284, p. 465, 61st Cong., 2d Session; 36 Stat. L. 465. ⁶ Instructions, Sept. 13, 1910, 39 Land Dec. 205.

§ 1252. Acts amendatory to the National Reclamation Act—Relating to subdivisions—The farm unit—Act of June 27, 1906.—The Act of June 27, 1906,¹ an Act providing for the subdivision of land under the Reclamation Act, and for other purposes, provides as follows:

“Sec. 1. That whenever, in the opinion of the Secretary of the Interior, by reason of the market conditions and the special fitness of the soil and climate for the growth of fruit and garden produce, a lesser area than forty acres may be sufficient for the support of a family on lands to be irrigated under the provisions of the Act of June 17, 1902, known as the Reclamation Act, he may fix a lesser area than forty acres as the minimum entry and may establish farm units of not less than ten nor more than 160 acres. That whenever it may be necessary for the purpose of accurate description to further subdivide lands to be irrigated under the provisions of the Reclamation Act, the Secretary of the Interior may cause subdivision surveys to be made by the officers of the reclamation service, which subdivisions shall be rectangular in form, except in cases where irregular subdivisions may be necessary in order to provide for practicable and economical irrigation. Such subdivision surveys shall be noted upon the tract books in the General Land Office, and they shall be paid for from the reclamation fund: *Provided*, That an entryman may elect to enter under said Reclamation Act a lesser area than the minimum limit in any State or Territory.

“Sec. 2. That whenever the Secretary of the Interior, in carrying out the provisions of the Reclamation Act, shall require by relinquishment lands covered by a *bona fide* unperfected entry under the land laws of the United States, the entryman upon such tract may make another and additional entry, as though the entry thus relinquished had not been made.”²

Sections 3 and 4 of the Act apply to townsites, and are quoted in another section.³

Section 5 of the Act applies to desert land entries, and is quoted in another section.⁴

¹ Supp. Fed. Stat. Ann., 1909, p. 543; 34 Stat. L. 519.

² The protection of the possession of a settler who prior to the date of the Reclamation Act of June 17, 1902, took possession of unsurveyed lands of the United States with intent to file

a homestead thereon whenever the lands should be surveyed or offered for settlement, is not given by this section. U. S. v. Hanson, 167 Fed. Rep. 881.

³ See Sec. 1251.

⁴ See Sec. 1253.

Under this Act, the entries may be reduced in area to the limit representing the acreage which, in the opinion of the Secretary of the Interior, may be reasonably required for the support of a family upon the lands in question, and the lands within a reclamation project are platted to farm units representing such areas. The farm units may be as small as ten acres where the lands are suitable for the raising of fruit and garden produce, etc., but under most projects so far, they have been fixed at from forty to eighty acres each. These areas are announced on the farm unit plats, and public notice is given stating the amount of charges, and other details concerning the payment are issued by the Secretary of the Interior, shortly before the Government is ready to furnish water. Until this public notice is given no definite information is given as to any particular tracts or as to the details to be covered by such notice.⁵ Inasmuch as every entry within the limits of a withdrawal under the Reclamation Act is subject to a conformation to an established farm unit, improvements placed upon different subdivisions by the entryman prior to such conformation are at his risk.⁶ They should be confined to one legal subdivision until the entry is conformed. In adjusting such an entry the Secretary is not required to confine the farm unit to the limits of the entry, but may combine any legal subdivision thereof with a contiguous tract lying outside of the entry so as to equalize in value the several farm units.⁷

Under Section 5 of the Act of June 25, 1910,⁸ it is provided "That no entry shall be hereafter made and no entryman shall be permit-

⁵ See Regulations, 38 Land Dec. 628, Sec. 3; Opinion Atty. Gen., 35 Land Dec. 110.

⁶ Jerome M. Higman, 37 Land Dec. 718; Regulations, 38 Land Dec. 630, Sec. 16.

⁷ Where a homestead entry within a reclamation project is divided into farm units, the entryman is entitled to retain only one of such units to be designated by him, and as to the remaining units, the entry must be canceled, or where satisfactory proof has been submitted an assignment may be made under the provisions of the

Act of June 23, 1910. Sarah S. Long, 39 Land Dec. 297.

So, also, where a portion of the homestead entry, made subject to the provisions of the Reclamation Act, is subsequently eliminated, and the portion remaining within the project is designated as a farm unit, the entryman may retain either the farm unit or the portion lying without the limits of the project, at his election, and the entry will be canceled as to the remainder. Laurel S. Shell, 39 Land Dec. 502.

⁸ 26 Stat. L. 837.

For full text of Act, see Sec. 1257.

ted to go upon lands reserved for irrigation purposes until the Secretary of the Interior shall have established the unit of acreage and fixed the water charges and the date when the water can be applied and made public announcement of the same." And it was held that under this provision, a homestead entry of land within a reclamation project allowed subsequently to the Act of June 25, 1910, upon an application in all respects regular, filed prior to that Act, and upon which action was delayed only because of pressure of business in the local office, is not in violation of the provisions of Section 5 of said Act.⁹

§ 1253. Acts amendatory to the National Reclamation Act—Relating to desert land entries—Act of June 27, 1906.—Section 5 of the Act of June 27, 1906,¹ relating to *bona fide* desert land entries which have or may be embraced within the limits of a reclamation project, provides as follows:

"Sec. 5. That where any *bona fide* desert land entry has been or may be embraced within the exterior limits of any land withdrawal or irrigation project under the Act entitled" (the Reclamation Act)² "approved June 17, 1902, and the desert land entryman has been or may be directly or indirectly hindered, delayed, or prevented from making improvements or from reclaiming the land embraced in any such entry by reason of such land withdrawal or irrigation project, the time during which the desert land entryman has been or may be so hindered, delayed, or prevented from complying with the desert land law shall not be computed in determining the time within which such entryman has been or may be required to make improvements or reclaim the land embraced within any such desert land entry: *Provided*, That if after investigation the irrigation project has been or may be abandoned by the Government, time for compliance with the desert land law by any such entryman shall begin to run from the date of notice of such abandonment of the project and the restoration to the public domain of the lands withdrawn in connection therewith, and credit shall be allowed for all expenditures and improvements

⁹ Charles C. Conrad, 39 Land Dec. 432.

See, also, Anna G. Parker, 40 Land Dec. 406.

¹ Supp. Fed. Stat. Ann., 1909, p. 543; 34 Stat. L. 520.

² For the full text of the Act, see Sec. 1252.

heretofore made on any such desert land entry of which proof has been filed; but if the reclamation project is carried to completion so as to make available a water supply for the land embraced in any such desert land entry, the entryman shall thereupon comply with all the provisions of the aforesaid Act of June 17, 1902, and shall relinquish all land embraced within his desert land entry in excess of 160 acres, and as to such 160 acres retained, he shall be entitled to make final proof and obtain patent upon compliance with the terms of payment prescribed in said Act of June 17, 1902, and not otherwise. But nothing herein contained shall be held to require a desert land entryman who owns a water right and reclaims the land embraced in his entry to accept the conditions of said Reclamation Act."

This Act applies only to persons who have been, directly or indirectly, delayed or prevented, by the creation of any reclamation project or by the withdrawal of public lands under the Reclamation Act, from improving or reclaiming the lands covered by their desert land entries. An entryman will not need to invoke the privileges of the Act in this connection until his final proof is due. If the reclamation project is carried to completion by the Government and a water supply has been made available for the land embraced in such desert land entry, the entryman must comply with all the provisions of the Reclamation Act and must relinquish all the land embraced in his entry in excess of 160 acres; and upon making final proof and complying with the terms of payment prescribed in the Reclamation Act, he will be entitled to patent for the amount of land retained.³

³ Regulations, 38 Land Dec. 644, Secs. 70-79.

See, also, desert land Acts, Secs. 1287-1311.

While desert land entrymen and their assignees are not invested with the legal title, they have such an equitable title and interest in the land as to constitute them proprietors within the spirit and purpose of the Reclamation Act, and the right to use water may be granted them, if they bring themselves within the provisions of the Act that "no right to the use

of water for land in private ownership shall be sold for a tract exceeding 160 acres to any one land owner, and no such sale shall be made to any land owner unless he be an actual and *bona fide* resident on such land or occupant thereof residing in the neighborhood of said lands." Instructions, 34 Land Dec. 29.

A desert entryman, whose land is included in a reclamation project, may elect to proceed with the reclamation thereof, on his own account, and thus acquire title to all, or so much of the

Where lands are in private ownership in blocks of more than 160 acres the excess may be conveyed to members of the owner's family, provided the transfer is *bona fide* and the requirements of the Reclamation Act as to residence are complied with.⁴ A final certificate and patent will not issue upon a desert land entry within a reclamation project until all payments for a water right under such project have been made and the water permanently attaches to the land.⁵

§ 1254. Acts amendatory—Entryman may assign his entry when—Act of June 23, 1910—The Act approved June 23, 1910, further amended the original Reclamation Act by providing that entrymen for homesteads within reclamation projects may assign their entries upon satisfactory proof of residence, improvement, and cultivation for five years as though said entry had been made under the original Homestead Act. The full text of this Act is as follows: "That from and after the filing with the Commissioner of the General Land Office of satisfactory proof of residence, improvement, and cultivation for the five years required by law, persons who have, or shall make, homestead entries within reclamation projects under the provisions of the Act of June 17, 1902, may assign such entries, or any part thereof, to other persons, and such assignees, upon submitting proof of the reclamation of the lands and upon payment of the charges apportioned against the same as provided in the said Act of June 17, 1902, may receive from the United States a patent

land included within his entry as he can secure water to irrigate, or accept the conditions of the Reclamation Act and acquire title thereunder to 160 acres; but he can not avail himself of both the reclamation project, and other means of reclamation, and thus acquire title to more than 160 acres of land. Robert J. Slater, 39 Land Dec. 380.

See, also, Instructions, Jan. 20, 1912, 40 Land Dec. 386.

⁴ Instructions, 32 Land Dec. 647.

For the disposal of such excess lands by vesting the title to the same in the water users' associations, with authority to sell the same in case of the failure of the owner to dispose

of them, see Instructions, 33 Land Dec. 202.

⁵ Leroy W. Furnas, 38 Land Dec. 194.

Under the Desert Land Act, as modified by Act of June 27, 1906, final proof, upon the desert entry within a reclamation project, can not be held to have been made and completed until the payments required by said Acts and the Act of June 17, 1902, have been made; and the Department is without authority to accept or regard final proof in such cases as complete or to issue patent thereon, until after full compliance with the terms of payment imposed by the Reclamation Act. W. H. Skinner, 39 Land Dec. 519.

for the lands: *Provided*, That all assignments made under the provisions of this Act shall be subject to the limitations, charges, terms, and conditions of the Reclamation Act.¹

"Under the provisions of this Act persons who have made or may make homestead entries subject to the Reclamation Act may assign their entries in their entirety at any time after filing in this office satisfactory proof of residence, improvements, and cultivation for the five years required by the ordinary provisions of the homestead law. The Act also provides for the assignment of homestead entries in part, but such assignments, if made prior to the establishment of farm units, must be made in strict accordance with the legal subdivisions of the public survey, and if made after such units are established must conform thereto. Such assignments which shall be made expressly subject to the limitations, charges, terms, and conditions of the Reclamation Act will be accepted by you, duly noted on your records and forwarded to this office in the usual manner, and the assignees in each case will be allowed to submit proof of reclamation and make payment of the water right charges as would the original entryman, and after full compliance with the law will be given final certificate and patent.²

"Assignments under this Act must be made expressly subject to the limitations, charges, terms, and conditions of the Reclamation Act, and inasmuch as that Act limits the rights of entry to one farm unit, the assignee must present a showing in the form of an affidavit, duly corroborated, that he has not acquired title to, and is not claiming, any other farm unit or entry under the Reclamation Act."³

§ 1255. New Mexico and Arizona—Price fixed for lands—Reservations.—In the Enabling Act of New Mexico and Arizona, ap-

¹ Session Laws, 1910, Chap. 357, p. 592, 61st Cong., 2d Session; 26 Stat. L. 592.

A homestead entryman who has not acquired title to his land can not convey or agree to convey to a water users' association one or more legal subdivisions of his entry to be held

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in trust, and to be sold for his benefit. Opinion Atty. Gen., 34 Land Dec. 532.

² Instructions of Sept. 13, 1910, 39 Land Dec. 202.

³ Circular of December 17, 1910, 39 Land Dec. 421.

See, also, Sarah S. Long, 39 Land Dec. 297.

proved June 20, 1910,¹ it was provided, relative to New Mexico,² that lands in such State "east of the line between ranges eighteen and nineteen east of the New Mexico principal meridian shall not be sold for less than five dollars per acre, and lands west of said line shall not be sold for less than three dollars per acre, and no lands which are or shall be susceptible of irrigation under any projects now or hereafter completed or adopted by the United States under legislation for the reclamation of lands, or under any other project for the reclamation of lands, shall be sold at less than twenty-five dollars per acre: *Provided*, That said State, at the request of the Secretary of the Interior, shall from time to time relinquish such of its lands to the United States as at any time are needed for irrigation works in connection with any Government project. And other lands in lieu thereof are hereby granted to said State, to be selected from lands of the character named and in the manner prescribed in Section 11 of this Act."

Relative to Arizona, it was provided:³ "No land shall be sold for less than three dollars per acre, and no lands which are or shall be susceptible of irrigation under any projects now or hereafter completed or adopted by the United States under legislation for the reclamation of lands, or under any other project for the reclamation of lands, shall be sold at less than twenty-five dollars per acre: *Provided*, That said State, at the request of the Secretary of the Interior, shall from time to time relinquish such of its lands to the United States as at any time are needed for irrigation works in connection with any such Government project. And other lands in lieu thereof are hereby granted to said State, to be selected from lands of the character named and in the manner prescribed in Section 24 of this Act."

§ 1256. Acts amendatory to the National Reclamation Act—The Reclamation Fund Act of June 25, 1910, as amended February 18, 1911.—The Reclamation Service, acting under the directions of the Secretary of the Interior, after the passage and approval of the Reclamation Act, took immediate steps for the segregation of great tracts of land and for the commencement of the construction of the works of many reclamation projects in the States and Territories

¹ 36 Stat. L. 557.

² See Sec. 10 of the Enabling Act.

³ See Sec. 28 of the Enabling Act.

named, and to which the Act applies. In fact, so strenuous had been the operations under the provisions of the Act in commencing these projects, that early in 1910 it was ascertained that the money received and which would be received in the immediate future from the sale of the public lands in those States and Territories would not be nearly sufficient to complete the projects then under various stages of construction without their being long delayed. Therefore, Congress by the Act approved June 25, 1910,¹ entitled, "An Act to authorize advances to the 'reclamation fund,' and for the issue and disposal of certificates of indebtedness in reimbursement therefor, and for other purposes," provided for the appropriation of \$20,000,000 from other funds of the United States, to be applied to the completion of such works as had already been commenced as the Secretary of the Interior might require.

The full text of this Act is as follows:

"Sec. 1. That to enable the Secretary of the Interior to complete Government reclamation projects heretofore begun, the Secretary of the Treasury is authorized, upon request of the Secretary of the Interior, to transfer from time to time to the credit of the reclamation fund created by the Act entitled 'An Act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands,' approved June 17, 1902, such sum or sums, not exceeding in the aggregate twenty million dollars, as the Secretary of the Interior may deem necessary to complete the said reclamation projects, and such extensions thereof as he may deem proper and necessary to the successful and profitable operation and maintenance thereof or to protect water rights pertaining thereto claimed by the United States, provided the same shall be approved by the President of the United States; and any such sum or sums as may be required to comply with the foregoing authority are hereby appropriated out of any money in the treasury not otherwise appropriated:

"Provided, That the sums hereby authorized to be transferred to the reclamation fund shall be so transferred only as such sums shall be actually needed to meet payments for work performed under existing law: And provided further, That all sums so transferred shall be reimbursed to the Treasury from the reclamation fund, as herein-

¹ Public, No. 289; 36 Stat. L. 835.

after provided: *And provided further*, That no part of this appropriation shall be expended upon any existing project until it shall have been examined and reported upon by a board of engineer officers of the army, designated by the President of the United States, and until it shall be approved by the President as feasible and practicable and worthy of such expenditure; nor shall any portion of this appropriation be expended upon any new project.

“Sec. 2. That for the purpose of providing the Treasury with funds for such advances to the reclamation fund, the Secretary of the Treasury is authorized to issue certificates of indebtedness of the United States in such form as he may prescribe and in denominations of \$50, or multiples of that sum; said certificates to be redeemable at the option of the United States at any time after three years from the date of their issue and to be payable five years after such date, and to bear interest payable semi-annually, at not exceeding 3 per centum per annum; the principal and interest to be payable in gold coin of the United States. The certificates of indebtedness herein authorized may be disposed of by the Secretary of the Treasury at not less than par, under such rules and regulations as he may prescribe, giving all citizens of the United States an equal opportunity to subscribe therefor, but no commission shall be allowed and the aggregate issue of such certificates shall not exceed the amount of all advances made to said reclamation fund, and in no event shall the same exceed the sum of twenty million dollars. The certificates of indebtedness herein authorized shall be exempt from taxes or duties of the United States as well as from taxation in any form by or under State, municipal, or local authority; and a sum not exceeding one-tenth of one per centum of the amount of the certificates of indebtedness issued under this Act is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to pay the expense of preparing, advertising, and issuing the same.

“Sec. 3. That, beginning five years after the date of the first advance to the reclamation fund under this Act, 50 per centum of the annual receipts of the reclamation fund shall be paid into the general fund of the Treasury of the United States until payment so made shall equal the aggregate amount of advances made by the Treasury to said reclamation fund, together with interest paid on

the certificates of indebtedness issued under this Act and any expense incident to preparing, advertising, and issuing the same.

"Sec. 4. That all money placed to the credit of the reclamation fund in pursuance of this Act shall be devoted exclusively to the completion of work on reclamation projects heretofore begun as hereinbefore provided, and the same shall be included with all other expenses in future estimates of construction, operation, or maintenance, and hereafter no irrigation project contemplated by said Act of June 17, 1902, shall be begun unless and until the same shall have been recommended by the Secretary of the Interior and approved by the direct order of the President of the United States.

"Sec. 5. That no entry shall be hereafter made and no entryman shall be permitted to go upon lands reserved for irrigation purposes until the Secretary of the Interior shall have established the unit of acreage and fixed the water charges and the date when the water can be applied and make public announcement of the same: *Provided*, That where entries made prior to June 25, 1910, have been or may be relinquished in whole or in part the lands so relinquished shall be subject to settlement and entry under the homestead law as amended by an Act entitled 'An Act appropriating the receipts from the sale and disposal of the public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands,' approved June 17, 1902.²

"Sec. 6. That Section 9 of said Act of Congress, approved June 17, 1902, entitled, 'An Act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands,' is hereby repealed.

"Approved, June 25, 1910."

§ 1257. Acts amendatory—Leaves of absence granted when—Act of June 25, 1910.—The Act of June 25, 1910, also amended the original homestead law where entries are made under reclamation projects, by providing that where water is not available for the irrigation of their lands, leaves of absence to homesteaders may be granted, until the water is turned into the main canals from which

² As amended by the Act approved Feb. 18, 1911; Public, No. 386; 36 Stat. L. 835.

See instructions of Sept. 13, 1910, 39 Land Dec. 202; Annie G. Parker, 40 Land Dec. 406.

the land is to be irrigated. The full text of the Act is as follows: "That all qualified entrymen who have heretofore made *bona fide* entry upon lands proposed to be irrigated under the provisions of the Act of June 17, 1902, known as the National Irrigation Act, may, upon application and a showing that they have made substantial improvements, and that water is not available for the irrigation of their said lands, within the discretion of the Secretary of the Interior, obtain leave of absence from their entries, until water for irrigation is turned into the main irrigation canals from which the land is to be irrigated: *Provided*, That the period of actual absence under this Act shall not be deducted from the full time of residence required by law."¹

As construed by the Secretary of the Interior, the Act of June 25, 1910, was intended to relieve entrymen who had made entry for lands within a reclamation project prior to the passage of said Act, and prior to the applying of water by the project, upon the necessity of maintaining residence upon the land "until water for irrigation is turned into the main irrigation canal from which the land is to be irrigated." It condones the prior failure of an entryman to maintain residence where water has not been available for irrigation of the land and suspends the running of the seven-year limitation of the life of the entry by allowing the period of residence to commence from the time when the water is made available.²

§ 1258. Acts amendatory—The sale of lands acquired under the provisions of the Act when not needed for its purposes—Act of February 2, 1911.—By the Act approved February 2, 1911, entitled "An Act to provide for the sale of lands acquired under the provisions of the Reclamation Act and which are not needed for the purposes of that Act,"¹ it was provided that whenever in the opinion of the Secretary of the Interior any lands which have been acquired under the provisions of the Reclamation Act, "or under the provisions of any Act amendatory thereof or supplementary thereto, for any irrigation works contemplated by said Reclamation Act are

¹ Session Laws, 1910, Chap. 432, p. 864, 61st Cong., 2d Session; 36 Stat. L. 864.

See, also, Instructions, 39 Land Dec.

203, 204, as amended by 39 Land Dec. 278.

² Roberts v. Spencer, 40 Land Dec. 306.

¹ Public, No. 338.

not needed for the purposes for which they were acquired, said Secretary of the Interior may cause said lands, together with the improvements thereon, to be appraised by three disinterested persons, to be appointed by him, and thereafter to sell the same for not less than the appraised value at public auction to the highest bidder, after giving public notice of the time and place of sale by posting upon the land and by publication for not less than thirty days in a newspaper of general circulation in the vicinity of the land.

"Sec. 2. That upon payment of the purchase price, the Secretary of the Interior is authorized by appropriate deed to convey all the right, title, and interest of the United States of, in, and to said lands to the purchaser at said sale, subject, however, to such reservations, limitations, or conditions as said Secretary may deem proper: *Provided*, That not over 160 acres shall be sold to any one person.

"Sec. 3. That the moneys derived from the sale of such lands shall be covered into the reclamation fund and be placed to the credit of the project for which such lands had been acquired."

§ 1259. Acts amendatory—The Government may contract for impounding, storing, and carriage of water, and to co-operate with other projects—Act of February 21, 1911.—Under the Act approved February 21, 1911, entitled "An Act to authorize the Government to contract for impounding, storing, and carriage of water, and to co-operate in the construction and use of reservoirs and canals under reclamation projects and for other purposes,"¹ it was provided "that whenever in carrying out the provisions of the reclamation law, storage, or carrying capacity has been or may be provided in excess of the requirements of the lands to be irrigated under any project, the Secretary of the Interior, preserving a first right to lands and entrymen under the project, is hereby authorized, upon such terms as he may determine to be just and equitable, to contract for the impounding, storage, and carriage of water to an extent not exceeding such excess capacity with irrigation systems operating under the Act of August 18, 1894, known as the Carey Act, and individuals, corporations, associations, and irrigation districts organized for or engaged in furnishing or in distributing water for irrigation. Water so impounded, stored, or carried under any such contract shall be for the purpose of distribution to individual

¹ Public, No. 406; 36 Stat. L. 925; Supp. U. S. Comp. Stat., 1911, p. 681.

water users by the party with whom the contract is made: *Provided, however,* that water so impounded, stored, or carried shall not be used otherwise than as prescribed by law as to lands held in private ownership within Government reclamation projects. In fixing the charges under any such contract for impounding, storing, or carrying water for any irrigation system, corporation, association, district, or individual, as herein provided, the Secretary shall take into consideration the cost of construction and maintenance of the reservoir by which such water is to be impounded or stored and the canal by which it is to be carried, and such charges shall be just and equitable as to water users under the Government project. No irrigation system, district, association, corporation, or individual so contracting shall make any charge for the storage, carriage, or delivery of such water in excess of the charge paid to the United States except to such extent as may be reasonably necessary to cover cost of carriage and delivery of such water through their works.

"Sec. 2. That in carrying out the provisions of said reclamation Act and Acts amendatory thereof or supplementary thereto the Secretary of the Interior is authorized, upon such terms as may be agreed upon, to co-operate with irrigation districts, water users' associations, corporations, entrymen or water users for the construction or use of such reservoirs, canals, or ditches as may be advantageously used by the Government and irrigation districts, water users' associations, corporations, entrymen, or water users for impounding, delivering, and carrying water for irrigation purposes: *Provided*, that the title to and management of the works so constructed shall be subject to the provisions of Section 6 of said Act: *Provided further*, that water shall not be furnished from any such reservoir or delivered through any such canal or ditch to any one land owner in excess of an amount sufficient to irrigate one hundred and sixty acres: *Provided*, that nothing contained in this Act shall be held or construed as enlarging or attempting to enlarge the right of the United States, under existing law, to control the waters of any stream in any State.

"Sec. 3. That the moneys received in pursuance to such contracts shall be covered into the reclamation fund and be available for use under the terms of the Reclamation Act and the Acts amendatory thereof or supplementary thereto."

§ 1260. Acts amendatory—Act authorizing the Secretary of the Interior to withdraw public notices—Act of February 13, 1911.—Under the Act approved February 13, 1911, entitled, "An Act to authorize the Secretary of the Interior to withdraw public notices issued under Section 4 of the Reclamation Act, and for other purposes," ¹ it was provided: "That the Secretary of the Interior may in his discretion, withdraw any public notice heretofore issued under Section 4 of the Reclamation Act of June 17, 1902, and he may agree to such modification of water-right applications heretofore duly filed or contracts with water users' associations and others entered into prior to the passage of this Act, as he may deem advisable, or he may consent to the abrogation of such water-right applications and contracts, and proceed in all respects as if no such notice had been given."

§ 1261. Action of the States affected.—The majority of the States and Territories affected by the Reclamation Act have assisted the Government in the work of the reclamation of the arid lands within their borders by enacting laws granting rights of way over the State lands, and by further providing that no lands belonging to the State, within the areas to be irrigated from works constructed or controlled by the United States, shall thereafter be sold except in conformity with the classification of farm units by the United States, and that the title to such lands shall not pass from the State until the applicant therefor shall have complied with the provisions of the laws of the United States and the regulations thereunder concerning the acquisition of the right to the use of water from such works, and shall produce evidence thereof duly issued. In order for this provision to take effect, however, the area or areas to be so irrigated by the Government shall be determined by due notice given by the United States and filed with the State Land Board. After the withdrawal of lands by the United States for any irrigation project, no application for the purchase of State lands within the limits of such withdrawal shall be accepted, except under the conditions prescribed above. These statutes also provide to the effect that any State lands needed by the United States for irrigation works shall be sold to the Government at private sale at the appraised value of such lands.

¹ Public, No. 353.

In some of the States provision is made for the confirmation of the right to use the water upon the filing of evidence that construction has been authorized by the Secretary of the Interior.

Provisions are also made for the formation of water users' associations, which are usually exempted from the payment of any corporation tax and the annual franchise tax.

For the purposes of the Act the United States is also authorized to make appropriations of water.¹

§ 1262. The withdrawal and restoration of lands for the purposes of the Act.—There are two classes of withdrawals of land authorized by the Reclamation Act: First, under Section 3 of the Act, the Secretary of the Interior is authorized to withdraw from public entry the lands required for any irrigation works contemplated under the provisions of the Act, and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not so acquired. Withdrawals of this class are designated by the Secretary as "Withdrawals under the first form," and only embrace lands that may possibly be needed in the construction and maintenance of the irrigation works. After the lands have been withdrawn under the first form they can not be entered, selected, or located in any manner so long as they remain so withdrawn, and all applications for such entries, selections, or locations will be rejected and denied, regardless of whether they were presented before or after the date of such withdrawal.¹

¹ For the statutes of the various States in aid of the National Reclamation Act, see Part XIV, under each State.

¹ For the powers granted the Secretary of the Interior under the National Reclamation Act, see *United States v. Burley*, 172 Fed. Rep. 615; *Id.*, 179 Fed. Rep. 1, 102 C. C. A. 429; *United States v. Cantrall*, 176 Fed. Rep. 946; *Twin Falls Canal Co. v. Foote*, 192 Fed. Rep. 583; *Regulations*, 38 Land Dec. 628, Secs. 5 and 6; *Ernest Woodcock*, 38 Land Dec. 349.

By the mere filing of an applica-

tion to enter under the homestead law, upon which action is suspended, and tender of necessary fees, the applicant acquires no vested right to or interest in the land applied for, nor does such application have the effect to segregate the land from the public domain so as to prevent a withdrawal thereof for reclamation purposes under the provisions of the Reclamation Act. *John A. Maney*, 35 Land Dec. 250.

See, also, *Board of Control, Canal No. 3, State of Colorado v. Terrence*, 32 Land Dec. 472; *Annie G. Parker*, 40 Land Dec. 406; *Todd v. Hayes*, 34

It is held by the Land Department that even a valid homestead entry for land within the limits of a withdrawal for irrigation works, under the authority of the Act, existing at the date of such withdrawal, upon which final certificate had not issued, or legal or equitable title to the land embraced therein become vested, may be canceled by the Department if it appear that such land is required for use in the construction and maintenance of such works, for such withdrawals have the force of legislative withdrawals, and are therefore effective to withdraw all lands within the designated limits to which a right has not vested.² Neither does the Reclamation Act contain any provision for the recognition or protection of any right of a settler on unsurveyed public lands which may be withdrawn and reserved thereunder for use in construction of irrigation works, and such settler has no right which he can oppose to the taking of the land for such purpose.³ Although the right of the Government to appropriate lands for its use in the construction and operation of irrigation works under the Act is not affected by the fact that the land is mineral in character, these lands are not by a withdrawal taken out of the operation of the mining laws, but continue open to exploration and purchase under such laws.⁴

The first form of withdrawal, under which no entries of any kind can be allowed, may be used in all preliminary withdrawals.⁵

Land Dec. 371; Charles A. Guernsey, 34 Land Dec. 560; Mary A. Sands, 34 Land Dec. 653; Instructions, 33 Land Dec. 607.

² See Instructions, 32 Land Dec. 387; John A. Maney, 35 Land Dec. 250; Opinion Atty. Gen., 34 Land Dec. 421, 445; Instructions, 33 Land Dec. 607; Instructions, 34 Land Dec. 158; Mary C. Sands, 34 Land Dec. 653; Charles G. Carlisle, 35 Land Dec. 649.

³ United States v. Hanson, 167 Fed. Rep. 881.

But a homestead entry upon which final proof has been made showing compliance with the law up to the date thereof, but where final certificate has not issued, has the same status as an entry upon which final certificate has issued, so far as it may

be affected by any withdrawal under the Reclamation Act. 5th Annual Rept. of the Reclamation Service, p. 25.

No such rights are acquired by settlement upon lands embraced in the entry of another as will attach upon cancellation of such entry, where at that time the lands are withdrawn for use in connection with an irrigation project under the Reclamation Act. George Anderson, 34 Land Dec. 478.

The practice of designating certain withdrawals made under the Act as "temporary" was discontinued. Charles G. Carlisle, 35 Land Dec. 649.

⁴ Instructions, 35 Land Dec. 216.

⁵ Instructions, 33 Land Dec. 104.

No authority is granted by the Reclamation Act for the withdrawal of

There is no authority to make such executive withdrawal of public lands in a State as will reserve the waters of a stream flowing over the same from appropriation under the laws of the State, nor will it in any manner interfere with the laws relating to the control, appropriation, use, or distribution of the same.⁶ Withdrawals under the first form of withdrawal are absolute, and the Land Department may remove persons from such lands as trespassers.⁷ The Secretary of the Interior is without authority to segregate lands in abandoned military reservations for use as reservoir sites in connection with reclamation projects.⁸ However, lands in forest reservations and in National parks may be appropriated and used for irrigation works to be constructed under the Act.⁹

The second class of withdrawals is also authorized by Section 3 of the Act, wherein it is provided that at or immediately prior to the time of beginning of the surveys for any contemplated irrigation works, the Secretary of the Interior is authorized "to withdraw from entry, except under the homestead law, any public lands believed to be susceptible of irrigation from said works." This class of withdrawals is designated by the Secretary of the Interior as "withdrawals under the second form," and which embrace lands not supposed to be needed in the actual construction and maintenance of irrigation works, but which may possibly be irrigated from such works.¹⁰ Withdrawal under the second form precludes any kind of entry, or appropriation of the land, other than under the homestead laws.¹¹ More lands are withdrawn by the Secretary

lands for reservoir sites for storing water to be used for domestic purposes. Opinion Atty. Gen., 33 Land Dec. 415.

⁶ Opinion Atty. Gen., 32 Land Dec. 254.

⁷ 4th Annual Rept. Reclamation Service, p. 29.

⁸ Instructions, 33 Land Dec. 130.

⁹ Opinion Atty. Gen., 33 Land Dec. 389.

¹⁰ Regulations, 33 Land Dec. 628, Sec. 5.

¹¹ Land so withdrawn can not be taken up in lieu of land relinquished to the United States in a forest re-

serve. Santa Fe Pac. R. Co., 33 Land Dec. 360.

Neither are they subject to soldiers' additional entry under Section 2306 of the Rev. Stat. of the U. S. Cornelius J. MacNamara, 33 Land Dec. 502; Nancy C. Yaple, 34 Land Dec. 311.

An application to enter under the provisions of Sec. 2306 of the Revised Statutes, even though approved by the Commissioner of the General Land Office, will not, prior to the allowance of entry thereon, prevent a withdrawal of the land covered thereby under the provisions of the Reclama-

than are finally included within any contemplated project. Only a portion of the lands withdrawn will be irrigated even if the project is feasible and the works finally constructed; this is so for the reason that it is impossible to decide in advance of careful examination what lands may be irrigated. It can not be determined in advance how much water there may be available, or what lands can be covered, or whether the cost will be too great to justify the undertaking until the surveys and the irrigation investigations have been completed. Withdrawals made under either of these forms do not defeat or adversely affect any valid entry, location, or selection which segregated and withheld the lands embraced therein from other forms of appropriation at the date of such withdrawal; and all entries, selections, or locations of that character will be permitted to proceed to patent or certification upon due proof of compliance with the law in the same manner and to the same extent to which they would have proceeded had such withdrawal not been made, except as to lands needed for construction purposes.¹² And for the purpose of construction all entries made upon the lands are subject to the Right of Way Act of August 30, 1890,¹³ and, therefore, all or any portion of such entries may be taken where the land is required for irrigation works constructed by the authority of the United States for the purposes of the Reclamation Act. All withdrawals under the Act become effective on the date upon which they are ordered by the Secretary of the Interior, and all orders for restoration on the date they are received in the local land office, unless otherwise specified in the order.¹⁴ Upon the cancellation of an

tion Act. Charles A. Guernsey, 34 Land Dec. 560; Mary C. Sands, 34 Land Dec. 653.

A settler on unsurveyed land subsequently embraced in a withdrawal under the Reclamation Act, may, upon survey of the land, make and complete entry for the full area allowed by law, notwithstanding such withdrawal previous to entry, free of added conditions and limitations imposed by the Reclamation Act. William Boyle, 38 Land Dec. 603.

Nor to desert entry. James Page, 32 Land Dec. 536.

Neither are they subject to disposal under the coal land laws. John Hopkins, 32 Land Dec. 560.

¹² Regulations, 38 Land Dec. 629, Sec. 8.

¹³ 6 Fed. Stat. Ann., p. 508; 26 Stat. L. 391.

For text of this Act, and construction, see Sec. 952.

¹⁴ Regulations, 38 Land Dec. 629, Sec. 10.

The filing of such plats in the office of the Commissioner of the General Land Office and in the local offices shall be regarded as equivalent

entry covering lands within a withdrawal under the Act, such withdrawal becomes effective as to such lands without further order.¹⁵ A withdrawal under the Reclamation Act becomes operative upon the lands covered by timber and stone applications when no payment has been made, and terminates the contingent right of the applicant.¹⁶ Again, by a successful contest against a desert-land entry, the contestant does not acquire such a preference right of entry as will, prior to its exercise, except the land from the operation of a withdrawal under the provisions of the Reclamation Act.¹⁷

Lands so withdrawn from entry may be restored by the Secretary of the Interior. In an opinion of the Attorney-General, approved by the Secretary of the Interior, it is held that when an order of withdrawal is revoked, the time for making entries may be fixed at some date in the future, leaving the lands subject to settlement from the date of the order of the revocation. This permits a right to attach to such lands, as the result of settlement, in advance of the possible filing of an entry for the same land by one who has not settled thereon.¹⁸

§ 1263. Reservation of rights of way for Government use.—By Section 1 of the Sundry Civil Appropriation Act of August 30, 1890,¹ still further provisions were made for rights of way for ditches and canals, the said Act being as follows:

to an order withdrawing such lands under the second form under the Act. George B. Pratt, 38 Land Dec. 146; Circular, 37 Land Dec. 27; Regulations, 38 Land Dec. 630, Sec. 12.

Where lands which have been withdrawn from all disposition are restored to entry, no application will be received or any rights recognized and initiated by the tender of an application for any such lands until the order of restoration is received at the local land office. George B. Pratt, 38 Land Dec. 146.

See, also, Circular, 37 Land Dec. 27.

15 Regulations, 38 Land Dec. 629, Sec. 11; Cornelius J. MacNamara, 33 Land Dec. 520.

16 Instructions, 32 Land Dec. 387.

17 Emma H. Pike, 32 Land Dec. 395.

18 Crichton v. Shelton, 33 Land Dec. 205.

The revocation of a withdrawal of its own force subjects the lands to entry and disposal under the general land laws free from all conditions, except such as are imposed by those laws, and removes the conditions prescribed by the Reclamation Act that had attached to entries made during the existence of the withdrawal. Opinion Atty. Gen., 34 Land Dec. 445.

16 Fed. Stat. Ann., 1905, p. 508; 2 U. S. Comp. Stat., 1901, p. 1570; 26 Stat. L. 391.

See, also, Sec. 936.

" . . . That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this Act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States."

By the terms of this Act it is evident that the Government was providing for some future reclamation Act by taking steps to reserve rights of way for its use for its works over all lands conveyed by the Government after the approval of the Act of August 30, 1890. And these reservations are now being utilized for the works being constructed under the National Reclamation Act.

By this Act Congress provided for reservations in all patents granted of rights of way for ditches and canals by enacting that in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by the Act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States. The purpose of this provision was to reserve and retain in the United States a right of way over all lands within the territory mentioned which may be disposed of under any land laws of the United States after the passage of the Act, and although it declares that such reservation shall be expressed in the patent, it does not follow that the reservation is less effective as to lands which are disposed of under land laws not requiring or authorizing the issuance of patents as evidence of the right of the grantee. The Act can not be confined to entries under land laws by which individuals alone acquire rights, but to all land laws in general in their operation under which inchoate and vested rights may be acquired under executive supervision by following the mode of procedure provided for by the Act. It was intended to apply to general land laws as distinguished from grants or other special Acts of Congress.² Hence it is held that the right of way acquired under the general law of

² Instructions, 32 Land Dec. 147; Regulations, 38 Land Dec. 629, Sec. 8.

All public lands west of the one hundredth meridian taken up under allotment, sale, homestead, or other form of disposition, subsequent to the

Act of August 30, 1890, as to which there is no claim by reason of settlement, occupancy, or otherwise, prior to that date, are subject to the reservations provided by that Act, to be expressed in the patent for right of

March 3, 1875,³ after the passage of the Act of August 30, 1890, is burdened with the reservation for the right of way for canals and ditches provided for by the latter Act, which right of way may be utilized by the Government without compensation, except for actual loss or damage, provided such use will not impair or defeat the use of the railroad right of way for the legitimate corporate purposes of the company.⁴ The railroad company may, therefore, occupy the lands *in presenti*, legally conveyed to it within a reclamation reservation by a homestead entryman. It may also be occupied by the entryman.⁵

The word "constructed," as used in the Act of 1890, quoted above, is construed not to limit the reservation to a right of way already constructed, but extends to those ditches or canals to be constructed by the Government in furtherance of its irrigation schemes for the reclamation of arid lands.⁶

§ 1264. The acquisition of rights of way for Government use.—In addition to the rights of way reserved in all patents to land granted since 1890, discussed in the previous section,¹ the Reclamation Act in Section 7 provides that where in carrying out the provisions of the Act it becomes necessary to acquire any rights or property, the Secretary of the Interior is authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums needed for that purpose. It is also made the duty of the Attorney-General of the United States upon every application of the Secretary of the Interior, under the Act, to cause proceedings to be

way for ditches and canals by authority of the United States. Clement Ironshields, 40 Land Dec. 28.

See, also, *Minidoka etc. R. Co. v. Weymouth*, — Idaho —, 113 Pac. Rep. 455, where it was held that the Acts of Congress, relative to the public lands, providing for entries thereof, and authorizing easements and rights of way thereover, must be construed together and in the light of the constitutions of the country as they existed when several Acts were passed.

³ 6 Fed. Stat. Ann., 1905, p. 501; 2

U. S. Comp. Stat., 1901, p. 1568, Chap. 152; 18 Stat. L. 482.

⁴ Instructions, 36 Land Dec. 482.

For the acquisition of rights of way by the Government, under the Reclamation Act, see Chap. 51, Sec. 936.

⁵ *United States v. Minidoka etc. R. Co.*, 176 Fed. Rep. 762; *Green v. Wilhite*, 14 Idaho 238, 93 Pac. Rep. 971.

⁶ *Green v. Wilhite*, 160 Fed. Rep. 755; *Green v. Wilhite*, 14 Idaho 238, 93 Pac. Rep. 971.

¹ See Secs. 936, 1263.

commenced for condemnation within thirty days from the receipt of the application of the Secretary of the Interior at the Department of Justice.² Under this section water rights as well as land for rights of way may be condemned by the Government.

In the event any lands embraced in any entry on which final proof has not been offered, or in any unapproved or uncertified selection, are needed in the construction and maintenance of any irrigation works (other than for right of way for ditches or canals reserved under the Act of August 30, 1890) under the Reclamation Act, the Government may cancel such entry or selection and appropriate the lands embraced therein to such use, after paying the value of the improvements thereon and the enhanced value of such lands, the rights of the claimants being adjusted upon the basis of the status of the land at the time such determination was made.³ The rights of the entryman as to the measure of compensation and the character of the action that may be taken by the Government in acquiring or appropriating the land embraced in his entry must be determined by the status of the entry at the time of the withdrawal of the lands for such purposes.⁴ Where the owners of the improvements shall fail to agree with the representative of the Government as to the amount to be paid therefor, the same shall be acquired by condemnation proceedings, as provided by Section 7 of the Reclamation Act.⁵

Again, for the purposes of carrying out the provisions of the Reclamation Act, the Government may avail itself of the privileges conferred by the Right of Way Act of March 3, 1891,⁶ granting rights of way through the public lands for the construction of ditches and reservoirs for irrigation purposes, to the same extent that individuals, corporations, or associations of individuals may exercise such privileges, and subject to the same conditions and limitations.⁷

² For full text of Section 7, see Sec. 1244.

For instructions relative to condemnation, see 38 Land Dec. 58.

³ Opinion Atty. Gen., 34 Land Dec. 421; Regulations, 38 Land Dec. 630, Sec. 14.

⁴ Agnes C. Pieper, 35 Land Dec. 459.

144—Kin. on Irr.

⁵ Regulations, 38 Land Dec. 630, Secs. 14, 15.

⁶ For the Act, and construction thereof, see Secs. 937-950.

⁷ Opinion Atty. Gen., 38 Land Dec. 563.

A permanent easement attaching to public lands by the construction of a reservoir and canals upon a right of

§ 1265. **Water rights—Acquisition of, by the Government for its projects.**—The Federal Government has the power under the Reclamation Act to acquire water rights for the use of its projects in the irrigation and reclamation of the lands thereunder by appropriation, purchase, or condemnation.¹ The Director of the Geological Survey is authorized by the Secretary of the Interior to designate suitable persons to file notices of water appropriation or to otherwise comply with the law of the respective States relative to the making valid appropriations of water for the projects of the Reclamation Service, in the name and on the behalf of the Secretary of the Interior, in pursuance of the provisions of Section 8 of the Reclamation Act.² The laws governing waters being left to the respective States where they naturally flow, this leaves the Government in the anomalous position of having to go to the State laws in order to acquire a right to the water necessary for these projects and flowing over its own lands.³

Statutes have been enacted by the legislatures of the various States affected, in aid of the National Reclamation Act, which statutes are fully discussed in a future part of this work.⁴

§ 1266. **Water rights—Reservation of waters by the Government for its projects.**—As has been stated before, the United States, first by its forbearance and afterward by its several Acts of Congress, has permitted vested rights to be acquired by individuals and others to the waters flowing over the public domain, separate and apart from the land itself.¹ But we have seen that the United

way under the Act of March 3, 1891, does not, upon acquisition of such irrigation system by the United States for use in connection with a reclamation project, become extinguished by merger in the estate of the Government in such reservoir lands; and entries allowed for lands within and below the flowage contour line of the reservoir as marked upon the township plat, are subject to the right of flowage by storage of waters in the reservoir. McMillan Res. Site, 37 Land Dec. 6.

¹ The United States may exercise the right of eminent domain against

other land owners to obtain land necessary to carry a proposed project under the National Reclamation Act into effect. *Burley v. United States*, 179 Fed. Rep. 1, 102 C. C. A. 429; affirming *Id.*, 172 Fed. Rep. 615.

² 4th Annual Rept. of the Reclamation Service, p. 26.

³ That the government of the waters is left to the States, see Secs. 507, 593.

⁴ See for statutes in aid of the National Reclamation Act, Part XIV.

¹ See for history of the Arid Region Doctrine of appropriation, Chap. 32, Secs. 595-626.

States still has rights in and to the water flowing over the public domain as a riparian proprietor,² and has the power authorized to maintain the navigability of the navigable waters of the United States.³ That as such proprietor, where the particular circumstances required, the Government has the right to reserve from all appropriation such waters for its own use and for particular purposes, such as the preservation of the navigable capacity of the rivers,⁴ or the use upon Indian reservations.⁵ The National Reclamation Act, in Section 8, provides: "That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws."⁶ And, in practice, the Secretary of the Interior proceeds under the laws of the respective States where the project is being constructed for the acquisition of the water rights.

But where the Government is the sole owner of both the lands and the waters, as where it is the sole riparian proprietor, and no vested rights have accrued in and to the waters, as is the case on some of the larger rivers, as was said in a recent case decided by the United States:⁷ "Has not the United States, as a land owner, the same rights within the State that any other land owner has?" We think it has, and as the sole riparian proprietor upon some of the streams, where it can be done without interfering with vested rights, not only this, but it has the right under its power to make reservations⁸ to reserve such waters from all appropriation under State laws, and in the face of the dedication by a State of all the waters flowing within its boundaries to the State or to the public.⁹ As was said by the Supreme Court of the United States: "The power of the Government to reserve the waters and exempt them from appro-

² For the United States as a riparian proprietor, see Sec. 480.

³ See Chap. 16, Secs. 341-357.

⁴ See Secs. 354-357, 388.

For power of Government to make reservations, see Secs. 411, 414.

⁵ See Secs. 667, 668.

⁶ For full text of Act, see Sec. 1244.

⁷ *Burley v. United States*, 179 Fed. Rep. 1, 102 C. C. A. 429; affirming *Id.*, 172 Fed. Rep. 615.

⁸ See sections cited *supra*.

⁹ For dedication of water as against the United States, see Sec. 388.

priation under the State laws is not denied, and could not be.”¹⁰ Again, in a case decided in 1910, by the United States Circuit Court of Appeals,¹¹ where the questions under consideration were the constitutionality of the National Reclamation Act and the rights of the United States to acquire property for the purpose of the Act by the exercise of eminent domain, it was said: “That the United States may, where the circumstances and conditions require it, reserve the waters of a river flowing through its public lands for a particular, beneficial purpose. . . . The authority of the United States to reserve the waters of its streams in the arid region for a beneficial purpose has been recently extended to the settlement of a long-standing controversy between the United States and Mexico respecting the use of the waters of the Rio Grande.”¹² In the latter matter referred to, the Secretary of the Interior refused to grant rights of way to utilize the water of the Rio Grande River where it might tend to embarrass the project near Engle, New Mexico, and where it would tend to interfere with the carrying out of the treaty of this country with Mexico.¹³

As we view the subject, the United States has the same authority to reserve waters flowing over the public domain to which vested rights have not attached, for the purposes of carrying out the provisions of the National Reclamation Act, as it has to make reservations for its own use, for the use upon Indian reservations, or to preserve the navigable capacity of the navigable streams of the United States.

§ 1267. **Duty of the Secretary of the Interior to construct the works—Contracts.**—It is made the duty of the Secretary of the Interior to construct all the reclamation works contemplated by the

¹⁰ *Winters v. United States*, 207 U. S. 564, 52 L. Ed. 340, 28 Sup. Ct. Rep. 207; affirming *Id.*, 143 Fed. Rep. 740, 74 C. C. A. 666; *Id.*, 148 Fed. Rep. 684, 78 C. C. A. 546.

See, also, *United States v. Winans*, 198 U. S. 371, 49 L. Ed. 1089, 25 Sup. Ct. Rep. 662; *United States v. Rio Grande Dam & Irr. Co.*, 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770; *Conrad Investment Co. v. United*

States, 161 Fed. Rep. 829, 88 C. C. A. 647; *Id.*, 156 Fed. Rep. 130; *Kansas v. Colorado*, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655.

¹¹ *Burley v. United States*, 179 Fed. Rep. 1, 102 C. C. A. 429; affirming *Id.*, 172 Fed. Rep. 615.

¹² For the treaty in question with Mexico, see Secs. 1218-1220.

¹³ See *Francis W. Bosco*, 39 Land Dec. 104.

Act. Section 4 of the Act provides that, upon determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the reclamation fund.¹ Under this authority the Secretary may, in his discretion, enter into contracts for the construction of the works or construct such works by labor employed and operated under the superintendence and direction of Government officials.² The primary power thus conferred by the Act upon the Secretary of the Interior is to construct irrigation works for the storage and development of waters when in his judgment the cost of the works, considered in reference to the quantity and character of the lands that may be irrigated therefrom, will justify their construction. The cost of construction is therefore a controlling factor in determining whether a contemplated irrigation project is practicable. There is no limitation imposed by the Act upon the Secretary in reference to how the works shall be constructed. Therefore, he may employ such means in the construction of the works as in his judgment will be most feasible.

It is held by the Federal Court in a case decided in Idaho³ that in the construction of works for the irrigation of arid lands under the Reclamation Act the United States is not exercising governmental functions, or even a strictly public function, but is promoting its proprietary interests, and such advantage as arises therefrom to the public at large is material and not governmental.

Section 4 of the Act provides: "That in all construction work eight hours shall constitute a day's work." To the engineer in charge, subject to review by his superiors, is intrusted the discretion in determining upon the existence of an extraordinary emergency requiring work in excess of eight hours. Extraordinary emergency is not defined in the Act, but depends wholly upon the facts of each particular case. However, the following has been given as a definition: "An extraordinary emergency is the sudden, unexpected happening of something not of the usual, customary, or

¹ For full text of section, see Sec. 1244.

³ *Twin Falls Canal Co. v. Foote*, 192 Fed. Rep. 583.

² Opinion Atty. Gen., 34 Land Dec. 567.

regular kind, demanding prompt action to avert imminent danger of life, limb, health, or property; the possibility of either is not enough. The peril must be sudden, unusual, imminent, and actual in order to constitute an extraordinary emergency.”⁴

In the case of contracts, the power of the Secretary of the Interior to extend a contract is limited to causes which were beyond the control of the contractor, such as the acts of Providence, fortuitous events, or the like, within the meaning of the contract.⁵ In computing 50 per cent of a contract for the construction upon which a deduction or “holdback” of 20 per cent is retained, the whole amount of work under the contract must be considered, and not merely the estimated amount.⁶ Where a contract provides for a penalty of a certain amount per day occupied in excess of the time set for the completion of the contract, the word “occupied” used in this connection is construed to mean that the duration of a delay shall be computed upon a basis of the actual working days, exclusive of holidays and Sundays. An executive officer has no authority to waive the provisions of a contract relating to deductions for delays, though the Government has suffered no loss by the delay. Neither should any statement be given by any official to a surety tending to indicate that there might be no liability, or the extent of the liability, if any, until the work has been completed and the liability of the principal, if any, has been ascertained.⁷

Where the works are constructed by contract, the contracts are so drawn that, in case of the suspension of the contract on account of a defaulting contractor, the Government has the right, as provided therein, to take possession of all materials belonging to the contractor delivered on the ground. In other words, under such circumstances, the contract provides that the Government shall act in the place and stead of the contractor, using his plant, materials, and appliances, as far as possible, for the completion of the work. There is no provision made in such contracts requiring the Government to purchase or pay for the materials thus taken. There is no purchase. They are used by the Government on the contractor's

⁴ 6th Annual Rept. Reclamation Service, p. 6.

⁵ Decision of the Comptroller, 6th Annual Rept. Reclamation Service, p. 6.

⁶ Decision of the Comptroller, 6th Annual Rept. Reclamation Service, p. 5.

⁷ 6th Annual Rept. Reclamation Service, p. 6.

account, and there exists no relationship or obligation as between the Government and the unpaid material-men who furnished them. The title to such materials will legally be presumed to have passed to the contractor, as in the case of any other personality in ordinary cases, upon delivery. Of the materials, etc., thus taken possession of by the Government, due and accurate account will be kept, in order that in final settlement of the contractor's account his proper credits may be definitely ascertained. So, too, should accurate account be kept of the cost of the work, including the purchase of other materials, that the excess cost of the work, if any, above the contract price may be determined and due payment thereof demanded of the sureties. The principle above stated applies equally to materials which have been built into the work, but which were not paid for by the contractor.⁸

§ 1268. Title and management of reclamation works.—Section 6 of the Reclamation Act provides that the title to and the management and operation of the reservoirs necessary for their protection and operation shall remain in the Government until otherwise provided by Congress.¹

The regulations of the Secretary of the Interior also provide that the control of the operation of all sublaterals constructed or acquired under the Act is retained by the Secretary of the Interior to such extent as may be necessary or reasonable to assure to the water users served therefrom the full use of the water to which they are entitled.²

§ 1269. The reclamation fund—The use of.—The Secretary of the Interior is authorized to use the reclamation fund provided for by the Act for the purpose of locating and constructing all irrigation works,¹ for the operation and maintenance of all reservoirs and works constructed,² also for the purpose of acquiring any rights or property necessary for the operation of any reclamation project.³ But outside of the purposes directly authorized by the Act, the

⁸ Decision of the Comptroller of the Treasury, 5th Annual Rept. Reclamation Service, p. 28.

¹ For the text of the Act, see Sec. 1244.

² Regulations, 37 Land Dec. 468; 38 Land Dec. 636, Sec. 43.

¹ See Section 2 of the Act, Sec. 1244.

² See Section 6 of the Act.

³ See Section 7 of the Act.

Secretary has no authority to use any portion of the reclamation fund. Therefore, the reclamation fund can not be used for drilling artesian wells for exploration. Such wells may be paid for from the reclamation fund only in cases when there is sufficient knowledge in advance to make it probable that water will be obtained from them in sufficient quantities for the irrigation of lands, with the probability that the cost will be returned to the reclamation fund.⁴ However, it is held by the Attorney-General that the drilling of wells in the vicinity of an irrigation project for the purpose of determining whether underground water exists that may be available in connection with the project comes within the power conferred by the second section of the Act, "to make examinations and surveys . . . for the development of waters."⁵

The payment for the construction of the reclamation works is directly authorized by the Act from the reclamation fund, and that, too, whether the works are constructed by contract or under the superintendence and direction of Government officials, who perform their duties under the direction of the Secretary of the Interior.⁶

Transportation may be furnished laborers from the place of entering into contracts for service to the place where the services are to be rendered as a part of the consideration for such services.⁷ Where an irrigation system already constructed and in operation may be utilized in connection with a greater system to be constructed by the Government, its purchase for such purpose comes within the purview of the Reclamation Act.⁸ The purchase of lands necessary for the construction and operation of the works may be made from the reclamation fund; but the fund can be used only for the purchase of lands necessary within the territorial limits of the United States.⁹ The rights of the entryman as to the measure of compensation and the character of the action that may be taken by the Government in acquiring or appropriating the land embraced in his entry for use in the construction and operation of the irrigation works under the Act must be determined by the status of the entry

⁴ Instructions, 32 Land Dec. 278.

⁵ Opinion Atty. Gen., 34 Land Dec. 533.

⁶ Opinion Atty. Gen., 34 Land Dec. 567.

⁷ 6th Annual Rept. Reclamation Service, p. 7.

⁸ California Dev. Co., 33 Land Dec. 391; Opinion Atty. Gen., 34 Land Dec. 351.

⁹ California Dev. Co., 33 Land Dec. 391.

at the time of the withdrawal of the lands for such purposes. And where the entryman at the time of the withdrawal had earned title to the land by full compliance with the law, he is entitled to compensation for the land and the improvements thereon as fully as if the legal title had passed to him, but no evidence of title, either equitable or legal, will be issued.¹⁰ The expenses of procuring abstracts of title to lands or rights are properly payable from the reclamation fund, provided the lands or rights are to be purchased and not condemned.¹¹ No abstracts are required where the land is donated to the Government, but in lieu thereof a certificate of the engineer that the tax records have been examined and indicate that the grantors are the owners, and that the said parties are the reputed owners, and that the land is not in the possession of one claiming adversely to the grantors. The abstracts should be prepared by a bonded abstractor, abstract company, or public officer, bonded or otherwise, whose duty it is to furnish such information. Abstracts should be examined by local counsel familiar with the local law applicable to title of real estate, corporations, and water rights, and preferably by the local United States attorney.¹² The payment of a sum of money for an option for a right of way, water right, or land needed for the reclamation work is not a proper expenditure from the reclamation fund.¹³ The private lands necessary for the construction of reclamation works must be purchased outright or condemned. The Secretary has no authority to permit the owner of lands that are needed for a reservoir to be constructed under the terms of the Reclamation Act to select other lands of the same area within the district that may be made susceptible of irrigation from the proposed reservoir in exchange for the lands needed for reservoir purposes.¹⁴ There is no law which prevents the United States from purchasing property encumbered with liens.¹⁵ It is within the power of the Secretary of the Interior to make a purchase under such conditions and to exact an indemnifying bond to protect against defects of title, and in order to secure immediate possession of the property.¹⁶

¹⁰ Agnes C. Pieper, 35 Land Dec. 459.

¹¹ 4th Annual Rept. of the Reclamation Service, p. 28.

¹² 6th Rept. Reclamation Service, p. 5.

¹³ 4th Annual Rept. Reclamation Service, p. 29.

¹⁴ Opinion Atty. Gen., 32 Land Dec. 459.

¹⁵ 10 Opinion Atty. Gen. 353.

¹⁶ 12 Compt. Repts. 691.

The necessary printing of specifications for the Reclamation Service as soon as they are received, at the lowest possible price for prompt delivery, may be paid for out of the fund; as is also the other necessary printing by the engineers in the field.¹⁷ Settlers upon lands within the limits of a withdrawal made under the terms of the Reclamation Act can not be compensated for their improvements when the lands are taken for construction purposes unless they have acquired a right as qualified settlers under the public land laws at the date of withdrawal.¹⁸ But where settlers have fully complied with the law and have made a *bona fide* settlement and cultivated and improved their lands, they are entitled to compensation for their improvements, although they have not placed their claim of record because of the unsurveyed condition of the land.¹⁹

§ 1270. Disposition of property not needed for a time—Leases.—It often occurs that after property has been once acquired by the Government, or has been withdrawn from public entry for the purposes of the Reclamation Act, that a considerable period of time elapses before it is actually used by the Government for the purpose for which it was acquired or withdrawn. It is the general rule that where land has been once acquired or withdrawn from public entry for a particular purpose, in the absence of any express prohibition as to the particular property, the head of the Executive Department in whose care and custody public property is placed to be used for a particular purpose may, until the property is needed for the purpose indicated, exercise his judgment and discretion as to its proper care and disposition, and any use of it not incompatible with the purpose intended is not a diversion to other uses and neither a violation of law nor an abuse of the supervisory authority and discretion reposed in him.¹ However, upon the other hand, where the lands are not taken out of the category of public lands, the Secretary of the Interior has no authority under his general power of supervision and control of the public domain to lease

¹⁷ 4th Annual Rept. Reclamation Service, p. 29.

¹⁸ 4th Annual Rept. Reclamation Service, p. 28.

¹⁹ 5th Annual Rept. Reclamation Service, p. 25.

However, there is no authority for the purchase of a claim of one who has settled upon the lands of another, or of his improvements. George Anderson, 34 Land Dec: 478.

¹ Opinion Atty. Gen. 549.

any part of it, unless authorized to do so by an Act of Congress.² But under the provisions of the Reclamation Act, providing for the construction and maintenance of irrigation works, the Secretary of the Interior is authorized to withdraw from public entry lands required for such works contemplated by the Act. The lands are thus withdrawn for a particular purpose, and for the time being are segregated from the public lands. It is heretofore held that the Secretary of the Interior may establish rules regulating the use of the withdrawn lands while not needed for the purpose for which they are reserved, and may lease them for grazing and limit the number of animals to be grazed thereon, the revenue derived from the leases going into the reclamation fund provided for by the Act.³

The same rule as above stated also applies to water rights. During the construction of a Government project the renting of the temporary use of the water rights and canals of an irrigation system purchased by the Government for conveying water to lands that would otherwise be allowed to go to waste is not incompatible with the purposes of the Act, but is directly in pursuance of the object for which the property was acquired.⁴

§ 1271. Entries allowed only under the homestead law.—Section 3 of the Reclamation Act ¹ provides for the withdrawal of lands

² *Clyde v. Cummings*, 35 Utah 461, 101 Pac. Rep. 106; Opinion Atty. Gen., 34 Land Dec. 549.

³ *Clyde v. Cummings*, 35 Utah 461, 101 Pac. Rep. 106.

The Secretary of the Interior has authority to make temporary leases of lands reserved or acquired by purchase for use in connection with an irrigation project contemplated under the provisions of the Reclamation Act, where use under the proposed lease will not interfere with the use and control of the lands when needed for the purposes contemplated by the reservation or purchase. Opinion Atty. Gen., 34 Land Dec. 480.

⁴ 5th Annual Rept. Reclamation Service, p. 8; *Alhambra Brick and Tile Co.*, 40 Land Dec. 573.

All leases should state the purpose for which the lands were acquired, and that such purpose will not in any manner be interfered with or be delayed by the lease. They should specifically provide for the immediate or speedy termination of a lease in event it is desired to utilize the land or any part thereof for reclamation works, or in event that the work of reclamation is found to be hindered or delayed by reason thereof. They should be limited to one year, but may contain provisions for renewal for the succeeding year in event the lands would not be needed for reclamation purposes. Instructions, Feb. 28, 1911, 39 Land Dec. 525.

¹ For full text, see Sec. 1244.

from all disposition other than that provided for by the Act, and under the section lands withdrawn are subject to entry under the provisions of the homestead law only, as far as the right to make entries thereof are concerned.² Therefore, the homestead law must in all cases be complied with, both as to the original rights granted thereunder and also subject to all provisions, limitations, charges, terms, and conditions of the original Reclamation Act and its amendments relating to homestead entries. The Act relating to the making of homestead entries within reclamation projects has been amended in a number of instances in matters of minor importance.

The Act of April 28, 1904, to amend the homestead laws as to certain unappropriated and unreserved lands in Nebraska, and to extend the homestead entries on arid lands in said State to 640 acres,³ in the proviso to Section 1, it is "*Provided*, that there shall be excluded from the provisions of this Act such lands within the territory herein described as in the opinion of the Secretary of the Interior it may be reasonably practicable to irrigate under the National law, or by private enterprise; and the Secretary shall, prior to the date above mentioned, designate and exclude from entry under this Act the lands, particularly along the North Platte River, which in his opinion it may be possible to irrigate as aforesaid, and shall thereafter, from time to time, open to entry under this Act any of the lands so excluded, which, upon further investigation, he may conclude not to be practically irrigated in the manner aforesaid."

By the Act of June 22, 1910, entitled, "An Act to provide for agricultural entries on coal lands,"⁴ it was provided that from and after the passage of the Act unreserved public lands of the United States, exclusive of Alaska, which have been withdrawn or classified as coal lands, or are valuable for coal, shall be subject to appropriate entry under the homestead laws by actual settlers only,⁵ under the desert-land law,⁶ to selections under the Carey Act,⁷ and

² Regulations, 38 Land Dec. 627, Sec. 1.

³ 10 Fed. Stat. Ann., 1906, p. 360, Sec. 1; 33 Stat. L. 547, Sec. 1.

⁴ Public, No. 227; 36 Stat. L. 583.

For the full text of Act, see coal lands, Sec. 443.

⁵ For the homestead laws, see Secs. 434, 435.

⁶ For the desert land law, see Secs. 1287-1311.

⁷ For the Carey Act, see Secs. 1312-1336.

to withdrawal under the Reclamation Act,⁸ whenever such entry, selection, or withdrawal shall be made with the object of obtaining or passing title, with a reservation to the United States of the coal in such lands and of the right to prospect for, mine, and remove the same.

§ 1272. **Opening of land to entry—Entries to be made under the homestead law.**—When a National reclamation project is sufficiently completed so the entries to the land thereunder may be made, the Secretary of the Interior is required by the Act ¹ to give public notice of this fact, also of the lands irrigable under such project, and the limit of area per entry, the charges which shall be made per acre for the water for such entries, and the lands in private ownership which may be irrigated by the waters of the said project, the number of annual installments, not exceeding ten, in which such charges shall be paid, and the time when such payments shall commence. The entries of such lands are made practically in the same manner as the usual homestead entries, but they are subject to all the provisions, limitations, charges, terms, and conditions of the Reclamation Act.² Therefore, in so far as those limitations and conditions impose additional burdens or are inconsistent with the general homestead law, they operate as a modification or repeal thereof.³

When an application for entry is allowed under the Reclamation Act, the registers and receivers are required to indorse across the face of each homestead application the following: "This entry allowed subject to the provisions of the Act of June 17, 1902 (32 Stat., L. 388)," and must advise each entryman of the provisions of the Act by furnishing him with a copy of the current circular

⁸ For the Reclamation Act, see Sec. 1244.

¹ See Section 4 of the original Act, Sec. 1244.

² Regulations, 38 Land Dec. 627, 629, Sec. 7.

The public lands lying within the irrigable area of a reclamation project can be disposed of only under the homestead law and in conformity with the legal subdivisions defined by the public land surveys. Instructions, 34

Land Dec. 66. But see amendatory Act of June 27, 1906, Sec. 1252.

³ Charles O. Hanna, 36 Land Dec. 449, where it was held that an entry of lands subject to the provisions of the Reclamation Act will not be allowed as additional to a prior entry subject only to the provisions of the general homestead law.

See, also, Frederick C. Long, 36 Land Dec. 332.

containing the various Acts of Congress and the regulations appertaining to the subject.⁴

These entries are not subject to the commutation provisions of the homestead law.⁵ All applications to make selections, locations, or entries of any other kind than under the homestead law will be rejected, regardless of whether they were presented before or after the date that the lands were withdrawn by the Secretary for the purposes of the Act.⁶

Additional entries may be made under certain circumstances. But a person who has entered and proved up on a farm unit within a reclamation project can not make an additional entry of public lands outside of the project, nor can a person make entry for a unit of less than 160 acres within a project after proving up on the same or make an additional entry within the same project, nor under another project. One who has made an entry upon the public domain for less than 160 acres is disqualified from making an additional entry of a farm unit within a reclamation project, which farm unit is equivalent to a homestead entry of 160 acres outside of the reclamation project. Where, however, the first or original homestead entry was made subject to the restrictions and conditions of the Reclamation Act, any entry additional thereto would be likewise subject to the same restrictions and conditions, and in such cases additional entries may be allowed within reclamation projects under Acts authorizing additional entries, except where farm units have been established prior to the filing of the applications. Both entries so allowed are subject to the same adjustment to one farm unit as if the entire tract had been included in the first entry.⁷

§ 1273. Contests—Cancellation of entries.—No contests are allowed by the Land Department against any entry included within the area of any "first-form withdrawal," or where the land withdrawn is needed in the construction and maintenance of irrigation works;¹ and in all cases where a contest has been allowed prior to

⁴ Regulations, 38 Land Dec. 628, 58; Archie M. Willis, 38 Land Dec. 58; Regulations, 38 Land Dec. 631.

⁵ Regulations, 38 Land Dec. 628, 1 For "first and second form" of withdrawals, see Sec. 1262.

⁶ 38 Land Dec. 629, Sec. 7.

⁷ Henry N. Williamson, 38 Land Dec. 233; Instructions, 38 Land Dec. The above rule, however, has no application to a protest by one claiming under a placer location against a

such withdrawal the withdrawal, if made before the termination of the contest or before entry by the successful contestant, will, *ipso facto*, terminate all right that was acquired by reason of such contest. Upon the other hand, any land embraced within the area of a "second-form withdrawal" may be contested after farm units have been established covering such entry, and public notice has been issued in connection with the same, fixing the water charges and the date when water can be applied, and if at the date of entry by the successful contestant the lands have not been released from withdrawal under the provisions of the Reclamation Act, his entry will be subject to the limitation charges and conditions imposed by that Act.²

The cancellation of entries made under the Act may be made for the following causes: First, all persons must, in addition to paying the water right charges, reclaim at least one-half of the total irrigable area of their entries as finally adjusted for agricultural purposes, and reside upon, cultivate, and improve the lands embraced in their entries for not less than a period required by the homestead law. Any failure to comply with the law in this respect will subject the entries to cancellation. Second, any failure to make any two payments when due will also render these entries subject to cancellation, and the money already paid by them subject to forfeiture, whether they have filed water right applications or not.³ The cancellation of an entry, whether by relinquishment or otherwise, carries with it a forfeiture of the water right appurtenant to such land. When the land is re-entered the water right that attaches to the land by force of the statute inures to the second entryman, who obligates himself to pay the charges apportioned to such tract.⁴ An installment due for the payment of a water right by a defaulting entryman is an obligation resting upon the land to which the first or subsequent entry is subject, and which the Government can always enforce by withholding patent until it is paid and by cancellation of the entry if it is not paid.⁵

conflicting desert land entry, no question of preference right of entry being involved in such proceeding. *New Castle Co. v. Zanganella*, 38 Land Dec. 314.

² Circular of Oct. 15, 1910, 39 Land

Dec. 296, amending Regulations, 38 Land Dec. 631, Secs. 19, 20.

³ Regulations, 38 Land Dec. 632, Sec. 21.

⁴ 5th Annual Rept. Reclamation Service, p. 27.

⁵ Instructions, 35 Land Dec. 29.

A successful contestant of an entry within a reclamation project will be required, in making entry in exercise of his preference right, to pay the building charge obtained at the time his application is filed, and is not entitled to the rate in effect when the former entry was made, nor to credit for the payments made by the former entryman.⁶

§ 1274. **Final proof on entries.**—Owing to the fact that the National Reclamation Act was so recently enacted that sufficient time has not elapsed for the making of final proofs under the Act, there are few, if any, decisions upon the subject. However, the Secretary of the Interior has promulgated rules and regulations upon the subject.¹

All persons who apply to make entry of lands within the irrigable area of any project commenced or contemplated under the Reclamation Act will be required to comply fully with the homestead law as to residence, cultivation, and improvement of the land, and the failure to supply water from such works in time for use upon the land entered will not justify a failure to comply with the law and to make proof thereof within the time required by the statutes. It is true that under the recent Act of June 25, 1910, an entryman may, upon application and a showing that he has made substantial improvements upon his land, and that water is not available for the irrigation of the same, within the discretion of the Secretary of the Interior, obtain leave of absence until the water is turned into the main canals from which the land is to be irrigated. But this provision applies to the residence only, as in the proviso to the Act it is provided "that the period of actual absence under the Act shall not be deducted from the full time of residence required by law." In other words there must be five years of actual residence upon the land.²

To establish compliance with the clause of the Reclamation Act that requires reclamation of at least one-half of the irrigable area of an entry, entrymen will be required to make proof by submitting testimony corroborated by two witnesses, showing that the land has

⁶ Henry A. Schroder, 40 Land Dec. 458.

² For the text of Act of June 25, 1910; see Sec. 1256.

¹ See Regulations, 38 Land Dec. 632, Secs. 22-40.

been cleared of sagebrush or other incumbrance and leveled, that sufficient laterals have been constructed to provide for the irrigation of the required area, that the land has been put in proper condition, and has been watered and cultivated, and that the growth of at least one satisfactory crop has been secured thereon.³ But persons who have resided upon, cultivated, and improved their lands for the length of time prescribed by the homestead law will not thereafter be required to continue such residence and cultivation, and they may make final proof of reclamation at any time, when they can also make proof of necessary residence, cultivation, and improvement for five years, but no final certificate or patent will issue until all fees, commissions, and construction charges, including operation and maintenance charges due at the time of payment, have been paid in full.⁴

Soldiers and sailors of the war of the rebellion, the Spanish-American War, or the Philippine insurrection and their widows and minor orphan children who are entitled to claim credit for the period of the soldier's service under the homestead laws, will be allowed to claim credit in connection with entries made under the Reclamation Act, but will not be entitled to receive final certificate or patent until all the water rights charges have been paid in full and the requirements as to reclamation have been met.⁵

The widows or heirs of persons who have made entries under the Reclamation Act will not be required both to reside upon and cultivate the lands covered by the entry of the person from whom they inherit, but they must reclaim at least one-half of the total irrigable area of the entry for agricultural purposes and make payment of all unpaid charges when due and before either final certificate or patent can be issued. Upon the death of a homesteader having an entry within an irrigation project, leaving no widow and only minor heirs, his right may, under Section 2292, Revised Statutes of the United States, be sold for the benefit of such heirs.⁶

³ Regulations, 38 Land Dec. 633, Land Dec. 332; Regulations, 38 Land Dec. 28; Instructions, 36 Land Dec. 256; Circular, 38 Land Dec. 229. Dec., Secs. 22, 23.

⁴ Regulations, 38 Land Dec. 633, Sec. 25.

⁵ Regulations, 38 Land Dec. 633, Sec. 26.

⁶ Heirs of Frederick C. DeLong, 36 145—Kin. on Irr.

The fact that a widow, who under Section 2291 of the Revised Statutes of the United States, succeeds to the right of her husband in an unperfected homestead entry within a reclamation project, has previously secured water

While entries can not be made of lands which have been withdrawn under the "first form" of withdrawal for use by the Government for construction purposes,⁷ valid entries which are made prior to such withdrawal are not defeated by the withdrawal, except as to the lands actually needed for construction purposes.⁸ Therefore, final proof will be received, under certain conditions, of lands entered before a withdrawal was made under the first form. When the registers and receivers issue final proof notices of any lands withdrawn under the first form of withdrawal, they will at once mail a copy of such notice to the engineer in charge of the reclamation project in which the lands are situated, for report, and indorse upon the back of such notice the following: "For report within thirty days by indorsement hereon as to whether or not the within described lands or any of them are needed for construction purposes." When they are informed that the lands described are needed for construction purposes, final proof may be submitted as in other cases, but the proof must be at once forwarded to the General Land Office, without issuance of final certificate, together with the report received from the reclamation engineer. If the report received is that none of the lands involved are needed for construction purposes, the register and receiver will consider and act on the proof in the same manner as though the lands had not been withdrawn, forwarding with the final papers the report of the reclamation engineer, and noting on the proof "Lands not needed for construction purposes." The regulations also provide for a second notice to the engineer should the first remain unanswered. Should no report be received under this second call, nor the registered letter be returned unclaimed, the register and receiver will proceed as if the report had been received that the lands are not needed. If, however, the registered letter is returned unclaimed, all papers will be forwarded to the General Land Office for instructions.⁹

When an entryman or the heirs of any entryman apply to make final proof after all the requirements of the homestead laws as to

from the project for reclamation of land held by her in private ownership, in nowise affects her right to acquire water under the project for completion of such entry under the Reclamation Act. Anna M. Wright, 40 Land Dec. 116.

⁷ For first form of withdrawal, see Sec. 1262.

⁸ Regulations, 38 Land Dec. 629, Secs. 6, 8.

⁹ Regulations, 38 Land Dec. 633, Secs. 29-33.

residence and cultivation have been complied with, the proof offered by them, if found by the register and receiver to be regular, in all cases where all the charges have not been fully paid, will be forwarded to the General Land Office without issuance of final certificate. If any proof offered under the Act be irregular or insufficient the register and receiver will reject it and allow the entryman the usual right of appeal; and if the General Land Office finds any proof to be fatally defective in any respect, the entryman will be notified of that fact and given an opportunity to cure the defect or to present acceptable proof.¹⁰

The registers and receivers are directed to notify, in writing, every person who makes final proof on a homestead entry which is subject to the limitations and conditions of the Reclamation Act, embracing land included in an approved farm-unit plat, where the entry does not conform to an established farm unit, and conformation notice has not been already issued, that thirty days from notice is allowed such entryman to elect the farm unit he desires to retain, in default of which the entry will be conformed by the General Land Office.¹¹

§ 1275. Action on final proof.—Before acting on final proof for lands entered subject to the Reclamation Act, in all cases where no public notice has issued, the Commissioner of the General Land Office will refer such cases to the Director of the Reclamation Service for report as to whether acceptance of proof and issuance of final certificate will conflict with any contemplated reclamation operations. In such cases as embrace lands in a project where the irrigation works will not be ready to furnish water for irrigation of such lands within a reasonable time, the land in question will be relieved from the withdrawal under said Act provided the entryman

¹⁰ Regulations, 28 Land Dec. 634, Secs. 34, 35.

¹¹ Regulations, 38 Land Dec. 634, Sec. 36.

Under the Desert Land Act, as modified by the Act of June 27, 1906, final proof upon the desert entry within a reclamation project can not be held to be made and completed until the payments required by said

Acts and the Act of June 17, 1902, have been made; and the Department is without authority to accept or regard final proof in such cases as complete or to issue patent thereon, until after full compliance with the terms of payment imposed by the Reclamation Act. W. H. Skinner, 39 Land Dec. 519.

subscribes to the Water Users' Association for the land covered by his entry in such manner as to make the same subject to a lien for the charges fixed under the Act.¹

Homesteaders who have resided on, cultivated, and improved their lands for the time required by the homestead law and have reclaimed at least one-half of the irrigable area of their farm units as required by the Act, and have submitted proof which has been found satisfactory to the General Land Office, will be excused from further residence on their lands, and a notice will be issued to them reciting that the conditions of residence, cultivation, improvement, and reclamation have been complied with, and that final certificate and patent will issue upon payment of the charges imposed by the public notice issued in pursuance of Section 4 of the Reclamation Act. In such cases, upon payment of the charges by the entryman, or in his behalf, final certificate and patent will issue in due course. Homesteaders who have resided on, cultivated, and improved their lands for the time required by the homestead laws, and have submitted proof which has been found satisfactory thereunder by the General Land Office, but who are unable to furnish proof of reclamation because water has not been furnished to the farms or farm units established, will be excused from further residence on their lands, and will be given notice reciting that further residence is not required, but that final certificate and patent will not issue until proof of reclamation of one-half of the irrigable area of the entry as finally adjusted and payment of all charges imposed in pursuance of Section 4 of the Reclamation Act.²

§ 1276. Water rights—For lands in private and corporate ownership.—Section 5 of the Reclamation Act specifically provides for the sale of water rights from a Government reclamation project to owners of land other than those who have made entries of lands with the project, under the provisions of the Act itself. Therefore, lands which have been patented or which were entered before the reclamation withdrawal may obtain the benefit of the Reclamation Act, but water right applications can not be made for more than

¹ Regulations, 38 Land Dec. 635, Secs. 37, 38.

For water users' associations, under the Act, see Secs. 1281-1286.

² Regulations, 38 Land Dec. 635, Secs. 39-42; for forms of notices under above, see Secs. 41, 42.

160 acres by any one land owner, and such land owner must be an actual *bona fide* resident on such land or occupant thereof residing in the neighborhood.¹ A land owner may, however, be the purchaser of the use of water for more than one tract in the prescribed neighborhood at one time, provided that the aggregate area of all the tracts involved does not exceed the maximum limit established by the Secretary of the Interior nor the limit of 160 acres fixed by the Reclamation Act; and a land owner who has made application for the use of water for 160 acres and sold the same, together with the water right, can make other and successive applications for other irrigable lands owned or acquired by him.² Therefore, owners of lands acquired under the provisions of the Carey Act,³ or the Desert Land Act,⁴ may purchase such additional rights to the use of water from the Government, to be furnished from a National reclamation project, as may be necessary to fully develop, cultivate, and reclaim the irrigable portions of their lands, subject to all the conditions governing the right to the use of water under any particular project.⁵ The provision of Section 5 of the Reclamation Act, limiting the area for which the use of water may be sold, does not prevent the recognition of all vested rights for a larger area and protection of the same by allowing the continued flowing of the water covered by the right through the works constructed by the Government under appropriate regulations and charges.⁶

¹ Twenty miles in a direct line is the maximum limit of distance for which residence will be construed as being in the neighborhood of the land for which a water right application is made. 5th Annual Rept. Reclamation Service, p. 26.

² Regulations, 38 Land Dec. 637, Sec. 44.

The provisions of Section 5 of the Reclamation Act restricting the sale of a right to the use of water for land in private ownership to not more than for 160 acres will not prevent the recognition of a vested water right for a larger area and protection of the same by allowing the continued flowage of the water covered by the right

through the works constructed by the Government. Opinion Atty. Gen., 34 Land Dec. 351.

See, also, ruling of June 25, 1906, 5th Annual Rept. Reclamation Service, p. 26.

³ For the Carey Act, see Secs. 1312-1336.

⁴ For the Desert Land Act, see Secs. 1287-1311.

See, also, Sec. 1253, this chapter.

⁵ Opinion Atty. Gen., 35 Land Dec. 222.

For the use of water on desert lands, see Sec. 1253.

⁶ Regulations, 38 Land Dec. 637, Sec. 45; 40 Land Dec. 139.

For form of water right applications, see 39 Land Dec. 532.

Corporations are also qualified to acquire a water right for lands owned by them in pursuance of the Act, provided their home office is on or in the neighborhood of the land for which they seek water service. Further, the corporation must show its stockholders that as individuals they have not in the aggregate taken water rights that, with that claimed by the corporation, will amount to more than 160 acres or the maximum limit established by the Secretary of the Interior. This construction does not tend to defeat the evident intent of the Act to assure actual small holdings.⁷

The requirements as to reclamation imposed upon lands under homestead entries under the Act are also imposed upon lands in private ownership and land entered prior to withdrawal, namely, that the land owner will reclaim at least one-half of the total irrigable area of his land for agricultural purposes, and no right to the water will permanently attach until such reclamation has been shown.⁸

Whenever in case of foreclosure of a mortgage given to secure a loan on land in private ownership for which charges are payable for a water right under a reclamation project, the mortgagee buys in the land, no steps will be taken to cancel the water right application on account of failure to maintain residence upon or in the neighborhood of the land until the expiration of one year from the date of the foreclosure sale; provided, that all charges that may be due or that may accrue during such interval be paid, and also that within such period of one year a water right application for such land be filed by a qualified person who, upon submitting satisfactory evidence of transfer of title, shall be entitled to credit equal to all payments theretofore made on account of the water right charges for said land.⁹

§ 1277. Water rights—Applications for same.—Upon the issuance of the public notice authorized by the Secretary of the In-

For form of water right certificates, see 39 Land Dec. 197.

⁷ Williston Land Co., 37 Land Dec. 428; Regulations, 38 Land Dec. 637, Secs. 46, 47.

⁸ Regulations, 37 Land Dec. 468; 38 Land Dec. 638, Sec. 48.

The applicant for a water right on land in private ownership must state

accurately upon the proper form the nature of his interest in the land. If this interest is such that it will ripen into a perfect title, at or before the time when the last annual installment of the water right is due, the application should be received. Circular, 34 Land Dec. 544.

⁹ Instructions, 38 Land Dec. 480.

terior that the Government is ready to receive applications for water rights under a particular reclamation project in order for an entryman or private owner of lands to secure a water right, he must first file a formal application for the same on one of the forms furnished by the Land Department. These forms vary according to the conditions of the case, and depend upon the fact as to whether the applicant is a homesteader who has made an entry of land under the project; a homesteader who is an assignee of credits paid by a prior entryman of the same lands; a private owner of lands embraced within a project; a private owner of such lands who is an assignee of credits paid by a prior owner of the same lands; or whether he is an Indian allottee of land within a project. Blanks of these forms will be furnished by the registers and receivers of the local land offices, and they must be used in all applications for water rights in any of the reclamation projects.¹

When practicable, all applications for water rights should be submitted by the applicants to the project engineer of the United States Reclamation Service for his examination and approval before the applications are filed in the local land office, in which cases the project engineers will endorse their approval upon the application forms, if found correct, or point out defects and suggest corrections if any are required. Where it is not practicable to have water right applications examined and approved by the project engineer prior to the filing in the local land office, the applications must be

¹ Regulations, 38 Land Dec. 638, Secs. 50-54.

For form of water right applications, see 39 Land Dec. 532.

An applicant for a water right must be the owner of the land and actually reside thereon or in the neighborhood. Having these qualifications, he may, after having disposed of the previously acquired water right, make another application, and after that may be considered in the position of an original applicant. The land owner may be the purchaser of the right for use of water for separate tracts at the same time, provided that he can properly qualify, and that the tracts involved

do not exceed 160 acres in the aggregate. 9th Annual Rept. of the Reclamation Service, 1909-1910, p. 10.

A settler on unsurveyed land subsequently embraced in a withdrawal under the Reclamation Act may, upon survey of the land, make and complete entry for the full area allowed by law and appropriated by his settlement, notwithstanding such withdrawal previous to entry is free of the added conditions and limitations imposed by the Reclamation Act upon settlers subsequent to the withdrawal. William Boyle, 38 Land Dec. 603.

See, also, 9th Annual Rept. of the Reclamation Service, 1909-1910, p. 11.

executed in duplicate and filed in the local land office. Registers and receivers will then suspend action in such cases and forward to the project engineer one copy of each of such water right applications for examination and return by the engineer within fifteen days, approved by him, or with defects indicated and corrections suggested if not in form for approval. In the latter case the applicant must be promptly advised and allowed thirty days to make the necessary amendments, in default of which the application will be rejected. The details for the certificate for correctness are fully given in the regulations.² If the Secretary of the Interior has made a contract with a water users' association under the project, due notice thereof will be given to the registers and receivers, and applications for water rights will not be accepted in such cases unless the certificate at the end thereof has been duly executed by said association.

With reference to water right applications for land in private ownership, included in entries not subject to the Reclamation Act, where an application is presented covering only a part of the irrigable land of the owner, the register and receiver will accept it, provided it bears the usual certificate of the project engineer and the local water users' association, where such association has been formed under the project. In case of sale by a private owner of a part of his irrigable land covered by a subsisting water right application, the vendor, in order to have his water right charges adjusted to the reduced acreage retained by him, will be required to present the following evidence: A certificate of the proper officer having charge of the county records showing a record of a subscription for stock in the local water users' association covering the land in question, and that the land has been duly conveyed by the subscriber at a time subsequent to the recording of the stock subscription; also the certificate of the local water users' association, if one has been organized on the project, under the corporate seal, to the effect that proof has been presented to the association of the transfer of the land to the person named, and that the appropriate transfer has been made on its books of the shares of stock appurtenant to said land. In case of a relinquishment by an entryman whose entry is not subject to the Reclamation Act, of a part of the land included in his entry, appropriate notation will be made on the water

² Regulations, 38 Land Dec. 639, Sec. 55.

right application, showing such relinquishment, and his charges will be reduced accordingly. Where this is the case, and the next person who enters the land so relinquished claims credit for installments paid by the first entryman, he must at the time of such entry file with his application to enter evidence showing that he is entitled to such credit, also a water right application covering the land.³

In order that there may be no unnecessary delay in the obtaining of water by entrymen and land owners in reclamation projects, after they have filed water right applications and made the preliminary payment, the register and receiver must issue in triplicate certificates of water right applications accepted, furnishing one copy to the applicant and mailing, on the day issued, one copy to the engineer in charge of the reclamation project, and at the end of each month they are to prepare a schedule of certificates issued upon water right applications accepted during the month, and an abstract of collections of charges made during the month, forwarding the original in triplicate to the General Land Office and furnishing the Director of the Reclamation Service and the project engineer with copies of each monthly schedule of certificates and abstract of collections made.⁴

Persons holding contracts to purchase land from the State on deferred payments, no conveyance of title to be made to the purchasers until full payment is made, are entitled, if not in default and their contracts are in good standing, to subscribe for and purchase water rights under the Reclamation Act for irrigation of such lands subject to the provisions and limitations of that Act.⁵

§ 1278. Water rights—Charges for same—Cancellation of water right.—Section 4 of the Reclamation Act provides that the charges for water rights shall be determined with a view of returning to the reclamation fund the estimated costs of construction of the project, and shall be apportioned equitably.¹ Therefore, the Secretary of the Interior will, at the proper time, fix and announce the area of lands which may be embraced in any entry theretofore made under the Act; the amount of water to be furnished per an-

³ Regulations, 38 Land Dec. 640, Sec. 56.

⁵ Instructions of Sept. 11, 1911, 40 Land Dec. 270.

⁴ Regulations, 38 Land Dec. 641, Secs. 57-59.

¹ For text of Act, see Sec. 1244.

num per acre, and the charges which shall be made per acre for the lands embraced in such entries and lands in private ownership, for the estimated cost of building the works and for operation and maintenance, and prescribe the number and amount and the date of payment of the annual installments thereof. Section 4 of the Act provides that the number of annual installments shall not exceed ten.²

There is nothing in the Act to prohibit a graduated scale of payments, and in all cases where it is advisable to do so it will be adopted.³

It was held by the Federal Court that the Act leaves the estimation and apportionment of charges against the land entirely to the Secretary of the Interior, that he may divide the charges into two parts, one for construction of works and one for their maintenance. It was held, however, that it was not within the power of the Secretary to fix charges which are unreasonable.⁴

The charges so assessed against lands entered under the Act attach to the lands themselves while so embraced in entries, and as annual installments thereof accrue they become fixed charges on the land in the nature of a lien. If any entry is canceled by reason of relinquishment, all annual installments due and unpaid on the relinquished entry at the date of its cancellation must be paid at the time of filing application to enter by any person who thereafter enters the land.⁵

² For full text of section, see Sec. 1244.

For the regulations for the collection of water right charges, see 37 Land Dec. 11, 12, 13, 16, as amended by Regulations, April 8, 1911, 40 Land Dec. 15.

³ Instructions, 34 Land Dec. 78.

Registers and receivers are not entitled to fees in connection with the filing of applications for water rights, but each are entitled to a commission of one per cent on all moneys received from water users at the office for which they are appointed to the extent of the maximum salary fixed by law. Opinion Atty. Gen., 35 Land Dec. 357.

⁴ United States v. Cantrall, 176 Fed. Rep. 949.

⁵ Regulations, 38 Land Dec. 642, Secs. 60, 61; Instructions, 36 Land Dec. 256; 35 Land Dec. 29.

No power exists in the Secretary of the Interior to formally grant specific extensions of time for payment of overdue water right charges. 8th Annual Rept. Reclamation Service, p. 4.

See, also, Walter L. Minor, 39 Land Dec. 351.

Where a payment is tendered for a part only of either an annual installment of water right building charges, or an annual operation and maintenance charge, receivers are instructed

The Reclamation Act does not make it a mandatory duty of the Secretary of the Interior to assess operation and maintenance charges against unentered land within a reclamation project, but he has authority to do so, and he has also sole authority to determine the time when such charges may be so assessed.⁶

Applicants for water rights are required to pay for water for the entire irrigable area of their entries, as shown on the plat of which the construction charges are apportioned; and where mistakes in the plat are alleged as to the irrigable area of the entry, application for correction thereof should be made to the local office of the Reclamation Service. No deduction from the irrigable area subject to the water charges will be made on account of easements for a right of way or irrigating ditches.⁷ A person who has entered lands under the Reclamation Act, and against whose entry there is no pending charge of non-compliance with the law or regulations, or whose entry is not subject to cancellation under the Act, may relinquish his entry and assign to a prospective entryman any credit he may have for payments already made on account of said entry, and the party taking such assignment may, upon making proper entry of the land and proving the good faith of the prior entryman to the satisfaction of the Commissioner of the General Land Office, receive full credits for all payments thus assigned to him, but must otherwise comply in every respect with the homestead law and the Reclamation Act.

Again, under the more recent amendatory Act of June 23, 1910,⁸ it is provided that from and after the filing with the Commissioner of the General Land Office of proof of residence, improvement, and cultivation for five years, persons who have made entries under the Act, may assign such entries or any part thereof, to other persons,

to accept the same if the insufficient tender is, in the opinion of the receiver, caused by the misunderstanding as to the amount due, and approximates the same, and the claimant is then allowed thirty days from notice to pay the balance. Circular, May 31, 1910, 40 Land Dec. 317.

⁶ 9th Annual Rept. of the Reclamation Service, 1909-1910, p. 11.

Water can not be furnished from a reclamation project to the Idaho Experiment Farm free of charge. 9th Annual Rept. of the Reclamation Service, 1909-1910, p. 11.

⁷ Williston Land Co., 39 Land Dec. 2.

⁸ 36 Stat. L. 592; for text of Act, see Sec. 1254.

and such assignees, and the charges against the land for the water right may be apportioned.

All charges due for operation and maintenance of the irrigation system for all the irrigable land included in any water right application must be paid on or before April 1 of each year, except where a different date is specified in the orders relating to a particular project, and in default of such payment no water will be furnished for the irrigation of such lands.⁹

The provisions of Section 5 of the Reclamation Act relative to the cancellation of entries for failure to make any two payments when due states the rule to govern all who receive water under any project, and accordingly a failure on the part of an applicant to make any two payments when due shall render his water-right application subject to cancellation with a forfeiture of all rights under the Reclamation Act as well as of any moneys already paid to or for the use of the United States upon any water right sought to be acquired under the Act. Therefore, "in the case of one who has made a homestead entry subject to the terms of the Reclamation Act, the entry shall be subject to cancellation in case of such delinquency in payment."¹⁰

It is also provided by the regulations of the Secretary of the Interior that: "If any entry subject to the Reclamation Act of June 17, 1902,¹¹ is canceled or relinquished, the payment for water-right charges already made and not assigned in writing to a prospective or succeeding entryman under the provisions of paragraph 62 of the circular of May 31, 1910, are forfeited. All water-right charges which remain unpaid are canceled by the relinquishment or cancellation of the entry except as provided by the specific provisions of public notices applicable to particular projects. Any person who thereafter enters the same land must, in the absence of an assignment in writing or public notice to the contrary, pay the water-right charges as if the land had never been previously en-

⁹ Regulations, 38 Land Dec. 642, Secs. 62, 63.

See Edwin P. Osgood, 38 Land Dec. 374, where payment was deferred where filing was too late in the year to raise a crop.

¹⁰ Regulations, 37 Land Dec. 468; *Id.*, 38 Land Dec. 638, Sec. 49.

For the specific directions and regulations as to the collection of reclamation water right charges by receivers of public moneys, see Regulations, 38 Land Dec. 643, Secs. 64-69; Fleming McLean, 39 Land Dec. 580.

¹¹ 32 Stat. L. 388.

tered. No credit will be allowed in such cases for the payment made by the prior entryman, and the new entryman must pay at the time of filing his homestead application and water-right application, such charges for building and operation and maintenance as are required by the public notice in force at the time on the particular project." ¹²

§ 1279. Water rights—As appurtenances.—The express purpose of the Reclamation Act, as first stated by Secretary Garfield,¹ is to secure the reclamation of arid or semi-arid lands and to render them productive. Section 8 of the Act ² declares that the right to the use of water acquired under the Act shall be appurtenant to the land irrigated and that "beneficial use shall be the basis, the measure, and the limit of the right." There can be no beneficial use of water for irrigation until it is actually applied to the reclamation of the land. The final and only conclusive test of reclamation is production. This does not necessarily mean the maturing of a crop, but does mean the securing to actual growth of a crop. This rule as to appurtenances is applied by the Secretary of the Interior to lands which are owned by individuals and corporations and for the reclamation of which water rights are sold by the Government.

We have discussed in a previous chapter the question of the attempt upon the part of a State to make a water right an inseparable appurtenance to a particular tract of land. We there held that it could not be done,³ where an individual was the absolute owner of the right; that the water right was a species of property as much as was the land to which it was applied; that the owner of the right could sell and dispose of the same to others, or could transfer its use to other lands. Therefore, we are of the same opinion as to the water rights acquired under the Reclamation Act, where they have been fully paid for by the owner thereof, and where all of the conditions necessary for the acquisition of the right imposed by the Government have been fully complied with. When this is the case, the owner thereof has the same right under the law to sell or dispose of his water right or to transfer its use to other lands as he has the

¹² Circular, Feb. 2, 1912, 40 Land Dec. 398.

¹ Regulations, 37 Land Dec. 468.

See, also, Regulations, 38 Land Dec. 638, Sec. 48.

² For full text, see Sec. 1244.

³ See Secs. 1015, 1016.

right to sell or dispose of any other property absolutely owned by him. Where, however, any of the conditions imposed by the Government remain unfulfilled, the Government has the undoubted right to insist that the water right remain an inseparable appurtenance to the particular tract of land for the irrigation of which it was originally acquired.

Again, take the case, as it often happens, where, by the irrigation of lands above, the lands of an entryman are supplied with seepage water, even to the point that it becomes a question of drainage rather than of irrigation, and this entryman has fully paid for his water right which, owing to the above conditions, he has no further use for. Has he not some property right which he may sell to another who is in need of the water, and for which he has fully paid the Government?

§ 1280. Appeals from the action of field officers in the Reclamation Service.—Appeals from the action of project engineers lie in the first instance to the Director of the Reclamation Service with right of further appeal to the Secretary of the Interior. "The Secretary of the Interior is the supervising head of the Reclamation Service, as he is of the Land Department and the Indian Office. Persons dealing with the Reclamation Service have the right to ask his ultimate decision, as do persons dealing with the Indian Office, and the General Land Office. The project engineer is simply the local representative of the Secretary of the Interior in deciding such matter."¹

"In order to provide for the orderly review by the Secretary of errors that may occur in the establishment of farm units or in passing upon water right applications the following procedure will be followed:

"1. All cases of error should be promptly called to the attention of the project engineer by the party affected.

"2. If the project engineer decides not to take the steps necessary to grant relief, the matter may be brought to the attention of the Secretary of the Interior, as hereinafter provided.

"3. The party aggrieved should promptly file with the project engineer a written statement addressed to the Director setting out clearly and definitely the grounds of complaint.

¹ Williston Land Co., 39 Land Dec. 2.

"4. The project engineer will note thereon the date of its receipt in his office and promptly forward the same with report and recommendation to the Director through the Supervising Engineer, who will attach his recommendation.

"5. Upon receipt of the papers in the Director's office, the matter will be carefully reviewed and if the action of the project engineer is concurred in, the claimant will be allowed sixty days in which to file with the Director an appeal to the Secretary of the Interior. In case of appeal, the matter will be submitted to the Secretary for consideration and appropriate action."²

§ 1281. *Water users' associations—Objects.*—Section 6 of the Reclamation Act provides that when the payments required by the Act are made for the major portion of the lands irrigated from the waters from any of the reclamation works, "then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior."¹

Therefore, under the authority of the Act, as above set forth, corporations known as "Water Users' Associations" are organized by the actual or contemplated water users of the water furnished from each of these reclamation projects. The objects of the organization of these corporations are twofold: First, to have some responsible organization, acceptable to the Secretary of the Interior, to which the management and operation of such irrigation works may, as contemplated by the Act, be eventually turned; and, second, owing to the fact that in practically all of these Government projects, there are several hundreds or even thousands of land owners, who are, or are contemplated water users, and who claim their rights by private ownership, or from applications under the provisions of the Act itself, it was found essential at an early stage of the operations under the Act to create one organization, so that the Government instead of dealing with hundreds of individuals separately could transact the business with one organization or with a small

² Regulations of June 27, 1910, 39 Land Dec. 51.

See, also, Anna M. Wright, 40 Land Dec. 116.

¹ For full text of Act, see Sec. 1244.

right to sell or dispose of any other property absolutely owned by him. Where, however, any of the conditions imposed by the Government remain unfulfilled, the Government has the undoubted right to insist that the water right remain an inseparable appurtenance to the particular tract of land for the irrigation of which it was originally acquired.

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² Regulations of June 27, 1910, 39 Land Dec. 51.

See, also, Anna M. Wright, 40 Land Dec. 116.

¹ For full text of Act, see Sec. 1244.

committee of men representing all of the water users under any particular project.²

§ 1282. **Water users' associations—Organization.**—The organization of these water users' associations, in order to secure the benefits of the Reclamation Act and to conform to its provisions, must primarily be in such form as will be acceptable to the Secretary of the Interior. The first step toward the formation of these associations was made by the water users under the Salt River project in Arizona, which resulted, after a discussion lasting nearly one year, in the organization of what is known as the Salt River Valley Water Users' Association, and the principles embodied in which organization have formed the basis of many similar organizations under other reclamation projects elsewhere. The essential features of these articles of incorporation are that they provide means for putting into effect the provisions of the Reclamation Act in regard to the ownership of the reclaimed areas in small tracts and for guaranteeing repayment to the United States of the cost of the reclamation of the land by the Government. The property of the water users is, in effect, mortgaged to the Government to secure the repayment of the estimated cost of the construction of the works; and the requirements of the law regarding the cultivation of the land in small tracts, the appurtenance of the water to the separate tracts, and other details are carefully guarded. The articles of incorporation represent a series of adjustments, and compromise and harmonize many complications of water right claims and of land ownership. The articles are set out in full in the Second Annual Report of the Reclamation Service.¹ This organization was satisfactory to the Secretary of the Interior as to that particular project, and while the main features of the same may be adopted in other locations, these must be made to conform to local conditions and to the laws of the respective States regarding corporations. According to the plan adopted by the Reclamation Service, the articles of incorporation themselves must follow the usual forms of the various States, and

² See Third Annual Rept. of the Reclamation Service, 1903-1904, p. 54; Water-Supply Paper No. 93; Second Annual Rept. of the Reclamation Service, pp. 76-87.

¹ See pages 76-87.
See, also, Third Annual Rept., pp. 54-56; Water-Supply Paper No. 93, pp. 130-158.

contain only the essential features required by their law to be specified in such articles. The by-laws, which constitute the second part of the organization, must prescribe the internal administration and the relations of the stockholders to each other and to the Government in the matter of water rights and the other features required by the Secretary of the Interior to comply with the provisions of the Reclamation Act.

The United States is not a party to a contract between water users' associations and the owners of lands lying within the irrigable areas of a reclamation project; its only interest in the agreement or benefit it may derive therefrom is in the subdivision of large holdings in tracts not exceeding 160 acres and the transfer of the excessive lands to individuals who will reside thereon and bring them within the provisions of the Reclamation Act, and in the mutual agreement to be secured thereby between water users throughout the irrigable area upon the use and distribution of the water and the subordination of whatever rights they may have theretofore acquired to the provisions of the Reclamation Act.²

While it is not our intent to devote much space to the subject of forms, for the reason that they are always subject to change and can always be secured from the executive officers in charge of the particular phase of the subject, these articles of incorporation contain so many new features which are of such vital importance to the water users and property owners under these reclamation projects, it is essential that we embody these forms,³ together with the form of contract between the United States Government and these associations.⁴ And while these general forms have been approved by the Secretary of the Interior, it must be borne in mind that the articles, by-laws, and contract must conform to local conditions, especially as relating to the laws of the respective States and be always subject to the approval of the Secretary of the Interior, as provided for in Section 6 of the Reclamation Act.

§ 1283. Water users' associations—Articles of incorporation.—The following form of articles of incorporation for water users' associations has been adopted as acceptable to the Secretary of the Interior:

² Instructions, 33 Land Dec. 202.

⁴ See Sec. 1385.

³ See Secs. 1283-1285.

146—Kin. on Irr.

**ARTICLES OF INCORPORATION OF THE ——— WATER
USERS' ASSOCIATION.**

Know all men by these articles of incorporation:

That we, the undersigned, have associated ourselves together under the laws of the ——— of ——— as a body corporate.

ARTICLE I.

The name of the corporation shall be and is ——— Water Users' Association.

ARTICLE II.

The names of the incorporators are: ———, but others may become members of this association by subscribing for the stock of this association or by the transfer of stock to them in the regular course of the administration of the affairs of the association.

ARTICLE III.

The principal place of transacting the business of the association shall be at ———, in the county of ———, in the ——— of ———.

ARTICLE IV.

The purposes for which this association is organized and the general nature of the business to be transacted are:

To acquire, furnish, provide for, and distribute to the lands of the shareholders of the association, an adequate supply of water for the irrigation thereof; to divert, store, develop, pump, carry, and distribute water for irrigation and all other beneficial uses, deriving the same from all available sources of supply; to construct, purchase, lease, condemn, or acquire in any manner whatever, and to own, use, sell, transfer, convey, control, maintain, and operate any irrigation works, structures, telephone systems, electric, or other power plants and transmission lines, and property both real and personal of every kind whatsoever, necessary or appropriate for the accomplishment of any of the purposes of this organization; to generate, create, transmit, use, and sell power and electrical energy; to act as trustee, agent, or attorney for the sale, disposal, and transfer of lands, in order to facilitate the disposal of such lands, or any part thereof, to persons qualified to perfect rights to the use of water under the laws of the United States applicable thereto, and the

rules and regulations established thereunder; to incur indebtedness, floating or bonded, and to secure the same by mortgage, deed of trust, pledge, or otherwise; to acquire, hold, and dispose of stock in other corporations, domestic or foreign; to have and exercise all the powers and to perform any and all acts necessary to or appropriate for the accomplishment of one or more of the said purposes or anything incident thereto, or which shall at any time appear conducive or expedient for the protection or benefit of the association or its shareholders, and to that end enter into any contract, agreement, or other arrangement with the proper representative of the United States, or any individual, association of individuals, or corporation, for the accomplishment of any of the aforesaid purposes, by means of the construction, acquisition, or control of appropriate works or structures, or in any other manner whatsoever; to enter into any agreement with the proper representatives of the United States with reference to the collection and payment of any and all charges made under the Federal statutes, for the works providing water for the lands of its shareholders, and to comply with the provisions of any Federal statutes applicable to the work done by the United States in connection with such system of water supply, and any rules and regulations established thereunder.

ARTICLE V.

The capital stock of the association shall be \$——— divided into ——— shares, of the par value of \$——— each, and said stock shall be assessable.

ARTICLE VI.

This corporation shall endure for the term of ——— years.

ARTICLE VII.

The exercise of the corporate powers of this association and the management of its affairs shall be vested in seven directors, elected to serve one year; and a president and vice president, each elected to serve two years. The president and vice president shall be ex-officio members of the board of directors. The board shall annually elect a secretary and treasurer.

ARTICLE VIII.

The individual property of the shareholders shall be exempt from liability for the corporate indebtedness of this association, except as provided herein or in the by-laws.

ARTICLE IX.

The corporate indebtedness shall not exceed two-thirds of the amount of the capital stock.

ARTICLE X.

The amount of capital stock of this corporation that has been actually subscribed, and the number of shares subscribed by each subscriber, and the par value thereof, are as follows:

<i>Name of Subscribers.</i>	<i>Number of shares.</i>	<i>Par value.</i>
.....

In addition to the above the articles must contain such additional provisions as are required by the laws of the particular State under which the corporation is organized. They must be also executed, and filed in accordance with the provisions of such laws.¹

It is held in Arizona that a water users' association may condemn land for the use of the association.²

§ 1284. **Water users' associations — By-laws.** — The principal features of the organization, and those which are necessary in order to conform to the requirements of the Reclamation Act, must be contained in Article I of the by-laws of the association. The form of by-laws acceptable to the Secretary of the Interior is as follows:

BY-LAWS OF THE _____ WATER USERS' ASSOCIATION
(Adopted _____)

ARTICLE I.

Section 1. The territory within which the lands to be irrigated are situated, to be known as the _____ irrigation district, includes all such lands within _____ Counties, State of _____,

¹ See Umatilla Water Users' Assn. v. Irvin, 56 Ore. 414, 108 Pac. Rep. 1016.

² Lee v. Salt River Valley Water Users' Assn., 268 Ariz. 11, 90 Pac. Rep. 1130.

as may be included in the reclamation project of the United States known as the ——— project, as finally approved by the Secretary of the Interior.

Sec. 2. Only those who are owners of lands, or occupants of public lands having initiated a right to acquire the same, within the area described in Section 1, or within such extensions thereof as may be duly made, shall be qualified to own shares of this association. One share and no more shall be allotted for each acre of land, or fraction thereof.

Sec. 3. Each share and the holder thereof shall be subject to the conditions of the form of stock subscription and contract herein prescribed, and shall execute such form for the stock subscribed by him, and no subscriptions for stock shall be taken or stock issued unless the applicant has subscribed to said form of stock subscription and contract, which shall be signed, executed, and acknowledged by the applicant in the same manner as required for the execution and acknowledgment of deeds of conveyance of real property. Said form of stock subscription and contract shall be as follows:

STOCK SUBSCRIPTION AND CONTRACT.

Know all men by these presents, That I ———, do hereby subscribe for and agree to take ——— shares of the capital stock of the ——— Water Users' Association, a corporation duly organized under the laws of the State (or Territory) of ———, and in conformity with the articles of incorporation and by-laws of said association and in consideration of the benefits to be received therefrom, I hereby covenant and agree as follows:

1. The said shares of stock and all rights and interests represented thereby or existing or accruing by reason thereof, or incident thereto, are to be inseparably appurtenant to the following described real estate, that is is say: ———.

2. The undersigned hereby agrees that the right to any water heretofore appropriated by him, or his predecessors in interest, for the irrigation of the lands above described or customarily used thereon, shall become appurtenant to such lands and be and remain incident to the ownership of the above shares appurtenant to such lands. There shall be further incident to the ownership of such shares the right to have such water delivered to the owner thereof by the association for the irrigation of said lands as the association

shall from time to time acquire or control means for that purpose: *Provided*, That the whole amount of water actually delivered to such lands from all sources shall not exceed the amount necessary for the proper cultivation thereof.

3. It is agreed and understood that the records of the association, as well as the certificate or other evidence of ownership of the shares of stock in the association, when issued, shall contain a description of the lands to be irrigated, as above described, and to which the aforesaid rights and shares shall be perpetually appurtenant; and all rights, whatever their source or whatever their manner of acquisition, to the use of water for irrigation of said lands, shall hereafter be forever inseparably appurtenant thereto, together with the said shares of stock and all rights and interests represented thereby or existing or accruing by reason thereof, unless such rights shall become forfeited under the provisions of this contract, or of the by-laws of this association, or by operation of law, or by the voluntary abandonment thereof by deed, grant, or other instrument, or by non-user for the term prescribed by law; but no such abandonment shall be for the benefit of any person designated by the undersigned or his successor, directly or indirectly, or to his use, nor confer any right whatsoever upon the holder of any grant, release, waiver, or declaration of abandonment of any kind; *Provided, however*, That if for any reason it should at any time become impracticable to beneficially use water for the irrigation of the lands to which the right to the use of the water is appurtenant, the said right may be severed from the said land and simultaneously transferred and attached to other lands to which shares of stock in this association are or shall thereby be made appurtenant, if a request for leave to transfer, showing the necessity therefor, shall have first been allowed by a two-thirds vote of the board of directors at a regular meeting and approved by the Secretary of the Interior.

4. Every transfer of the title to said lands to which said rights and shares are appurtenant, whether by grant or operation of law (except where the land may be subjected by grant, or involuntarily under any law, to an easement, the exercise of which does not interfere with the cultivation of the soil by the servient owner) shall operate, whether it be so expressed therein or not, as a transfer to the grantee or successor in title of all rights to the use of water for the irrigation of said lands, also all rights arising from or inci-

dent to the ownership of such shares, as well as the shares themselves, and upon presentation to this association of proof of any such transfer of land the proper officer shall transfer such shares of stock upon its books to the successor in title to said lands.

5. Any transfer or attempted transfer of any of the above shares of this association made or suffered by the owner thereof, unless simultaneously a transfer of the land to which they are appurtenant is made or suffered to or in favor of the same party, shall be of no force or effect for any purpose, and shall confer no rights of any kind whatsoever on the person or persons to whom such transfer may have been attempted to be made.

6. The undersigned or his transferee agrees to make prompt application to the proper authorities of the United States for a water right for the land represented by his shares, and duly proceed to the perfection thereof, in full compliance with the law applicable thereto and the rules and regulations established in pursuance thereof, as soon as official announcement shall be made that the water for such lands is available from the works constructed, owned, or controlled by the United States.

7. The undersigned shall, as prescribed in this contract, make application to the proper representative of the United States for a water right, at a rate not to exceed one acre for each share. Upon proper proof to the association that such application has been accepted and that he has complied with all the requirements in relation thereto, such subscriber shall be deemed to have paid on his stock the amount then paid to or for the use of the United States for such rights.

8. Calls and assessments shall be made and levied from time to time for the collection of the amounts due on the shares of stock of the association, in pursuance of the requirements of the United States in connection with such water-right applications; and when all payments required for such rights shall have been made, and when the proper evidence of the perfection of such water right has been issued, his stock shall be deemed and held to have been fully paid up, and until further paid he shall be liable therefor; and the payments due thereon in pursuance of assessments and calls duly made by the association shall be a lien upon such lands and shares, and the said lien shall be enforced by the association by foreclosure and sale of said stock and lands, or so much thereof as may be

necessary, in the manner provided by law for the foreclosure of mortgages, and the purchaser at such sale shall be entitled to the benefit of all payments on the water right appurtenant to the land purchased, and shall take said lands subject to the obligations and conditions herein provided; but nothing herein shall be construed as permitting any redemption of such stock and lands except as provided in the by-laws.

9. Assessments may be made from time to time as required for the operation, maintenance, repair, renewal, replacement, improvement, enlargement, or extension of the works owned, controlled, or to be maintained by the association, and for the construction, acquisition, or control of any works, property, or rights required in connection with the business of the association and for the fulfillment of any obligation undertaken by it, or for the carrying out of any of its purposes.

10. It is understood and agreed that expenditures for purposes that are of benefit to a part only of the shareholders may be especially assessed against such shareholders in proportion to such benefits.

11. Assessments shall become due from time to time, as they are made and levied, a lien on said lands and shares of stock of the undersigned and his transferee, and all rights and interests represented by said shares, and until they are paid or otherwise discharged, shall be and remain a lien thereon. The manner of enforcing said lien shall be by foreclosure and sale of the stock and lands as herein provided for payments on capital stock.

12. It is expressly understood that business may be begun and that the subscriber shall be liable for any assessments or calls made or levied after —— (insert number of shares) shares of the capital stock shall have been subscribed.

13. The undersigned furthermore grant to the association or to the United States, as the case may be, over the lands described herein, as may be required in connection with the works constructed or controlled by the association or by the United States for the use and benefit of the stockholders, necessary right of way for the construction, operation, and maintenance of canals, tunnels, and other water conduits, telephone and electric transmission lines, drains, dikes, and other works for irrigation, drainage, or reclamation.

14. It is further understood that no stockholder shall be entitled

to more than 160 votes, and the benefit of any laws to the contrary is hereby expressly waived.

15. The undersigned furthermore agree to be bound by all the terms, conditions, limitations, and provisions contained in the articles of incorporation and by-laws of said _____ Water Users' Association, including all amendments thereto now existing or which may hereafter be duly adopted.

IN WITNESS WHEREOF, we have hereunto set our hands and seals, this _____ day of _____, 191—.

(Signature of Wife.)

Signed in the presence of

Witnesses.

State of _____ }
County of _____ } ss.

(The acknowledgment should be made in the form prescribed by the statute of the State or Territory where the land is situated, and must be sufficient to release any homestead exemptions, dower, or other rights.)

The above subscription and contract was accepted and approved by the _____ Water Users' Association at a meeting of the board of directors held on the _____ day of _____, 191—.

_____ WATER USERS' ASSOCIATION.

By _____, President.

Attest:

Secretary.

And such stock subscription and contract shall become binding upon the association only when approved and executed by the association.

Sec. 4. Any shares of stock which may be forfeited under the provisions of the stock subscription and contract, as set forth in Section 3 of Article I of the by-laws, shall at once be canceled and shall not, under any circumstances, be renewed, revived, or reissued. Other stock in lieu thereof up to the limit of the total

number of shares authorized by the articles of incorporation may be subscribed for and issued, subject to all the conditions of these by-laws and the articles of incorporation and to the approval of the Secretary of the Interior.

Sec. 5. The ownership of each share of stock of this association shall carry as incident thereto a right to have water delivered to such shareholder by the association for the irrigation of the lands to which such share is appurtenant.

Sec. 6. The amount of water to be delivered to such owner during any irrigation season shall be that proportionate part of all the water available for distribution by the association during that season as the number of shares owned by him shall bear to the whole number of valid and subsisting shares then outstanding, such water to be delivered to and upon said lands at such times during that season as may be needed for the proper irrigation thereof.

Sec. 7. The records of the association, and each and every certificate or other evidence of ownership of the shares of stock in the association, when issued, shall contain a description of the lands to be irrigated, and to which the aforesaid rights and shares shall be perpetually appurtenant; and all rights to the use of water for the irrigation of said lands, whatever their source, or whatever their manner of acquisition, shall be forever inseparably appurtenant thereto, together with the said shares of stock, and all rights and interests represented thereby or existing or accruing by reason thereof, unless such rights shall become forfeited under the provisions of these by-laws, or by operation of law, or by the voluntary abandonment thereof by deed, grant, or other instrument, or by non-user for the term prescribed by law; but no such abandonment shall be for the benefit of any person designated by such shareholder, directly or indirectly, or to his use, nor confer any right whatsoever upon the holder of any grant, release, waiver, or declaration of abandonment of any kind: *Provided, however,* That if for any reason it should at any time become impracticable to beneficially use water for the irrigation of the land to which the right to the use of the water is appurtenant, the said right may be severed from said land and simultaneously transferred and attached to other lands to which shares of stock in this association are or shall thereby be made appurtenant, if a request for leave to transfer, showing the necessity therefor, shall have first been allowed and approved by

the Secretary of the Interior. All the provisions and agreements of this section shall be set forth in the aforesaid certificate or other evidence of ownership of shares of stock in the association, together with any other provisions and agreements made necessary by the articles of incorporation, or by-laws, and such certificate or other instrument shall be signed, executed, and acknowledged by the president and secretary of the association, and the board of directors shall pass by-laws prescribing the form of such certificate or other instrument not inconsistent with the articles of incorporation or these by-laws.

Sec. 8. If it should be determined by the United States that the amount of water available from the entire irrigation system as owned or controlled by it and by the association shall be insufficient to properly irrigate one acre of land for each share of the capital stock, then no shares in excess thereof shall be issued, and the number of shares shall be so reduced, by appropriate amendment of the articles of incorporation as not to exceed the number of acres determined by the United States as irrigable from the entire available supply of water.

Sec. 9. If, when such determination is made, the number of shares subscribed shall be in excess of the number of acres so determined, an allotment of shares shall be made to the subscribers equal to the number of acres irrigable, giving preference to cultivated land. The surplus shares so subscribed shall thereupon be canceled, and shall not be reissued. By-laws shall be adopted to govern such allotment.

Sec. 10. If the number of shares of irrigable land or the cost of the works, or both, as determined by the United States, shall exceed the number of shares of the capital stock authorized, appropriate amendment of the articles of incorporation as to the number of shares, the par value thereof, and the capital stock shall be made in compliance with the laws applicable thereto.

Sec. 11. Revenues necessary for the accomplishment of the purposes of this association shall be raised by call or assessment, from time to time as required, upon and against the shareholders.

Sec. 12. The board of directors shall have power to make and enforce necessary by-laws for fixing and enforcing the lien on the

lands of the shareholders, and for making, levying, collecting, and enforcing of all assessments.¹

Sec. 13. Nothing in the articles of incorporation and by-laws or in the fact of becoming a member of this association shall be construed as affecting, or intending to affect, or in any way interfering with the vested rights of any person to the prior use or delivery of any waters.

Sec. 14. The articles of incorporation or by-laws shall not be so amended as to in anywise conflict with any Federal statutes or the rules and regulations established thereunder for the administration of water from any reservoir or other works acquired, constructed, or controlled by the United States, and which may be used for supplying water to the lands of the shareholders of this association.

Sec. 15. No provision of any by-law embraced in Article I of these by-laws shall be amended or modified except with the approval of the Secretary of the Interior.

It will be noticed that Article I of the by-laws as above set forth has to deal with the relations of the water users' association with the Federal Government, and that no provisions thereof can be amended or modified except with the approval of the Secretary of the Interior. The remainder of the by-laws deal principally with the government of the corporations and are similar to the by-laws of other corporations. These by-laws must conform to the statutes of the State where the corporation is organized, and must not conflict with any Federal statute or the rules and regulations established thereunder for the administration of water or water rights by the Reclamation Service of the Government in relation to these projects. In fact, the main object for the organization of these water users' associations is to aid and not to hinder or interfere with the general scheme of the Federal Government in the operation of these reclamation projects.

¹ Where a water users' association owning lands within a National reclamation project had agreed to collect an assessment levied by the Secretary of the Interior, and the corporation's by-laws also provided for special assessments on property especially benefited, it was held by the Oregon Court that the corporation had power to levy

an assessment on its stockholders on property within the reclamation project to meet the assessment levied by the Secretary of the Interior and payable one year before the assessment levied by the Secretary would become delinquent. *Umatilla Water Users' Assn. v. Irvin*, 56 Ore. 414, 108 Pac. Rep. 1016.

§ 1285. **Water users' associations—Contract with the Government.**—The organization of a water users' association having been completed in the form approved by the Secretary of the Interior, the following form of contract between the Federal Government and the association has also received the approval of the Secretary of the Interior:

**CONTRACT BETWEEN ASSOCIATIONS OF WATER USERS
AND THE SECRETARY OF THE INTERIOR.**

These articles of agreement, made and entered into this _____ day of _____, 19____, by and between the United States of America, acting on its behalf by _____, Secretary of the Interior, party of the first part, and the _____ Water Users' Association, a corporation duly organized and existing under the laws of the _____ of _____, party of the second part, their successors and assigns,

WITNESSETH: That whereas the _____ Water Users' Association is a corporation organized and existing under the laws of the _____ of _____, for the purposes mentioned in its articles of incorporation and by-laws, copies of which are appended to this agreement, and are, for every purpose of the interpretation, construction, and consideration of this agreement and of the rights of the parties thereunder, or to be deemed, held, read, and considered as if fully written out or printed herein, and deemed a part hereof; and,

WHEREAS, the lands embraced within the area proposed to be irrigated as described in said articles of incorporation or by-laws are naturally desert and arid and incapable of proper cultivation without irrigation, and will to a greater or less extent remain unclaimed, unfit for habitation, and uncultivated, in which condition they, or a greater part thereof now are, unless the waters of the _____ River in _____ and _____ tributaries be impounded and the flow thereof regulated and controlled; and,

WHEREAS, the Secretary of the Interior contemplates the construction of certain irrigation works under the provisions of an Act of Congress, entitled "An Act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid

lands," approved June 17, 1902, for the irrigation and reclamation of the lands described in the said articles or by-laws; and,

WHEREAS, the incorporators and shareholders of said _____ Water Users' Association are, and under the provisions of its articles of incorporation and by-laws must be, owners and occupants of lands in said area, and in some cases are appropriators of water for the irrigation thereof, and in addition thereto such incorporators and shareholders and their successors or assigns must initiate rights to the use of water from the said proposed irrigation works, to be constructed by the Secretary of the Interior as soon as such rights may be initiated, and thereafter complete the acquisition thereof in the manner and upon the terms and conditions to be prescribed therefor by the Secretary of the Interior, which rights shall be, and thereafter continue to be, forever appurtenant to designated lands owned by such shareholders; and,

WHEREAS, neither the relative priority nor the extent of the individual appropriations of such water heretofore made by said incorporators and shareholders for the lands described in said articles or by-laws, and which are now vested rights, have been ascertained or determined, but said incorporators and shareholders have agreed among themselves, by the terms and provisions of said articles of incorporation and by-laws, upon the rules and principles by and upon which the relative priority and the extent of their several appropriations and vested rights to the use of such water shall be determined;

Now, THEREFORE, it is agreed and understood by and between the parties hereto:

1. That if the Secretary of the Interior shall authorize and cause the construction of the said irrigation works, the said association will take prompt action to secure the determination by the courts of the relative rights of its shareholders to the use of water for said lands, and that in the determination of such rights and of their respective rights to the use of water acquired under said Act of Congress the rules and principles set out in said articles of incorporation and by-laws, for such determination, shall be deemed and established rules and principles for that purpose.

2. That only those who are or may become members of said association, under the provisions of its articles of incorporation and

by-laws, shall be accepted as applicants for the rights to the use of water available by means of said proposed irrigation works.

3. That the aggregate amount of such rights to be issued shall, in no event, exceed the number of acres of land capable of irrigation by the total amount of water available for the purpose, being (1) the amount now appropriated by the shareholders of said association, and (2) the amount to be delivered from all sources in excess of the water now appropriated; and that the Secretary of the Interior shall determine the number of acres so capable of irrigation as aforesaid, his determination to be made upon due and expert consideration of all available data, and to be based upon and measured and limited by the beneficial use of water.

4. That the payments for the water rights to be issued to the shareholders of said association, under the provisions of said Act of Congress, shall be divided into not less than _____ annual payments, the first of which shall be payable when the water is first delivered from said works, or within a reasonable time thereafter, and after due notice thereof by the Secretary of the Interior to the association, and that the cost of said proposed irrigation works shall be apportioned equally per acre among those acquiring such rights.

5. That the said Water Users' Association hereby guarantees the payments for that part of the cost of the irrigation works which shall be apportioned by the Secretary of the Interior to its shareholders, and also for the cost of operation and maintenance as may be assessed from year to year by the Secretary of the Interior, and will promptly levy calls or assessments therefor and collect or require prompt payment thereof in such manner as the Secretary of the Interior may direct; that it will promptly pay the sums collected by it to the receiver of the local land office for the district in which said lands are situated; that it will promptly employ the means provided and authorized by the said articles of incorporation and by-laws for the enforcement of such collections, and will not change, alter, or amend its articles of incorporation or by-laws in any manner whereby such means of collection, or the lien given to it by the shareholders to secure the payment thereof, or any assessments contemplated or authorized thereby, shall be impaired, diminished, or rendered less effective, without the consent of the Secretary of the Interior.

6. That the United States shall in no manner be responsible for the sums collected by said association until they have been paid into the hands of the receiver of the local land office, as provided by law, and in accordance with such regulations as may be prescribed by the Secretary of the Interior.

7. That for the purpose of enforcing collections, the association will adopt and enforce proper by-laws, subject to the approval of the Secretary of the Interior, and not change them so as to in anywise impair their efficiency for said purpose, and will otherwise do any and all things it is authorized and empowered to do in the premises.

8. That the association will adopt and enforce such rules and regulations as it is authorized by its articles of incorporation and by-laws to adopt and enforce, concerning the use of water by its shareholders and concerning the administration of the affairs of the association, to effectually carry out and promote the purposes of its organization within the provisions of said articles of incorporation and by-laws, which rules and regulations shall be subject to the approval of the Secretary of the Interior, and that if the association fail to make and adopt such rules and regulations, then the Secretary of the Interior may prescribe them; but in such event the Secretary of the Interior shall impose no rule or regulation interfering with any vested right of the shareholders of the association, as defined or modified by said articles of incorporation and by-laws.

9. That persons who are not now members of the association, but who may be the owners or occupants of land to be irrigated, as described in its articles of incorporation or by-laws, or of added lands as therein provided for and to whom rights to the use of water from the proposed irrigation works may be issued by the United States, may, at the designation of the Secretary of the Interior, become members of the association upon subscribing to the stock thereof and upon compliance with the other conditions prescribed for such membership.

10. That in all the relations between the United States and this association and the members of the association, the rights of the members of the association to the use of water where the same have vested are to be defined, determined, and enjoyed in accordance with the provisions of the said Act of Congress and of other Acts of Congress on the subject of the acquisition and enjoyment of the

rights to use water; and also by the laws of ———, where not inconsistent therewith, modified, if modified at all, by the provisions of the articles of incorporation and by-laws of said association.

11. That nothing contained in this agreement, or to be implied from the fact of its execution, shall be construed, held, or deemed to be an approval by the Secretary of the Interior, nor an adoption by him of the articles of incorporation or by-laws of said association in all their details as to form of organization of water users contemplated and authorized by Section 6 of the said Act of Congress of June 17, 1902; but such approval and adoption is expressly reserved until the conditions prescribed in said Act authorizing such approval and adoption shall have arisen; and that when the Secretary of the Interior shall make, approve, and promulgate rules and regulations for the administration of the water to be supplied from said proposed irrigation works, such rules and regulations and such modifications thereof as the Secretary may, from time to time, approve and promulgate, shall be deemed and held to be obligatory upon this association as fully and completely, and to every intent and purpose, as if they were now made, approved, promulgated, and written out in full in this agreement, and the same are to be so read and construed.

IN WITNESS WHEREOF, the undersigned have hereunto subscribed their names and affixed their seals the day and year first herein written.

(Department Seal.)

*Secretary of the Interior for and
on behalf of the United States
of America, Party of the First
Part.*

(Corporate Seal.)

By _____
Party of the Second Part.

Attest: _____,
Secretary.

§ 1286. Water users' associations—And our conclusions.—As can readily be seen from the foregoing forms of the articles of incorporation, by-laws, and the contract between these associations

and the Federal Government,¹ everything in connection with the organization of these associations must be in accordance with the Government's method, as approved by the Secretary of the Interior, or not at all. In fact, this whole scheme of reclamation, as included in the National Reclamation Act and all of its amendments, and especially as interpreted by the Secretary of the Interior, as indicated by the rules and regulations promulgated by him, together with his requirements for the incorporation of the water users' associations, is, upon the part of the Government, a cold-blooded business proposition, constructed with the view of returning to the Government every penny that it has expended in the acquisition of rights and the construction of the works under any of these projects. Although this legislation was undoubtedly induced by Western members of Congress, a careful study of the law and the rules and regulations thereunder, as they stand today, leads us to the belief that there is one essential element which has been almost entirely overlooked, and that is the right of the consumer of the water, "the poor, but honest farmer," who is induced to settle upon these desert and arid lands and attempt to make a home for himself and family. The whole scheme seems to be drawn upon the plan of a shrewd Eastern money loaner, who takes extraordinary precautions to secure the payment of the money advanced upon security of doubtful value. Settlers may be induced to make entries under these projects, but when it comes to their making the annual payments for the water furnished, it will be found that the law, as it now stands, is entirely too severe as to forfeitures. From a long experience in the arid West and with settlers under irrigation propositions of various kinds, the writer has ascertained that very few of these settlers, at the time of making their entries, have, as a general thing, more ready money than sufficient to make their entries, purchase a team and the necessary stock, construct a small house, barn, and other necessary buildings, and when it comes to the payments of from \$2.00 to \$4.00 per acre for the water furnished, and beginning these payments the first year of their settlement, and to earn this money out of the land itself, it will be found that, generally speaking, the burden will be too great for them to bear, and that many forfeitures will be worked. Of course,

¹ See Secs. 1282-1285.

the operations under the law are too recent for us to give any direct results of its workings, but we predict that the law will have to be amended in many respects and many extensions granted for the making of the payments for the water, before these reclamation projects can be made to attain the success which was intended.

CHAPTER 66.

THE DESERT LAND ACTS.

- § 1287. Scope of chapter.
- § 1288. "Desert lands"—Provisions for disposal to individuals.
- § 1289. Desert land claims—Water rights—Report of the Commissioner of the General Land Office, 1911.
- § 1290. Full text of Acts—Acts of March 3, 1877, March 3, 1891.
- § 1291. Amendatory Act of June 27, 1906—Delay caused by reclamation projects.
- § 1292. Amendatory Act of March 26, 1908, relative to additional entries.
- § 1293. Amendatory Act of March 28, 1908, restricting entries to the public surveys.
- § 1294. Relative to entries on coal lands—Acts of March 3, 1909, and June 22, 1910.
- § 1295. Effect of Act as relating to navigation and appropriation.
- § 1296. The application for entry.
- § 1297. Quantity of land that may be entered—Land must be in compact form.
- § 1298. Essentials for acquiring land under the desert land laws.
- § 1299. Essentials—Citizenship.
- § 1300. Essentials—The land must be desert land.
- § 1301. Essentials—The entryman must acquire a water right.
- § 1302. Essentials—Acts tending toward reclamation—Annual proof.
- § 1303. Essentials—Actual reclamation necessary—Final proof.
- § 1304. Essentials—Final proof, when, and how taken.
- § 1305. Essentials—Payment for the land.
- § 1306. The sale or assignment of desert land entries.
- § 1307. Contests.
- § 1308. Relinquishments.
- § 1309. "The Dry Farm Act" or "Enlarged Homestead Act"—Cause of its enactment.
- § 1310. "The Dry Farm Act" or "Enlarged Homestead Act."
- § 1311. "The Dry Farm Act"—Construction of the Act.

§ 1287. **Scope of chapter.**—In this chapter we will discuss the various Desert Land Acts of Congress, not only in respect to the water rights relating thereto, but also in respect to the acquisition of title to desert lands by their reclamation by the means of irrigation.

§ 1288. **"Desert lands"**—Provisions for disposal to individuals.—Throughout all of the arid region of the United States are

great tracts of land with a soil as rich as any that can be found on earth, but in localities where the rainfall is so slight that it does not furnish sufficient moisture to nourish plants other than the native sagebrush, greasewood, and vegetation of a similar character. These lands have been denominated by the statutes "desert lands," although in fact they are far from being lands of that character. The very fact that the sagebrush and greasewood will grow with only the moisture furnished by the scanty rainfall tends to prove, in a most conclusive manner, that these lands have a rich and enduring soil, and that with the artificial application of water by means of irrigation, they will produce any crops which can withstand the climate of any particular locality. These lands, as a general thing, are not riparian, but lie back from the streams, and therefore it is more difficult to conduct the water to them. And hence, prior to the year 1877, comparatively small areas of these lands had been taken up and cultivated; and the only use that they were put to was for pasture, especially in winter, for the sheep and stock of the flock and herd masters who ranged their animals in these localities.

In 1877, Congress, viewing the situation relative to these lands, with the object of having them taken up, settled, and cultivated, made special inducements toward that end. By the Act of March 3 of that year ¹ Congress provided that any person of the requisite age and citizenship, upon the payment of twenty-five cents per acre, might file a declaration in the local land office that he intended to reclaim a tract of desert land not exceeding 640 acres by conducting water upon the same within the period of three years thereafter, and at any time within said period of three years after the filing of the declaration, upon making satisfactory proof of the reclamation of said tract and upon the payment of the additional sum of one dollar per acre, a patent to the land should be issued to him. The character of the lands which might be so taken up under the Act was described as all lands exclusive of timber and mineral lands which would not, without irrigation, produce some agricultural crop. These lands, within the meaning of the Act were deemed desert lands.

The terms of the Act were amended by the Act of March 3, 1891,² requiring the applicant, who must be a resident citizen of the State

¹ 6 Fed. Stat. Ann., 1905, p. 392; 2 U. S. Comp. Stat. 1901, p. 1548; 19 Stat. L. 377.

² 6 Fed. Stat. Ann., p. 395; 2 U. S. Comp. Stat., p. 1549; 26 Stat. L. 1096.

or Territory in which the land sought to be entered is located, at the time of his filing his application, to also file a map of said land, which shall exhibit a plan showing a mode of contemplated irrigation, and which plan shall be sufficient to thoroughly irrigate and reclaim said land, and prepare it to raise ordinary crops, and shall also show the source of the water to be used for irrigation and reclamation of the land covered by his application. There was also another important requirement to the effect that for the first three years, while the application was pending, one dollar per acre must be expended each year by the applicant in permanent improvements, and in the securing of water rights for the irrigation of the land. Also, the time within which the final proofs may be made was extended to four years, and the amount which might be taken up by one person was cut down to 320 acres. However, the amendment provided that all *bona fide* claims initiated before the amending Act might be perfected and patented upon the same terms and conditions as though the amending Act had not been passed.

Also, by the prior Act of August 30, 1890,³ it was provided that no person after the passage of the Act could enter upon any of the public lands with a view of occupation, entry, or settlement, under any of the land laws, and could acquire title to more than 320 acres in the aggregate under all of said laws, but the limitation was made not to curtail the right of persons who before the passage of the Act had made such entry or settlement on the public lands.

§ 1289. Desert land claims—Water rights—Report of the Commissioner of the General Land Office, 1911.—The situation of the desert lands in connection with the Desert Land Act is summed up in the report of the Commissioner of the General Land Office for the fiscal year ending June 30, 1911,¹ and which is as follows: "The Desert Land Act of 1877, as modified by the amendment of March 3, 1891, recognized the desirability of effecting the reclamation of desert land through the efforts of individual entrymen. At the time of the enactment of these laws there were many sources of water available to the individual, of which he could take advantage and thus secure a water supply sufficient to irrigate the land cov-

³ 6 Fed. Stat. Ann., 1905, p. 313; 2 U. S. Comp. Stat., 1901, p. 1404; 26 Stat. L. 391.

¹ See above report, p. 17.

ered by his entry. Like the homestead law, the exercise of the right once exhausted the privilege. It also was limited to persons duly qualified in the matter of citizenship, who at the time of entry were residents of the State in which the entry was made. The apparent purpose of these limitations was to prevent the misuse of the beneficent intention of the Act by fraudulent and speculative combinations, made with the purpose of obtaining unlawful control of large bodies of the public lands. It therefore becomes necessary for the land office, in the administration of this law, to carefully consider the good faith of the claim, whether the land is of the character subject to such entry, and, later, whether it has been reclaimed by securing a permanent supply of water sufficient to effect irrigation of the entire tract.

“What constitutes land desert in character is largely dependent upon relative conditions, all of which must be taken into consideration in the adjudication of these claims. The most difficult question, however, is one pertaining to water rights. The Land Department must determine whether, under the laws of the State where the entry is made, the entryman has secured such a water right as will be appurtenant to the land and fully accomplish the intended reclamation. The value of water in States containing arid and semi-arid lands has been recognized by appropriate legislation, under which all water rights must be adjudicated by the State authorities, and it is incumbent upon the Land Department, in passing to title a desert land entry, to see that under such laws and adjudications the entryman has secured a permanent water right.

“The gradual absorption of the water supply from the smaller streams by the individual entryman naturally resulted in the necessity of organizing water companies to bring water from a great distance, and this has led, in some instances, to relations between entrymen and water companies that require the utmost scrutiny to prevent the acquisition of large holdings through entries nominally made for the benefit of the individual, but actually in the interest of the company.”

§ 1290. Full text of Acts—Acts of March 3, 1877, March 3, 1891.—On March 3, 1877, there was approved an Act passed by Congress, entitled: “An Act to provide for the sale of desert lands

in certain States and Territories,"¹ the full text of which is as follows:

"That it shall be lawful for any citizen of the United States, or any person of requisite age, 'who may be entitled to become a citizen, and who has filed his declaration to become such,' and upon payment of twenty-five cents per acre to file a declaration under oath with the register and receiver of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one section, by conducting water upon the same, within the period of three years thereafter.

"*Provided, however,* that the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres shall depend upon *bona fide* prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the waters of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights.

"Said declaration shall describe particularly said section of land if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey.

"At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid, and upon payment to the receiver of the additional sum of one dollar per acre for a tract of land not exceeding six hundred and forty acres to any one person, a patent for the same shall be issued to him.

"*Provided,* that no person shall be permitted to enter more than one tract of land and not to exceed six hundred and forty acres, which shall be in compact form.

"Sec. 2. That all lands, exclusive of timber lands, and mineral lands, which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands, within the meaning of this Act,

¹ 6 Fed. Stat. Ann., 1905, pp. 392- 1548, 1549; Supp. Rev. Stat. U. S., 397; 2 U. S. Comp. Stat. 1901, pp. 1874-1891, p. 137; 19 Stat. L. 377.

which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated.

"Sec. 3. That this Act shall only apply to and take effect in the States of California, Oregon, and Nevada, and the Territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico and Dakota, and the determination of what may be considered desert land shall be subject to the decision and regulation of the Commissioner of the General Land Office."

To the above Act, Sections 4 to 8 were added by the Act of March 3, 1891,² which provide as follows:

"Sec. 4. That at the time of filing the declaration hereinbefore required the party shall also file a map of said land, which shall exhibit a plan showing the mode of contemplated irrigation, and which plan shall be sufficient to thoroughly irrigate and reclaim said land, and prepare it to raise ordinary agricultural crops, and shall also show the source of the water to be used for irrigation and reclamation. Persons entering or proposing to enter separate sections, or fractional parts of sections, of desert lands, may associate together in the construction of canals and ditches for irrigating and reclaiming all of said tracts, and may file a joint map or maps showing their plans of internal improvements.

"Sec. 5. That no land shall be patented to any person under this Act unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in the permanent improvements upon said land, and in the purchase of water rights for the irrigation of the same, at least three dollars per acre of the whole tract reclaimed and patented in the manner following: Within one year after making entry of such tract of desert land as aforesaid the party so entering shall expend not less than one dollar per acre for the purposes aforesaid; and he shall in like manner expend the sum of one dollar per acre during the second and also during the third year thereafter, until the full sum of three dollars per acre is so expended. Said party shall file during each year with the register proof, by affidavits of two or more credible witnesses, that the full sum of one dollar per acre has been expended in such necessary

² 6 Fed. Stat. Ann., 1905, p. 395; 2 U. S. Comp. Stat., 1901, p. 1549; 26 Stat. L. 1096, 1097.

improvements during such year, and the manner in which expended, and at the expiration of the third year a map or plan showing the character and extent of such improvements. If any party who has made such application shall fail during any year to file the testimony aforesaid, the lands shall revert to the United States, and the twenty-five cents advanced payment shall be forfeited to the United States, and the entry shall be canceled. Nothing herein contained shall prevent a claimant from making his final entry and receiving his patent at an earlier date than herein prescribed, provided that he then makes the required proof of reclamation to the aggregate extent of three dollars per acre: *Provided*, That proof be further required of the cultivation of one-eighth of the land.

"Sec. 6. That this Act shall not affect any valid rights heretofore accrued under the Act of March 3, 1877, but all *bona fide* claims heretofore lawfully initiated may be perfected, upon due compliance with the provisions of said Act, in the same manner, upon the same terms and conditions, and subject to the same limitations, forfeitures, and contests as if this Act had not been passed; or said claims, at the option of the claimant, may be perfected and patented under the provisions of said Act, as amended by this Act, so far as applicable; and all Acts and parts of Acts in conflict with this Act are hereby repealed.

"Sec. 7. That at any time after filing the declaration, and within the period of four years thereafter, upon making satisfactory proof to the register and receiver of the reclamation and cultivation of said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for, and that he or she is a citizen of the United States, and upon the payment to the receiver of the additional sum of one dollar per acre for said land, a patent shall issue therefor to the applicant or his assigns; but no person or association of persons shall hold by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands, but this section shall not apply to entries made or initiated prior to the approval of this Act. *Provided, however*, That additional proofs may be required at any time within the period prescribed by law, and that the claims or entries made under this or any preceding Act shall be subject to contest, as provided by the law, relating to homestead cases, for illegal inception, abandonment, or failure to

comply with the requirements of law, and upon satisfactory proof thereof shall be canceled, and the lands, and the moneys paid therefor, shall be forfeited to the United States.

"Sec. 8. That the provisions of the Act to which this is an amendment, and the amendments thereto, shall apply to and be in force in the State of Colorado, as well as the States named in the original Act; and no person shall be entitled to make entry of desert land except he be a resident citizen of the State or Territory in which the land sought to be entered is located."³

§ 1291. **Amendatory Act of June 27, 1906—Delay caused by reclamation projects.**—Under Section 5 of the Act of June 27, 1906,¹ it is provided that where the desert-land entry has been or may be embraced within the exterior limits of a reclamation project, under the Act of June 17, 1902,² and the entryman has been hindered, delayed, or prevented from making his improvements or from reclaiming the land embraced within his entry, by reason of the withdrawal of the land for such reclamation project, the time during which he has been so hindered, delayed, or prevented shall not be computed in determining the time within which such entryman is required to make such improvements and reclamation, if the reclamation project should be afterward abandoned. But if the reclamation project is carried to completion, so as to make available a water right for the land embraced in any such desert-land entry, and the entryman is not the owner of a water right, he is required to comply with all the provisions of the Reclamation Act of June 17, 1902, and to relinquish all land embraced within his desert-land entry in excess of 160 acres, and as to such 160 acres retained, he shall be entitled to make final proof and obtain patent upon compliance with the terms of payment prescribed in the said Reclamation Act, and not otherwise. But nothing contained in said Section 5 shall be held to require a desert-land entryman who owns a water

³ For the full text of Section 5 of the Act of June 27, 1906, making deductions for time the entryman of desert land entries was hindered and delayed by reason of reclamation projects under the National Reclamation Act, and requiring the entryman in

certain cases to take advantage thereof, see Sec. 1253.

¹ Supp. Fed. Stat. Ann., 1909, p. 544; 34 Stat. L. 520.

² For the National Reclamation Act, see Chap. 65, Secs. 1235-1286.

right and thereby reclaims the land embraced in his entry to accept the conditions of the Reclamation Act.³

Under this Act, no entryman will be excused from compliance with all the requirements of the desert land law until he has filed in the local land office an affidavit showing in detail all of the facts upon which he claims the right to be excused. This affidavit must show when the hindrance began, the nature, character, and the extent of the same, and it must be corroborated by two disinterested persons, who can testify from their own personal knowledge. The matter must be then submitted to the General Land Office, where the request will be allowed or denied, as the circumstances justify. An entryman will not need to invoke the privileges of the Act in connection with final proof until such final proof is due. If after investigation the reclamation project is abandoned, the time for compliance with the law will begin to run from the date of notice of such abandonment. If, however, the reclamation project is carried to completion by the Government and a water supply has been made available for the land embraced in such desert-land entry, the entryman must comply with all the provisions of the Reclamation Act, and must relinquish all the land embraced in his entry in excess of 160 acres. Nothing contained in the Reclamation Act, however, shall be construed to mean that a desert-land entryman who owns a water right and reclaims the land embraced in his entry must accept the conditions of the Reclamation Act, but he may proceed independently of the Government's plan or irrigation and acquire title to the land embraced in his desert-land entry by means of his own system of irrigation. However, desert-land entrymen within the exterior boundaries of a reclamation project who expect to secure water from the Government works must relinquish all of the lands embraced in their entries in excess of 160 acres whenever they are required to do so through the local land office, and must reclaim at least one-half of the irrigable area covered by their water right in the same manner as private owners of land irrigated under a reclamation project.⁴

“Special attention is called to the fact that nothing contained in

³ For the full text of Section 5 of the Act of June 27, 1906, see the amendatory Acts to the National Reclamation Act, Secs. 1245-1260.

⁴ Circular, Sept. 30, 1910, 39 Land Dec. 253, Secs. 34-44; Regulations, 38 Land Dec. 644, Secs. 70-79; Regulations, 37 Land Dec. 322, Secs. 34-42.

the Act of June 27, 1906, shall be construed to mean that a desert-land entryman who owns a water right and reclaims the land embraced in his entry must accept the conditions of the Reclamation Act of June 17, 1902, but he may proceed independently of the Government's plan of irrigation and acquire title to the land embraced in his desert-land entry by means of his own system of irrigation." ⁵

§ 1292.—Amendatory Act of March 26, 1908, relative to additional entries.—The amendatory Act of March 26, 1908,¹ provided as follows: "That any person who prior to the passage of this Act has made entry under the desert-land laws, but from any cause has lost, forfeited, or abandoned the same, shall be entitled to the benefits of the desert-land law as though such former entry had not been made, and any person applying for a second desert-land entry under this Act shall furnish the description and date of his former entry: *Provided*, That the provisions of this Act shall not apply to any person whose former entry was assigned in whole or in part or canceled for fraud, or who relinquished the former entry for a valuable consideration."

A person, except as provided for in the above Act, can make but one entry of desert lands. In order to take advantage of the benefits of the Act, it must be shown that the former entry was not assigned in whole or in part or canceled for fraud, and it must be described by section, township, and range, or by the date and number, as to be readily identified on the records of the General Land Office. In such cases it is not sufficient for the applicant to state that he made an entry at a certain land office, about a certain time; but the land must be sufficiently described, or the date and number of the entry stated.²

For desert land entries within the boundaries of reclamation projects, see the Reclamation Act, Sec. 1253.

See, also, case of W. H. Skinner, 39 Land Dec. 519; Robert J. Slater, 39 Land Dec. 380.

A desert entryman of lands falling within a Government reclamation project, who seeks to secure water for the reclamation thereof from the project, is required, as a condition prece-

dent to his right to water, to relinquish to the Government all of the land embraced within his entry in excess of 160 acres. Instructions, Jan. 20, 1912, 40 Land Dec. 386.

⁵ Circular, Sept. 30, 1910, 39 Land Dec. 253, Sec. 42.

¹ Supp. Fed. Stats. Ann., 1909, p. 549; 35 Stat. L. 48.

² Regulations, 37 Land Dec. 313, Sec. 5.

The above Act was made to apply also to homestead entries by the Act approved February 3, 1911,³ which is as follows: "That any person who, prior to the approval of this Act, has made entry under the homestead or desert-land laws, but who, subsequently to such entry, from any cause shall have lost, forfeited, or abandoned the same, shall be entitled to the benefits of the homestead or desert-land laws as though such former entry had not been made, and any person applying for a second homestead or desert-land entry under this Act shall furnish a description and the date of his former entry: *Provided*, That the provisions of this Act shall not apply to any person whose former entry was canceled for fraud, or who relinquished his former entry for a valuable consideration in excess of the filing fees paid by him on his original entry."⁴

"A person applying to make second homestead or desert-land entry under this Act must file in the local land office an application to enter a specific tract of public lands, subject to entry under the laws in question, accompanied by his affidavit executed before an officer authorized to administer oaths under the public land laws, stating the description of the former entry by section, township, and range numbers (or the number of the entry and land office where made); date of entry; when he lost, forfeited, or abandoned the same; that it was not canceled for fraud; and the amount, if anything, received for abandoning or relinquishing his former entry. This affidavit must be corroborated by the affidavit of one or more persons having knowledge of the facts relative to the abandonment of the claim, or the relinquishment of the former entry, and the consideration received therefor, which corroborating affidavit may be executed before any officer authorized to administer oaths, and having an official seal."⁵

A second desert land entry, under the above Act, may be held under an assignment of the same. *Harrington v. Patterson*, 38 Land Dec. 438.

The act of March 26, 1908, does not authorize a second desert entry by one who has received patent on a former entry, notwithstanding the lands so patented have become worthless by reason of the destruction of the re-

clamation project, upon which irrigation thereof depended. *Matthias P. Zindorf*, 40 Land Dec. 96.

³ Public, No. 340; — Stat. L. —.

⁴ For instructions for the above Act, see those of Feb. 28, 1911, 39 Land Dec. 524.

⁵ Instructions of May 17, 1911, 40 Land Dec. 91.

§ 1293. **Amendatory Act of March 28, 1908, restricting entries to the public surveys.**—These Acts were still further amended by the amendatory Act of March 28, 1908,¹ which provided as follows:

"Sec. 1. That from and after the passage of this Act the right to make entry of desert lands under the provisions of the Act" approved March 3, 1877, as amended by the Act approved March 3, 1892,² "shall be restricted to surveyed public lands of the character contemplated in the Acts, and no such entries of unsurveyed lands shall be allowed or made of record: *Provided, however,* That any individual qualified to make entry of desert lands under said Acts who has, prior to survey, taken possession of a tract of unsurveyed desert land not exceeding in area 320 acres in compact form, and has reclaimed or has in good faith commenced the work of reclaiming the same, shall have the preference right to make entry of such tract under said Acts, in conformity with the public land surveys, within ninety days after the filing of the approved plat of survey in the district land office."

Section 2 provides for assignments of desert-land entries, and will be treated in another section.³

"Sec. 3. That any entryman under the above Acts who shall show to the satisfaction of the Commissioner of the General Land Office that he has in good faith complied with the terms, requirements, and provisions of said Acts, but that because of some unavoidable delay in the construction of the irrigation works, intended to convey water to the said lands, he is, without fault on his part, unable to make proof of the reclamation and cultivation of said land, as required by said Acts, shall, upon filing his corroborated affidavit with the land office in which said land is located, setting forth said facts, be allowed an additional period of not to exceed three years, within the discretion of the Commissioner of the General Land Office, within which to furnish proof as required by said Acts of the completion of said work." ⁴

¹ Supp. Fed. Stat. Ann., 1909, p. 550; 35 Stat. L. 52.

² *Supra*.

³ See Sec. 1306.

See Circular, Sept. 30, 1910, 39 Land Dec. 253, Sec. 7; Virgil Patterson, 40 Land Dec. 264.

⁴ The above section contemplates

that unavoidable delay in the construction of irrigation works by means of which the entryman intends to convey water upon his claim is the only ground upon which its provisions may be invoked; and in the absence of some actual, tangible work in the way of an irrigation system on the claim,

Prior to the Act of March 28, 1908, a desert-land entry could embrace unsurveyed lands, but, since the date of that Act, desert-land entries can not be made on unsurveyed lands. This Act provides, however, that if a duly qualified person shall go upon a tract of unsurveyed desert land and reclaims, or commences to reclaim, the same he shall be allowed a preference right of ninety days after the filing of the plat of survey in the local land office to make entry of the land. To preserve this preference right the work of reclamation must be continued up to the filing of the plat of survey, unless the reclamation of the land is completed before that time, and in that event the claimant must continue to cultivate and occupy the land until the survey is completed and the plat filed.⁵

§ 1294. Relative to entries on coal lands—Acts of March 3, 1909, and June 22, 1910.—By the Act of March 3, 1909,¹ Congress provided that, when any person has in good faith located or entered under the non-mineral land laws of the United States any lands, which subsequently to the entry thereof, are classified as coal lands, he may, if he so elects, receive a patent therefor, which shall contain a reservation to the United States of all coal in said lands, and the right to prospect for, mine, and remove the same. This Act

a mere intention, or even contract, to obtain water from an irrigation system in the future, in the event the practicability of such system be demonstrated by actual test, is not sufficient to warrant the extension authorized by the above Act. *John S. Tenedick*, 37 Land Dec. 332.

⁵ Regulations, 37 Land Dec. 313; *Arthur E. Day*, 39 Land Dec. 475; *Hoobler v. Treffry*, 39 Land Dec. 557.

Where, under an action for land claimed under a certificate of entry as a desert location, described as the south half of section 33 of a designated township and range, the evidence showed that the description in the certificate was based on the description in a private survey, and that the land in controversy was under the Government survey in sections 34

and 35, the certificate showed no title, for the description in the certificate must mean the south half of section 33 as finally located by the official survey of the Federal Government. *Edgar v. McNair*, 157 Cal. 494, 108 Pac. Rep. 306.

The right to extension of time within which to submit final proof upon a desert land entry accorded by the Act of March 28, 1908, is fixed by the Act itself upon a proper showing of facts bringing a case within its provisions and is not a mere privilege resting in the discretion of the Commissioner to allow or deny. *Hoobler v. Treffry*, 39 Land Dec. 557.

¹ Supp. Fed. Stat. Ann., 1909, 563; 35 Stat. L. 844.

For the full text of the Act, see *Coal Lands*, Sec. 443.

applies to all desert entries and to other entries made for agricultural purposes and to selections by any State.² But Congress did not stop with the above Act. By the Act of June 22, 1910, it provided for a similar patent with a similar reservation to lands which were known and classified to be chiefly valuable for coal, prior to the time of entry. By the Act of June 22, 1910,³ it was provided that unreserved public lands of the United States, exclusive of Alaska, which have been withdrawn or classified as coal lands, or are lands valuable for coal, shall be subject to entry by actual settlers only, under the desert-land laws, and under other laws named in the Act, with a reservation to the United States of the coal in such lands and of the right to prospect for, mine, and remove the same. But no desert entry made under the provisions of the Act shall contain more than 160 acres.

§ 1295. **Effect of Act as relating to navigation and appropriation.**—By these Acts Congress again recognized and assented to the appropriation of water under the Arid Region Doctrine of appropriation,¹ and in contravention of the common law right of the lower proprietor to insist on the continuous flow of the waters of the natural streams flowing over the public domain.² And as will be noticed by the terms of Section 1 of the Act the water which may be appropriated is not dedicated for the use of merely those who take advantage of the law to take up lands under its provisions, but all surplus water shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights. By this Act, as far as the *Government was concerned*, the right of all riparian proprietors who took up lands after its passage, to the undiminished flow of the natural streams flowing over the public domain, was abrogated, as inapplicable throughout the arid and semi-arid West.³

² For selections under the Carey Act, see Sec. 1321.

See, also, State of Utah, 38 Land Dec. 245.

³ Public, No. 227; 36 Stat. L. 583. For full text of Act, see Sec. 443.

¹ For the Arid Region Doctrine of appropriation, see Secs. 585-594.

For the previous recognition of the 148—Kin. on Irr.

doctrine by Congress, see discussion of Acts of 1866 and 1870, Secs. 611-619.

² For appropriation as against the rights of riparian owners, see Secs. 810-823.

³ See discussion upon question of undiminished flow, Sec. 549.

See, also, Hough v. Porter, 51 Ore.

"By this Act the general Government made the water, not only of lakes and rivers, but also other sources of water supply upon the public lands, and not navigable, the subject of appropriation. The conditions about the water shed of Quartz Gulch make it clearly a situation where the water is the subject of appropriation, under the liberal terms of the Act of Congress referred to."⁴ The matter, however, was left to the respective States to adopt such rule as it saw fit governing waters within their boundaries.⁵ But, under the terms of the Act, Congress did not intend to release its control over the navigable waters of the country, and to grant to those reclaiming arid lands the right to appropriate the waters of either the main stream itself, or the waters of the tributary streams which united into a navigable water course, to the extent that it will thereby destroy the navigability of such water course in derogation of the interests of all the people of the United States.⁶ Neither did it release the right upon the part of the Government to make reservations of the waters for certain purposes, discussed in previous sections.⁷

§ 1296. The application for entry.—A person who desires to make an entry under the desert-land laws, must file with the register and receiver of the local land office a declaration or application, under oath, showing that he is a citizen of the United States, or has declared his intention to become a citizen; that he is 21 years of age

318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; *United States v. Rio Grande etc. Co.*, 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770; *Farm Inv. Co. v. Carpenter*, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918; *Gutierrez v. Albuquerque etc. Co.*, 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338; affirming *Id.*, 10 N. M. 177, 61 Pac. Rep. 357; *Williams v. Altnow*, 51 Ore. 275, 95 Pac. Rep. 200; *United States v. Conrad Inv. Co.*, 156 Fed. Rep. 123; *State ex rel. Liberty Lake Ice Co. v. Superior Court*, 47 Wash. 310, 91 Pac. Rep. 968; *Boquillas Land & Cattle Co. v. Curtis*, 213 U. S. 339, 53 L. Ed. 822, 29 Sup. Ct. Rep. 493;

11 Ariz. 128, 89 Pac. Rep. 504; *United States v. Conrad Investment Co.*, 156 Fed. Rep. 123; *Winters v. United States*, 207 U. S. 564, 52 L. Ed. 340, 28 Sup. Ct. Rep. 207; affirming *Id.*, 148 Fed. Rep. 684, 78 C. C. A. 546; *Id.*, 143 Fed. Rep. 740, 74 C. C. A. 666.

⁴ *Borman v. Blackmon*, — Ore. —, 118 Pac. Rep. 848.

⁵ See Sec. 493.

⁶ *United States v. Rio Grande etc. Co.*, 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770; *Kansas v. Colorado*, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552; *Id.*, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655.

⁷ See Secs. 388, 668.

or over; and that he is also a *bona fide* resident of the State or Territory in which the land sought to be entered is located. He must also state that he has not previously exercised the right of entry under the desert-land laws by making an entry or having taken one by assignment;¹ that he has not, since August 30, 1890, acquired title to, nor is claiming under any of the agricultural land laws, including the lands applied for, lands which in the aggregate exceed 320 acres; and that he intends to reclaim the lands applied for, by conducting water thereon, within four years from the date of his application. This declaration must contain a description of the land, by legal subdivisions, section, township, and range. The terms set forth in the application require a personal knowledge by the entryman of the lands intended to be entered. The affidavit, which is made a part of the application, can not be made by an agent or upon information and belief, and the register and receiver are instructed to reject all applications in which it is not made to appear that the statements contained therein are made upon the applicant's own knowledge and that it was obtained from a personal examination of the lands. A complete statement of the facts must be made, showing the applicant's acquaintance with the land and how he knows it to be desert land.² This declaration must be corroborated by the affidavits of two reputable witnesses, who must be personally acquainted with the land, and they must state the facts regarding the condition and situation of the land upon which they base their opinion that it is subject to desert-land entry. Applicants and witnesses must in all cases state their places of actual residence, their business or occupation, and their postoffice addresses. The application and corroborating affidavits must be sworn to before the register or receiver of the land district in which the land is located, or before a United States commissioner of a court exercising Federal jurisdiction in the territory, or before the judge or clerk of any court of record in the county or land district in which the land is situated. In case the application and affidavits are made out of the county in which the land is located, the applicant must show, by affidavit, that the application was made before the nearest or most accessible officer qualified to take such affidavits in the land

¹ See, however, for additional desert entries, Secs. 1309-1311.

² As to what constitutes desert land under the Act, see Sec. 1300.

district;³ the affidavits of the applicant and his two witnesses must in every instance be made at the same time and place and before the same officer.⁴

As it is required that persons who make desert-land entries must acquire a clear title to the use of sufficient water to irrigate and reclaim the whole of the land entered, or as much thereof as susceptible of irrigation, and to keep it permanently irrigated; therefore, if a person makes an entry before he has acquired a water right, he does so at his own risk, because one entry will exhaust his right, and he will not be repaid the money paid at the time of making the entry. At the time of filing his application with the register and receiver, the applicant should also file a map showing the plan by which he proposes to conduct water upon the land and the manner by which he intends to irrigate the same, and at the same time he must pay the receiver the sum of 25 cents per acre for the land applied for. The receiver will issue a receipt for the money, and the register and receiver will jointly issue a certificate showing the allowance of the entry. This application will be given its proper serial number, and at the end of each month an abstract of the entries allowed under these laws will be transmitted to the General Land Office.⁵

Amendments to desert-land applications may be made under certain conditions. Where, through no fault of the entryman, the lands embraced in an entry are found to be so unsuitable for the purposes for which the entry was made, as to make the completion of the entry impracticable, an amendment of the entry may be allowed by eliminating one or more of the subdivisions entered and including other tracts in lieu thereof. But in such case at least a legal subdivision approximating forty acres in area of the land originally entered, must be retained, and the entry as amended embrace contiguous tracts. The application to amend must be filed within one year from the date of the original entry.⁶ So, too, where the entryman can not at the date of his original filing take

³ See Circular, Sept. 30, 1910, 39 Land Dec. 253.

See Circular, 32 Land Dec. 539; Act of March 11, 1908, 32 Stat. L. 63.

⁴ Regulations, 37 Land Dec. 312, Secs. 8-11.

⁵ Circular, Sept. 30, 1910, p. 253,

Secs. 12, 13; Regulations, 37 Land Dec. 315, Secs. 12, 13.

⁶ Jennie M. Mitchell, 37 Land Dec. 43.

See, also, Circular, 36 Land Dec. 287; Circular, 37 Land Dec. 655.

the full quantity of land allowed by law, because of prior entries or filings covering adjacent lands, and he immediately takes steps which result in the clearing of the record as to the tracts desired, he will thereupon be permitted to amend his application by including such tracts to the full extent of the land allowed by law; but he can not make such an amendment where there is any considerable delay in taking the initiatory steps with a view to clearing the record.⁷

§ 1297. Quantity of land that may be entered—Land must be in compact form.—Under the original Act of March 3, 1877,¹ a person was allowed to enter one section, or 640 acres, of desert land. But, by the Act of March 3, 1891, no person is allowed to enter more than 320 acres of desert land. Moreover, by the Act of August 30, 1890,² it is provided as follows: "No person who shall after the passage of this Act, enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than 320 acres in the aggregate, under all of said laws, but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public lands, or whose occupation, entry, or settlement, is validated by this Act."

Under this Act no person is permitted to acquire title, under all the agricultural land laws, to more than 320 acres; therefore, if a person has, since August 30, 1890, acquired, under any of the laws except mineral laws, 320 acres, or is at the date of his application claiming 320 acres under said laws, he is not authorized to make a desert-land entry for any quantity whatever.³

A person can only make one entry under the desert-land law, and the right is exhausted by that entry, whether the maximum quantity of land, or less, is entered, except, however, as provided for by the

⁷ Charles C. Wilson, 37 Land Dec. 769; Instructions, 36 Land Dec. 44.

Where a desert entry is made for a less area than the entryman is entitled to take under the law, he may be permitted, in the absence of adverse claim, to amend his entry to include an adjoining tract. Gust Hammar, 40 Land Dec. 576.

¹ See Sec. 1290.

² 6 Fed. Stat. Ann., 1905, 312; 2 U. S. Comp. Stat., p. 1404; 26 Stat. L. 391.

³ For the exception as to mineral laws, see 6 Fed. Stat. Ann., 1905, p. 313; 2 U. S. Comp. Stat., 1901, p. 1405; 26 Stat. L. 1101.

Act of March 26, 1908, where the entry has been abandoned, lost, or forfeited, prior to the passage of that Act.⁴

However, it is held that where a desert entryman could not, at the date of entry because of existing withdrawals covering part of the land desired by him, embrace in his entry the full area allowed by law, he may, upon the restoration of the withdrawn land, be permitted to enlarge his entry to conform to his original intentions.⁵

The land entered under the desert-land laws must be in compact form; which means that it should be as nearly square as possible. Where, however, it is impracticable, on account of the previous appropriation of adjoining lands, or on account of the topography of the country, to take the land in a compact form, all the facts regarding the situation, location, and character of the land sought to be entered, and the surrounding tracts, should be stated, in order that the General Land Office may determine whether, under all the circumstances, the entry should be allowed in the form sought. Entrymen should make a complete showing in this regard, and should state the facts, and not the conclusions they derive from the facts, as it is the province of the Land Department of the Government to determine whether or not, from the facts stated, the entry should be allowed.⁶

§ 1298. Essentials for acquiring land under the desert land laws.—It will be noticed from the provisions of the desert land Acts, as set forth in a preceding section,¹ that in order for a person to acquire title to a tract of desert land, under the Acts, that there are five important essentials which must be complied with. First, there must be the requisite citizenship; second, the land sought to be entered must be desert land within the meaning of the Acts; third, there must be sufficient water appropriated or purchased to irrigate and reclaim the land, and the ditches and other works must be constructed to conduct the water to the place of use; fourth, there must be an actual reclamation of the land, and an actual cultivation of at least one-eighth of the tract entered; and,

⁴ For the Act of March 26, 1908, see Sec. 1293; Circular, Sept. 30, 1910, 39 Land Dec. 253; Regulations, 37 Land Dec. 313, Sec. 5.

⁶ Regulations, 37 Land Dec. 313, Sec. 6; Circular, Sept. 30, 1910, 39 Land Dec. 253, Sec. 6.

¹ See Sec. 1290.

⁵ Bridget Thibedeau, 39 Land Dec. 48.

fifth, there must be the payment of \$1.25 per acre. As will be readily seen, the chief object of the law was the reclamation of the land, so as to make it habitable; and, therefore, this reclamation was made a condition precedent to the acquisition of title to the same.

It will also be noticed that under the Acts there is a union of Federal and State control as far as the acquisition of both the lands and water are concerned. The title to the lands comes from the Federal Government, while the title to the water must be acquired under the laws of the respective States. But they are in a way dependent upon each other. The title to the land can not be acquired unless there has been also acquired a title to a water right sufficient to reclaim the land. While, upon the other hand, the title to the water right can not be acquired unless there is the land to which it can be applied for irrigation or some other beneficial use. In the following sections, therefore, we will discuss the subject from the standpoint of the requisite essentials for the acquisition of title to both the land and the water right, and in the order named above.²

§ 1299. **Essentials—Citizenship.**—In the first place there must be the requisite citizenship. The applicant must be a "resident citizen" of the State in which the land sought to be entered is located. Relative to individuals this is held to include the citizens of one State who go to another State with the avowed intention to make their permanent home therein.¹ But the citizens of one State can not file the necessary applications for desert land in another State. Under the original Act of 1877, it was held that the language clearly excluded associations or corporations from making desert entries.² But under the law as amended in 1891, it is held by the Land Department, that a corporation may make a desert entry; but in order to be qualified to make such an entry, it must show the qualification of each member of such corporation; and if one member is disqualified to make such entry, then such corporation is not qualified to make entry.³ A woman, whether married or single,

² See Secs. 1299-1305.

¹ *Pettet v. McCormick*, 34 Land Dec. 586.

² *Salina Stock Co. v. United States*, 35 Fed. Rep. 339, 29 C. C. A. 181.

³ *Jacob Switzer Company*, 33 Land Dec. 383; *Silabee Town Co.*, 34 Land Dec. 430.

who possesses the necessary qualifications, can make a desert-land entry.⁴ At the time of making final proof, an entryman of alien birth must have been admitted to full citizenship, which must be shown by a duly certified copy of the certificate of naturalization.⁵

§ 1300. Essentials—The land must be desert land.—The land applied for must be desert land within the meaning of the Acts; that is to say, lands which will not, without irrigation, produce some agricultural crop. The occasion on which the desert character of the land is to be ascertained is at the time of the filing of the declaration. This is also a fact to be determined by the register of the land office upon affidavits or other proper evidence; and his determination is final and conclusive on the courts in the absence of direct impeachment for fraud.¹ And in the determination of the character of the land, the annual rainfall, the crops which may be produced on the land without irrigation, whether the land has living water flowing through it or living springs, the natural growth of the timber on the land, as to whether the land is all or only part desert, and any other facts which enter into each particular case, may be taken into consideration.

Lands not subject to desert land entry under the Act:

First. Lands bordering upon streams, lakes, or other natural bodies of water, or through which or upon which there is any river, stream, arroyo, lake, pond, body of water, or living spring, until the clearest proof of their desert character is furnished.

Second. Lands which produce native grasses in sufficient quantity, if unfed by grazing animals, to make an ordinary crop of hay in usual seasons, are not desert lands.

Third. Lands which will produce an agricultural crop of any kind, in amount to make the cultivation reasonably remunerative, are not desert.

Fourth. Lands containing sufficient moisture to produce a natural growth of trees are not to be classed as desert lands.²

⁴ Regulations, 37 Land Dec. 312; Dec. 228; Regulations, 37 Land Dec. Circular, Sept. 30, 1910, 39 Land Dec. 312.

253, Sec. 4.

⁵ Regulations, 37 Land Dec. 312.

¹ United States v. Mackintosh, 85 Fed. Rep. 333, 29 C. C. A. 176.

² Circular, Jan. 15, 1902, 31 Land

See, also, Circular, Sept. 30, 1910, 39 Land Dec. 253, Sec. 3.

Desert land, so far reclaimed by a former entryman that in one year it produced 200 tons of hay, is not sub-

In this connection it is held by the Land Department that is is a mere presumption that lands containing sufficient moisture to produce trees will also produce agricultural crops; but, like all presumptions of fact, it may be rebutted by proof showing that the land is actually desert in character and will not produce agricultural crops without irrigation.³ Lands that one year after another for a series of years will not without artificial irrigation produce reasonably remunerative crops are desert within the meaning of the desert land law. Therefore, lands situated within a notoriously arid or desert region, and themselves previously desert within the meaning of the desert land law, do not necessarily lose their character as desert lands merely because of unusual rainfall for a few successive seasons their productiveness was increased and larger crops were raised thereon; and, under such circumstances a strong preponderance of evidence will be required to take them out of the class of desert lands.⁴ The character of the land at the rate of the desert-land entry controls in determining whether the land is subject to such an entry, and the fact that the entryman purchased the improvements of a prior desert entryman for the same land does not entitle him to have the character of the land determined as of the date of the prior entry.⁵

ject to desert land entry after the relinquishment of the land by such entryman. *Fisher v. Ballinger*, Court of Appeals, District of Columbia, case decided March 6, 1911.

³ See Instructions, Dec. 5, 1901, 31 Land Dec. 149.

See, also, *Heinzman v. Letroadec's Heirs*, 28 Land Dec. 497; Instructions, 31 Land Dec. 149; *Id.*, 4 Land Dec. 33; Ruling of Secretary, 6 Land Dec. 662; *Babcock v. Watson*, 2 Land Dec. 19; *C. G. Johnson*, 27 Land Dec. 123; Circular, June 27, 1887, 5 Land Dec. 708; *Nilson v. Anderson*, 23 Land Dec. 138; *Dickinson v. Auerbach*, 18 Land Dec. 16; *Lay v. Hunter*, 2 Land Dec. 17; *Houck v. Bettelyoun*, 7 Land Dec. 425; *Riggan v. Riley*, 5 Land Dec. 595; *Alexander Toponce*, 4 Land Dec. 261; *Freeman v. Lind*, 8 Land Dec. 163; *Roots v. Emmerson*, 10 Land

Dec. 169; *W. L. Rynerson*, 7 Land Dec. 177; *Keys v. Rumsey*, 10 Land Dec. 558; *United States v. Jenks*, 14 Copp's L. O. 61; *Andrew Leslie*, 9 Land Dec. 204; *Sims v. Phalen*, 11 Land Dec. 206; *United States v. Haggin*, 12 Land Dec. 34; *Dillon v. Moulton*, 15 Land Dec. 271; *Wm. H. Wheeler*, 22 Land Dec. 412; *James A. Hardin*, 10 Land Dec. 313; *R. W. Makinson*, 4 Land Dec. 165; *Taylor v. Rogers*, 14 Land Dec. 194; *Campbell v. Sutter*, 16 Land Dec. 40; *Wm. Skeen*, 14 Land Dec. 270.

⁴ *Pederson v. Parkinson*, 37 Land Dec. 522.

⁵ *Chiffin v. Swift*, 37 Land Dec. 89; *Rivers v. Burbank*, 9 C. L. O. 238; *Taylor v. Rogers*, 14 Land Dec. 194; *Campbell v. Sutter*, 16 Land Dec. 40.

§ 1301. **Essentials—The entryman must acquire a water right.**—The third essential in order for the entryman to secure a patent to land under the desert laws is that he must secure a water right sufficient to irrigate the land, and this water right must depend upon a "*bona fide* prior appropriation." He may appropriate the water himself directly from the natural streams, but this is not required by the law. He may purchase the right or acquire it in any legal method permitted for the acquisition of water rights, under the local laws of the State wherein the land is located. Hence a corporation organized for the purpose of appropriating and selling water to settlers may become the intermediary for furnishing water to applicants under the desert land law.¹ The applicant may also sink artesian or other wells and secure the water for the land in this manner, where the physical features of the country will permit.² In fact the method of obtaining the water right is immaterial, provided that a permanent water right is acquired by the applicant, and that the water is of sufficient quantity for the cultivation of the land, filed upon by the applicant.³ There must be a *bona fide* ownership in the applicant of the water right; and an agreement, made between the entry of the land and final proof, to sell the water after such proof, is ground for the cancellation of the entry.⁴

¹ *Gutierrez v. Albuquerque Land & Irr. Co.*, 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338; affirming 10 N. M. 177, 61 Pac. Rep. 357, where the Court held that irrigation corporations generally are recognized in the legislation of Congress; and the rights conferred are not limited to such corporations as are mere combinations of owners of irrigable land.

See for powers of corporations, Secs. 1464-1478.

The applicant may purchase stock in an irrigation company, whereby he is entitled to the use of sufficient water. *Bradley v. Vasold*, 36 Land Dec. 106.

See, also, Instructions, Aug. 25, 1899, 29 Land Dec. 133; *A. W. Lindsey*, 28 Land Dec. 512; *Wallace v. Boyce*, 1 Land Dec. 26; *Pederson v.*

Parkinson, 37 Land Dec. 522; Regulations, 37 Land Dec. 320, Secs. 26, 27; Circular, Sept. 30, 1910, 39 Land Dec. 253; Secs. 12, 14.

See, also, final proof, Secs. 1303, 1304.

² *Orin P. McDonald*, 13 Land Dec. 30.

³ *Wallace v. Boyce*, 1 Land Dec. 26.

⁴ *Wheaton v. Wallace*, 24 Land Dec. 100.

Upon the subject of actual reclamation necessary, see next section.

Water acquired to reclaim a desert entry does not become an inseparable appurtenance therefrom, and it may be conveyed separate and apart from a conveyance of the land. *Village of Hailey v. Riley*, 14 Idaho 481, 95 Pac. Rep. 686, 17 L. R. A., N. S., 86.

§ 1302. **Essentials—Acts tending toward reclamation—Annual proof.**—And, again, before the entryman can secure a title to the land covered by his application, he must make satisfactory proof of the reclamation and cultivation of said land. It was the manifest purpose of Congress to hold out to the citizens of the United States by the Desert Land Acts an inducement to reclaim the waste and desert lands of the public domain, and thus render them subservient to the uses of husbandry by means of irrigation. This is to be accomplished by such a system of ditches as would carry to the subdivisions of the land, a supply of water such as, when let out of the ditches, might spread over the land, and stimulate vegetable life. It is not enough to simply acquire a water right, or to have the ditches constructed in which the water might be conveyed to the land, but there must be proof of the actual reclamation and cultivation of the land to the extent and cost and in the manner provided by the law. The law as amended by the Act of 1891, provides that no land shall be patented to any person under the Act, unless the entryman or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least three dollars per acre of the whole tract. This expenditure must be made at least at the rate of one dollar per acre per annum beginning with the first year after filing the application; but the applicant may make these expenditures of the whole three dollars per acre at an earlier date than the first three years, and upon making sufficient proof receive his patent: *Provided*, That he also furnishes proof of the actual cultivation of at least one-eighth of the land covered by his application. And determining whether a desert land entryman has complied with the requirement of the statute relative to annual expenditure, the reasonable value of the work done or improvements placed upon the land is the criterion, and not the amount alleged by the entryman to have been expended therefor.¹

The statutory requirements as to the yearly expenditures is explicit and mandatory, as are all of the other requirements imposed

¹ Bradley v. Vasold, 36 Land Dec. 106; Rigdon v. Adams, 24 Land Dec. 279.

For the method of making annual proofs, see Regulations, 37 Land Dec. 317, Secs. 17-19.

by the Desert Land Act, and the Land Department, in the face of a contest brought upon the ground of failure to comply with the law, is without authority to waive its observance, even though it should be convinced of the intent of the claimant to in the future fully comply with the law; and, hence in cases for non-compliance with the law the only thing that the Department can do is to cancel the entry as provided in the Act.²

During the first, second, and third years after making an entry, the entryman must expend one dollar each year for each acre of land entered by him for the purpose of improving and reclaiming the land, and at or before the end of each year he must make and file with the register and receiver proof of such expenditure.³

In making annual proof, expenditures for ditches, canals, dams, fences, roads, where they are necessary, the first breaking of the soil for erecting barns, stables, etc., and for digging wells, where

² *Wilkinson v. Stillwell*, 35 Land Dec. 92, where the Department held that well casing purchased and placed upon a desert land entry can not, so long as it is unattached to the realty, and retains its status as personal property, be considered a permanent improvement of the land within the meaning of the Act. *Rigdon v. Adams*, 34 Land Dec. 279.

So also there was the same ruling in the case of expenditures for machinery for boring wells. *Nelson J. Littlejohn*, 35 Land Dec. 638.

As no residence is required, the expenditure for the erection of a dwelling house is not within the contemplation of the Act. Instructions, Feb. 27, 1906, 34 Land Dec. 465.

An expenditure for "discing" land embraced in a desert land entry, with the view of planting the same to crop, may be accepted as equivalent to the first plowing of the soil, and the entryman is entitled to credit therefor. *James Stimson*, 37 Land Dec. 75.

See, also, *Munsen v. Johnson*, 39 Land Dec. 127, where it is held that

the payment by a desert land entryman to cover his proportionate share of the cost of construction and maintenance of irrigation, by means of which his land is proposed to be irrigated is a proper basis for annual proof.

To entitle a desert entryman to credit for improvements made upon the land by a former entryman, they must be permanent in character, and have enduring utility, tending to affect reclamation of the land; therefore, expenditures for breaking up land by a previous entryman can not be accepted toward meeting the requirements of the statute where the ground broken has been permitted to relapse into its original state. *Hefin v. Schnare*, 40 Land Dec. 261.

³ Circular, Sept. 30, 1910, 39 Land Dec. 253, Secs. 17-19; Regulations, 37 Land Dec. 317, Sec. 17.

A contest may be successfully maintained for the failure to make the requisite annual expenditure. Regulations, 37 Land Dec. 322, Sec. 32.

See, also, contests, Sec. 1307.

they are to be used in irrigating the lands, will be accepted by the Land Department as satisfactory expenditures; but expenditures for surveying the land in order to locate the corners of the same will not be accepted. However, where such surveying is for the purpose of ascertaining the levels of ditches, canals, etc., it will be accepted. Expenditures for cultivation after the soil has been first prepared will not be allowed, because the entryman is supposed to be repaid for such work by the crops to be reaped as the result of cultivation. Expenditures for material of any kind will not be allowed, unless such material has been actually installed or used for the purpose for which it was purchased. The annual proofs must contain itemized statements showing the manner in which expenditures were made. Expenditures for stock or an interest in an irrigation company, through which the water is to be secured for irrigating the land, will also be accepted as satisfactory annual expenditures, when the claimant shall file and make a part of his annual proof:

(a) A receipt or other writing signed by the proper officer or agent of the company showing payment in cash for stock or interest in the company, and the affidavit of the claimant showing that the payment was made in cash and when made.

(b) An affidavit of the claimant showing the nature of the contract or agreement he had with the company entitling him to the use of water, and the quantity of water to which he is entitled under such contract or agreement, or proper showing that the ownership of the stock or interest entitles him to the use of water and the quantity of water to which he is entitled by virtue of such ownership.

(c) A statement, under oath, of the proper officers of the company, showing the right of the company to the use of water; whether such right is based upon a decree, or decrees, of court, or upon appropriation or flings made in conformity to the State laws; the source or sources of its water supply; the quantity of water owned or appropriated by it; the total quantity of water which it is under contract or agreement to deliver to its patrons and stockholders, and the date when, no unforeseen obstacle preventing, it

will be able to deliver water on the land of the entry, which land must be described in the sworn statement.⁴

The annual proofs must be forwarded to the General Land Office at the end of the month during which they are made, after having been properly noted on the records of the local land office. Nothing in the statutes or the regulations should be construed to mean that the entryman must wait until the end of the year to submit his annual proof, because the proof may be properly submitted as soon as the expenditures have been made. Proof for the three years may be offered whenever the amount of \$3.00 an acre has been expended in reclaiming and improving the land, and thereafter annual proof will not be required.⁵

§ 1303. Essentials — Actual reclamation necessary — Final proof.—One who makes a desert land entry must clearly show, in submitting his final proof, not only that he has a right to a sufficient supply of water to successfully irrigate the lands, and that the system of ditches is adequate for that purpose, but also that the necessary supply of water has been actually used on the lands in a manner to prove the beneficial results.¹ There must be an actual cultivation of at least one-eighth of the land covered by the entry. This provision was added by the amendatory Act of 1891,² and the actual tillage of this amount of land as tending to prove reclamation is required.³ While the law does not require proof that agricul-

⁴ Regulations, 38 Land Dec. 157, amending that portion of Sec. 18 of the Regulations, 37 Land Dec. 317.

See, also, *Caldwell v. Halvorson*, 36 Land Dec. 395.

It is not evidence of fraud, or ground of contest, that a group of desert land entrymen agree voluntarily to subject their lands to the support of an irrigation system from which water may be taken for their reclamation. *Williams v. Kirk*, 38 Land Dec. 429.

⁵ Regulations, 37 Land Dec. 317, Secs. 18, 19.

¹ *Pederson v. Parkinson*, 37 Land Dec. 522.

² For text of Act, see Sec. 1290.

³ For the method of making final proof, see Regulations, 37 Land Dec. 318, Secs. 20-22; *Mary Munro*, 35 Land Dec. 15; Instructions, Feb. 17, 1904, 32 Land Dec. 456. Final proof, which shows that because of irrigation there is on the land, "a marked increase in the growth of grass," or that "grass sufficient to support stock has been produced on all the land," is not sufficient.

See, also, *Brandon v. Costley*, 34 Land Dec. 488; Regulations, 37 Land Dec. 319, Sec. 25.

But see *John Cunningham*, 32 Land Dec. 207; *Staats v. Northern Pac. R. Co.*, 36 Land Dec. 175.

tural crops have been actually raised upon the land by means of irrigation, this fact is considered by the Land Department as one of the best proofs of the reclamation of the land. The law as it now stands only requires that the land be prepared to raise ordinary agricultural crops, and the best proof that can be furnished of its condition is to prove that crops of this kind have been actually raised on them. Actual tillage must be shown. And the Department holds that if the kind of crops required by the statute have not been actually raised on the land, it must be made to conclusively appear, that because of climatic conditions, crops other than grass can not be successfully produced. In that case the actual production of a crop of hay of merchantable value, as a result of actual irrigation, may be accepted as sufficient compliance with the requirement as to cultivation.⁴

The final proof must show specifically the source and volume of water supply, and how it is acquired and how maintained. The number, length, and carrying capacity of all the ditches of each of the legal subdivisions must also be shown. The claimant and his witnesses must each state in full what has been done in the matter of reclamation and improvement of the land, and must answer fully, of their own personal knowledge, all of the questions contained in

⁴ Instructions, Feb. 17, 1904, 32 Land Dec. 456; Regulations, 37 Land Dec. 319, Sec. 25.

Reclamation shown by crops produced. Wallace v. Boyce, 1 Land Dec. 26.

Where the cultivation of one-eighth of the area of a desert land entry, covering a smallest legal subdivision, is rendered impossible by reason of physical conditions, proof showing that the entryman has cultivated all the area susceptible of cultivation, may be accepted and the entry submitted to the Board of Equitable Adjudication. Henry Welke, 39 Land Dec. 283.

The fact of reclamation may be shown without crops raised by irrigation, under original Act of 1877; Babcock v. Watson, 2 Land Dec. 19;

Miller v. Noble, 3 Land Dec. 9; Instructions, July 23, 1885, 4 Land Dec. 51; George Ramsey, 5 Land Dec. 120; Chas. H. Shick, 5 Land Dec. 151; William G. Rudd, 7 Land Dec. 167; Adam Schindler, 7 Land Dec. 253; Emma J. Warren, 8 Land Dec. 113; Vibrans v. Langtree, 9 Land Dec. 419; William Skeen, 14 Land Dec. 270; John H. Kirk, 15 Land Dec. 535; Meads v. Geiger, 16 Land Dec. 366; Dickinson v. Auerbach, 18 Land Dec. 16; Thompson v. Bartholet, 18 Land Dec. 96; Rider v. Atwater, 20 Land Dec. 449; Gage v. Atwater, 21 Land Dec. 211; United States v. McKinney, 27 Land Dec. 516.

See, also, United States v. Mackintosh, 85 Fed. Rep. 333, 29 C. C. A. 176.

the final proof blanks. They must state plainly whether, at any time, they saw the land effectually irrigated, and the different dates on which they saw the land irrigated should be specifically stated. All of each legal subdivision must be actually irrigated. Therefore, it is not sufficient to state that water has been conducted upon each legal subdivision. If there are some high points which it is not practicable to irrigate, the nature, extent, location, and area of such points should be fully stated. If part of a legal subdivision is not susceptible of irrigation, such legal subdivision must be relinquished.⁵

The final proof must also show that the claimant has a right, under the laws of the State in which the land is located, to a sufficient supply of water to successfully irrigate all the irrigable lands embraced in his entry. It must also clearly appear that the system of ditches to conduct the water to the land and to distribute it over the whole of each legal subdivision is adequate for that purpose. Where the final proof submitted upon a desert-land entry shows that the entryman has cultivated and irrigated at least one-eighth of the land, and has constructed ditches, owns a sufficient water right, has brought the water to the land, and is prepared to turn water upon the entire tract when it shall have been prepared for cultivation, he is not required to show further that the water has been actually distributed over all the irrigable land in the entry.⁶ In those States where entrymen have made applications for water rights, and have been granted permits, but where no final adjudication of the water right can be secured from the State authorities, owing to delay in the adjudication of the water courses, or other delay for which the entrymen are in no way responsible, proof that the entrymen have done all that is required of them by

⁵ Circular, Sept. 30, 1910, 39 Land Dec. 253, Secs. 20-28; *Rider v. Atwater*, 20 Land Dec. 449.

⁶ Alonzo B. Cole, 38 Land Dec. 420, giving directions for amendment of Regulations, 37 Land Dec. 312; Circular, Sept. 30, 1910, 39 Land Dec. 253, Secs. 23-28.

A certificate of stock in a water company which under the by-laws of the company is limited, under penalty, to location and use upon a certain

designated 20-acre tract, can not be accepted toward meeting the requirements of the Desert Land Act, with respect to water rights as to another and different 20-acre tract embraced in the same entry, notwithstanding the amount of water to which the entryman is entitled under the stock may be more than sufficient to irrigate the 20 acres to which it is appurtenant. Theodore A. Isigii, 39 Land Dec. 285.

the laws of the State, together with the proof that the necessary supply of water has been actually used on the land, may be accepted.⁷ This modification of the rule that the claimant must furnish evidence of an absolute water right will apply only in those States, where, under the local laws, it is absolutely impossible for the entryman to secure title to his water right within the time allowed him to submit final proof on his entry, and in such cases the best evidence obtainable must be furnished.⁸

§ 1304. **Essentials—Final proof, when and how taken.**—The entryman, or his assignee, if the entry has been assigned, is ordinarily allowed four years from the date of the entry in which to complete the reclamation of the land, and he is entitled to make final proof and receive patent as soon as he has expended the sum of \$3.00 an acre in improving and reclaiming the land, and has reclaimed all of the irrigable land embraced in his entry, and has actually cultivated one-eighth of the entire area of the land entered. Under the provisions of the Act of March 28, 1908, the period of four years may be extended, in the discretion of the Commissioner of the General Land Office, for an additional period not exceeding three years, if, by reason of some unavoidable delay in the construction of the irrigating works intended to convey the water to the land, the entryman is unable to make the proof of reclamation and cultivation within the four years. This does not mean that the period within which the proof may be made will be extended as a matter of course. Applications for extensions will not be granted unless it is clearly shown that the failure to reclaim and cultivate the land within the regular period of four years was due to no fault on the part of the entryman, but to some unavoidable delay for which he was not responsible and could not have readily foreseen.¹ Provided an extension has not been granted, where final proof is not made within the period of four years the register and receiver will send the claimant a notice, addressed to him at his postoffice address of record, informing him that he will be allowed ninety days in which to submit final proof. Should no action be taken within the time allowed, the register and receiver will report that

⁷ Instructions, 35 Land Dec. 305.

¹ For text of Act of March 28, 1908,

⁸ Regulations, 37 Land Dec. 319, see Sec. 1293.

Secs. 23-28.

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fact, together with evidence of service, to the General Land Office, whereupon the entry will be canceled.² An entryman who desires to make application for this extension of time should file with the register and receive an affidavit setting forth fully all the facts, showing how and why he has been prevented from making final proof of reclamation and cultivation within the regular period. This affidavit should be corroborated by two witnesses who have personal knowledge of the facts, and the register and receiver, after carefully considering all the facts, will forward the application to the General Land Office, with appropriate recommendations thereon.³

The method of making final proof is as follows: When an entryman has reclaimed the land and is ready to make his final proof, he should apply to the register and receiver for a notice of intention to make such proof. This notice must contain a complete description of the land and must describe the entry by giving the number thereof and the name of the entryman. If the proof is made by an assignee, his name as well as that of the original entryman should be stated. It must also show when, where, and before whom the proof is to be made. Four witnesses may be named in this notice, two of whom must be used in making the proof. This notice must be published once a week for five successive weeks in a newspaper of established character and general circulation published nearest the land, and it must also be posted in a conspicuous place in the local land office. Proof of publication must be made by affidavit of the publisher of the newspaper or by some one authorized to act for him. The register will certify to the posting of the notice in the local land office.

At the time and place mentioned in the notice, and before the officer named in the notice, the claimant will appear with two of the witnesses named in the notice, and make proof of reclamation, cultivation, and improvement of the land. This proof may be taken by any officer qualified to take the affidavits taken at the

² Regulations, 37 Land Dec. 320, Sec. 28.

By the Act approved Jan. 26, 1912, Public, No. 62, the Secretary of the Interior was authorized to grant a further extension of time within which to make proof upon desert land en-

tries in the counties of Weld and Larimer, Colorado.

³ Regulations, 37 Land Dec. 320, Sec. 29; Mary E. Norton, 38 Land Dec. 215; Gustave Gilbertson, 38 Land Dec. 474.

time of making the original entry. All claimants, however, wherever possible, should make proof before the register and receiver, because, by so doing, they may, in many instances, avoid delay caused by the fact that proofs submitted before officers other than the register and receiver are frequently suspended for investigation by a special agent, the testimony of each claimant should be taken separate and apart from and not within the hearing of either of the witnesses, and the testimony of each witness should be taken separate and apart from and not within the hearing of either the applicant or of any of his witnesses, and both the applicant and each of the witnesses should be required to state, in and as a part of the final proof testimony given by them, that they have given such testimony without any actual knowledge of any statement made in the testimony of either of the others.⁴

If the original entryman is dead, proof may be made by any one of the heirs or devisees.⁵ At the time of making final proof, entrymen of alien birth must have been admitted to full citizenship, which must be shown by a duly certified copy of the certificate of naturalization.⁶

§ 1305. Essentials—Payment for the land.—At present, under the Desert Land Acts, there must be a payment by the entryman of 25 cents per acre, at the time of filing his application, and, upon making final proof, there must be a further payment of one dollar per acre. Under the original Act of 1877, there was one exception to this rule, and that was where the filing was made upon the even numbered sections, retained by the Government, within the place limits of a railroad grant. Relative to these lands, it was held that while desert entries might be made, under the Desert Land Act, if they come within the character of desert lands, but that the price of these lands was fixed by the previous Act of Congress of March 3, 1853, embodied in the proviso of Section 2357 of the Revised Statutes of the United States, which provided as follows: "That the price to be paid for alternate reserved lands, along the line of railroads within the limits granted by any Act of Congress, shall be

⁴ Regulations, 37 Land Dec. 318, Secs. 20-22.

⁶ Circular, Sept. 30, 1910, 39 Land Dec. 253, Sec. 4.

⁵ Regulations, 37 Land Dec. 321, Sec. 30.

two dollars and fifty cents per acre."¹ As a result prior to the passage of the Act of 1891, lands, although within the general description of desert lands, could not be disposed of at less than \$2.50 per acre. Furthermore, cases initiated under the original Act of 1877, but not completed by final proof until after the passage of the Act of 1891, came under the same rule and the sum of \$2.50 per acre must be paid—the law, which was in effect at the time the entry was made, governing as to price.² After the amendatory Act of 1891, providing that the price of desert lands should be \$1.25 per acre and repealing all prior Acts in conflict therewith, this was construed by the Land Department to thereafter authorize desert land entries at that price "without regard to the situation of the land with relation to the limits of railroad grants."³ This is the present law as to all entries initiated after the passage of the amendatory Act of 1891.⁴ Therefore, at the time of making final proof, the claimant must pay to the receiver the sum of \$1.00 per acre for each acre of land upon which proof is made; this, together with the 25 cents per acre paid at the time of making the original entry, will amount to \$1.25 per acre, which is the price, under the present law, to be paid for all lands entered under the desert-land law, regardless of their location. The receiver will issue

¹ See 6 Fed. Stat. Ann., 1905, p. 333; 2 U. S. Comp. Stat., 1901, p. 1444; 3 Stat. L. 566.

² *United States v. Healey*, 160 U. S. 136, 40 L. Ed. 369, 16 Sup. Ct. Rep. 247; reversing 29 Ct. Cl. 115; *United States v. Ingram*, 172 U. S. 327, 43 L. Ed. 465, 19 Sup. Ct. Rep. 177; reversing 32 Ct. Cl. 147.

The principal, if not the only, object of the requirement that the alternate reserved sections along the lines of land-grant railroads should be sold for not less than double the minimum price fixed for other public lands, was to compensate the United States for the loss of the sections given away by the Government. *Id.*

See, also, *Wm. Brandt*, 31 Land Dec. 277; Circular, June 27, 1887, 5 Land Dec. 708; *John Cameron*, 7 Land

Dec. 436; *Daniel G. Tilton*, 8 Land Dec. 368; *Annie Knaggs*, 9 Land Dec. 49; *Cyrus Wheeler*, 9 Land Dec. 271; *Hugh Reese*, 10 Land Dec. 541; *Henry L. Davis*, 12 Land Dec. 632.

It was not ruled in these latter cases that lands within the limits of a railroad grant could not be entered under the Desert Land Act, but simply that they could not be entered for the price named in the Act, \$1.25 per acre. *J. F. Holcomb*, 22 Land Dec. 604; *F. W. Lawrence*, 23 Land Dec. 450; *Kate G. Organ*, 25 Land Dec. 231; *Id.*, 20 Land Dec. 406.

³ Instructions, Jan. 13, 1892, 14 Land Dec. 74; *Robert J. Gardinier*, 19 Land Dec. 83; *Kate G. Organ*, 20 Land Dec. 406; *Id.*, 25 Land Dec. 231.

⁴ For text of Act, see Sec. 1290.

a receipt for the money paid, and, if the proof is satisfactory,⁵ the register will issue a certificate in duplicate and deliver one copy to the entryman and forward the other copy to the General Land Office at the end of the month during which the certificate was issued.

If the original entryman is dead, and proof is made by any one of the heirs or devisees, the final certificate should issue to the heirs or devisees generally, without naming them.

When the final proof is made on an entry made prior to the Act of March 28, 1908, for unsurveyed land, if such proof is satisfactory, the register and receiver will approve the same and forward it to the General Land Office, without collecting the final payment of \$1.00 an acre, and without issuing final certificate. Fees for reducing the final proof testimony to writing should be collected and a receipt issued therefor, if the proof is taken before the register and receiver. As soon as the land is surveyed, they will call upon the entryman to make proof in the form of an affidavit, duly corroborated, showing the legal subdivisions covered by his entry. When this is done, the register and receiver will correct their records so as to make them describe the land by legal subdivisions, and, if final proof has been made and found satisfactory, and no other objections exist, final papers will be issued, upon the payment of the proper amount.⁶ No fees or commissions are required of persons making entry under the desert-land laws, except such fees as are paid to the officers for taking the affidavits and proofs.⁷

§ 1306. The sale or assignment of desert land entries.—Where desert land was filed upon under the original Act of 1877,¹ and an assignment of the entry was made before final proof and before the amendatory Act of 1891 went into effect, it was uniformly held by the Land Department that the assignment was void, and rendered the entry subject to cancellation.² But it was held by the courts

⁵ For making final proof, see Sec. 1304.

⁶ The above applies only to entries made prior to the Act of March 28, 1908, which provides that thereafter all entries shall conform to the legal subdivisions and that no desert land entries can thereafter be made upon unsurveyed lands. For the text of

the Act, and the construction thereof, see Sec. 1293.

⁷ Regulations, 37 Land Dec. 321, Secs. 30, 31; Circular, Sept. 30, 1910, 39 Land Dec. 253, Secs. 30, 31.

¹ For Act of 1877, see Sec. 1290.

² Downey Case, 7 Copp's L. O. Dec. 26; David B. Dole, 3 Land Dec. 214; Henry W. Fuss, 5 Land Dec. 167; In-

that there was nothing in the statute denouncing a mere intention upon the part of the locator to transfer his title, when perfected, when he complies fully with the law with respect to the reclamation of the land, and pays the purchase money. In such cases, after the patent has been issued to him he may transfer the land to whom he pleases.³

But the Act as amended in 1891,⁴ clearly provides for the assignment of these entries. Section 5 provides, "That no land shall be patented to any person under this Act unless he or his *assignors* shall have expended," etc. Also, by Section 7 authority is expressly given to issue patent "to the applicant *or his assigns*; but no person or association of persons shall hold by *assignment* or otherwise prior to the issue of patent, more than 320 acres of such arid or desert lands." Hence it was held by the Land Department that an entry taken up under the original Act of 1877, might, after the passage of the Act of 1891, be assigned to another by the entryman, and the title perfected in accordance therewith.⁵ As to all lands taken up after the Act of 1891, there is no question as to the right of assignment before final proof.⁶ An assignment, however,

structions, June 27, 1887, 5 Land Dec. 708; *Haggin v. Doherty*, 14 Land Dec. 123; *Gasquet v. Butlers Heirs*, 27 Land Dec. 721.

³ *United States v. Mackintosh*, 85 Fed. Rep. 333, 29 C. C. A. 176; *Williams v. United States*, 4 Ariz. 19.

⁴ See Sec. 1290.

⁵ *Gasquet v. Butler's Heirs*, 27 Land Dec. 721.

⁶ *Ellingson v. Aitken*, 30 Land Dec. 71; *S. S. Hobson*, 29 Land Dec. 453; Circular, July 11, 1899, p. 42, where it was prescribed that the affidavit of the assignee must be made before a United States Commissioner, or a judge or clerk of a court of record in the county wherein the land in question is situated.

See, also, *Anna I. Dool*, 31 Land Dec. 184; *Arthur F. Hogsett*, 29 Land Dec. 355; *Luther J. Prior*, 32 Land Dec. 608. The assignment of a por-

tion only of a desert entry will not be recognized.

See *Jacob Switzer Co.*, 33 Land Dec. 385; *Wm. A. Calderhead*, 36 Land Dec. 446; *T. C. Power & Bro.*, 33 Land Dec. 152; Instructions, Sept. 17, 1904, 33 Land Dec. 251; *Haggin v. Doherty*, 14 Land Dec. 123; *Herbert C. Oakley*, 34 Land Dec. 383, where it was held that no executory contract on the part of the entryman to convey after securing title would be recognized.

See, also, *Wheaton v. Wallace*, 24 Land Dec. 100; *Campbell v. Glover*, 35 Land Dec. 474. A certified copy of the instrument of assignment must be filed with the local land office.

See, also, *Wm. H. Calderhead*, 36 Land Dec. 446; *Green Piggot*, 34 Land Dec. 573; *Young v. Trumble*, 35 Land Dec. 515. Prior to final proof and certificate, an entryman has no such

must be made to one who is qualified to make an original entry under the Act. Therefore, where an assignment is made of an entry and the assignee recognized by the General Land Office, the entryman or person making the assignment thereby parts with his title to the land, even if it be subsequently shown upon contest or investigation that the assignee is not qualified to hold by assignment.⁷ Any other rule would permit unlawful assignments without any penalty by way of forfeiture in case of detection.

Under the Act of 1891 an assignment may be made to a corporation; but it is within the power and is the duty of the Land Department to require a corporation, as assignees of the original entryman, to show that the individual members composing the corporation are not disqualified under the desert-land laws from holding and acquiring title to the land covered by such an entry.⁸ And no person or association of persons could hold, by assignment or otherwise, prior to the issuance of patent, more than 320 acres of such arid or desert land.⁹ However, by Section 2 of the Act of March 28, 1908,¹⁰ it was provided:

"Sec. 2. That from and after the date of the passage of this Act no assignment of an entry made under said Acts shall be allowed or

right in the land as may be assigned by operation of law without any voluntary act on his part.

For procedure upon assignment, see Circular, Sept. 30, 1910, 39 Land Dec. 253, Secs. 14-16.

⁷ *Bone v. Rockwood*, 38 Land Dec. 253; overruling *Owens v. State of California*, 22 Land Dec. 369; *Vradenburg's Heirs v. Orr*, 25 Land Dec. 323; *Heinzman v. Letroadec's Heirs*, 28 Land Dec. 497, in so far as they conflict with the above views.

See, also, *Love v. Flahive*, 205 U. S. 195, 51 L. Ed. 768, 27 Sup. Ct. Rep. 486; *Id.*, on rehearing, 206 U. S. 356, 51 L. Ed. 1092, 27 Sup. Ct. Rep. 729.

⁸ *J. H. McKnight Co.*, 34 Land Dec. 443; *Jacob Switzer Co.*, 33 Land Dec. 383; *Silsbee Town Co.*, 34 Land Dec. 430; *Nevada So. R. Co.*, 22 Land Dec. 1.

A corporation of individuals all of whom have exhausted their rights under the desert land law is disqualified to take the assignment of a desert land entry. *Edmond A. Fogarty*, 37 Land Dec. 567.

⁹ See Sec. 7 of the Act of 1891, 6 Fed. Stat. Ann., 1905, p. 395, 2 U. S. Comp. Stat., p. 1550; 26 Stat. L. 1097; *Silsbee Town Co.*, 34 Land Dec. 430.

A corporation holding an assignment of a desert land entry must show that the members composing the corporation do not hold, in the aggregate, by assignment or otherwise, more than 320 acres of land under the desert land law. *Jacob Switzer Co.*, 33 Land Dec. 383.

¹⁰ Supp. Fed. Stat. Ann., 1909, p. 550; 35 Stat. L. 52.

recognized, except it be made to an individual who is shown to be qualified to make entry under said Acts of the land covered by the assigned entry, and such assignment may include all or a part of an entry; but no assignment to or for the benefit of any corporation or association shall be authorized or recognized."

Therefore, it is held by the Land Department that, if a person has made an entry in his own right, he can not thereafter take an entry by assignment, notwithstanding the fact that the area of the two entries combined does not exceed 320 acres. The language of the Act indicates that the taking of an entry by assignment is equivalent to the making of an entry, and this being so, no person is allowed to take more than one entry by assignment. The desert-land right is exhausted either by making an entry or by taking one assignment. However, under the practice recognized by the General Land Office, it is held that, where, prior to the date of the above Act, assignments were taken of more than one entry, or where a person made an entry and also took one or more entries by assignment, the aggregate area of the land embraced in all such entries not exceeding 320 acres, such assignments and entries will not be disturbed. But all assignments and entries made subsequent to the approval of the Act of March 28, 1908, must be governed by the terms of that Act, which is held to mean that the desert-land right is exhausted either by making an entry or by taking one by assignment.¹¹ The Act of March 28, 1908, forbids the assignment of a desert-land entry to a corporation or an association of individuals.

Subject to the above limitations, desert-land entries may be assigned in whole or in part, and as evidence of the assignment there should be transmitted to the General Land Office the original deed of assignment or a certified copy thereof. Where the deed of assignment is recorded, a certified copy may be made by the officer who has custody of the record. Where the original deed is pre-

¹¹ Regulations, 37 Land Dec. 315, Secs. 14, 15; *Harrington v. Patterson*, 38 Land Dec. 438.

Where, however, one whom has exhausted his right by taking an entry by assignment was nevertheless permitted to make an additional entry in his own name, it may be permitted to

stand within the provisions of the Act of March 28, 1908, authorizing second desert entries, notwithstanding a pending contest charging disqualification at the time the entry was made. *Harrington v. Patterson*, 38 Land Dec. 438.

sented to an officer qualified to take proof in desert-land cases, a copy certified by such officer will be accepted. Copies of deeds of assignment certified by notaries public or justices of the peace, or, indeed, any other officers than those who are qualified to take proofs and affidavits in desert-land cases, will not be accepted.¹²

An assignee must also file with his deed of assignment an affidavit showing qualifications to take the entry assigned to him. He must show what entries have been made by or assigned to him under the agricultural laws, and he must show his qualifications as a citizen of the United States, that he is 21 years of age or over, and also that he is a resident citizen of the State in which the land assigned to him is situated. In short, the assignee must possess the qualifications required of the party making an entry. No assignable interest is acquired by the applicant prior to the payment of 25 cents an acre.¹³ An assignment made prior to or on the day of such payment is treated as evidence of fraud.¹⁴ The sale of the land embraced in an entry at any time before final payment must be regarded as an assignment of the entry, and in such cases the person buying the land must show that he possesses all the qualifications required of an assignee.¹⁵

§ 1307. **Contests.**—Contests may be instituted against desert land entries for illegality or fraud in the inception of the entry or for failure to comply with the law after entry, or for any sufficient cause affecting the legality of the claim. An entry made in the interest or for the benefit of another is illegal, and is subject to contest on that ground. Successful contestants will be allowed a preference right of entry for thirty days after notice of the cancellation of the contested entry, and the register will give the same notice, and is entitled to the same fee for notice as in other cases.¹

A contest charging a desert-land entryman with the failure to make the requisite annual expenditure, thus putting in issue the truth of the annual proof offered by the entryman, may be brought

¹² Regulations, 37 Land Dec. 316, Sec. 16.

¹³ T. C. Power & Bro., 33 Land Dec. 152.

¹⁴ Joab Lawrence, 2 Land Dec. 22.

¹⁵ Simeon S. Hobson, 29 Land Dec. 453.

See, also, Regulations, 37 Land Dec. 316, Sec. 16.

¹ Regulations, 37 Land Dec. 322, Sec. 32; Circular, Sept. 30, 1910, 39 Land Dec. 253, Secs. 32, 33.

But see Gray v. Dixon, 83 Cal. 33, 23 Pac. Rep. 60.

prior to the expiration of the time allowed for the submission of the final proof.² So, too, the charge that the assignee of a desert entry is disqualified to take by assignment is sufficient basis for contest.³ However, the fact that the annual expenditures for the benefit of a desert-land entry are made by another, for the entryman, is not sufficient ground for contest, if made in good faith to effect reclamation, and not with a view to indirectly obtain title to the land.⁴

The filing of contest against a desert-land entry during the pendency of an application for extension of time under the Act of March 28, 1908, will not prevent the allowance of such application, where the contest affidavit does not charge facts tending to overcome the *prima facie* evidence showing right to the extension set forth in the application.⁵

§ 1308. Relinquishments.—A desert land entry may be relinquished at any time by the party owning the same, and when relinquishments are filed in the local land office the entries will be canceled by the register and receiver in the same manner as homestead, pre-emption, and other entries. Where an entry has been relinquished the land reverts to the Government. A relinquishment can not be made in favor of another person.¹ However, one in possession of desert land open to filing under the Desert Land Act may surrender the possession to another, and file a relinquishment to file thereon, and the latter taking possession may file thereon, and obtain a patent upon complying with the law.² This ruling, as we view the law, depends upon the condition that such a filing is prior to any other after the relinquishment has been made.

§ 1309. "The Dry Farm Act" or "Enlarged Homestead Act"—Cause of its enactment.—In all of the States of the arid West

² Bradley v. Vasold, 36 Land Dec. 106; Julian v. Harding, 31 Land Dec. 10; Wilkinson v. Stillwell, 35 Land Dec. 92; Porter v. Carlile, 34 Land Dec. 521; Stevenson v. Scharry, 34 Land Dec. 676; Richmond v. Davidson, 40 Land Dec. 452.

³ Bone v. Rockwood, 38 Land Dec. 253.

⁴ Williams v. Kirk, 38 Land Dec. 439.

⁵ Hoobler v. Treffry, 39 Land Dec. 557.

¹ One who, after attempting to perfect a desert land entry taken by assignment, relinquishes the same in the face of charges by a special agent, is disqualified to make an original entry of the same tract. Ida Lundquist, 37 Land Dec. 149.

² Moore v. Groffholdt, 10 Cal. App. 714, 103 Pac. Rep. 149.

there are vastly more lands which might be irrigated and reclaimed than there is water to reclaim them. Owing to the recent scientific experiments made by agricultural colleges and the Government experts, it has been ascertained that certain agricultural crops may be raised upon these hot, dry, exceedingly arid lands without irrigation and at some profit. Therefore, Congress, always anxious that the arid lands throughout the West should be brought into a state of cultivation, and always generous to the extreme when it comes to the matter of the granting of its public lands, enacted the Dry Farm Act.

The lands to which the Act applies are "non-irrigable" lands; that is to say, land which, as a rule, lacks sufficient rainfall to produce agricultural crops without the necessity of resorting to the unusual methods of cultivation, such as the system commonly known throughout the arid West as "scientific dry farming" or "dry farming," and for which there is no known source of water supply from which such lands may be successfully irrigated at a reasonable cost. "What are dry-farming methods? you may ask. Briefly told, simply this: Deep plowing, in order to form a sufficient reservoir for the reception of all the moisture that falls; surface cultivation at the proper times in order to maintain a dust mulch and prevent the evaporation of the gathered moisture; the selection of drouth-resisting crops, which are numerous, and include splendid varieties of all the more important cereals, fruits, and vegetables; careful attention to the surface of the soil while the crop is growing. Simple enough, like standing an egg on end, when you know how, but requiring great care, patience, and thoroughness. Catch all the moisture that falls and do not allow any of it to escape, except as it passes into the growing and ripening crop. Such is the science of dry farming." ¹

§ 1310. "The Dry Farm Act," or "Enlarged Homestead Act."—By the Act of February 19, 1909,¹ there was enacted "The Dry Farm" or "Enlarged Homestead" Act, the full text of which is as follows:

"Sec. 1. That any person who is a qualified entryman under the

¹ From the speech of Hon. Frank W. Mondell of Wyoming, in the House of Representatives, Dec. 14, 1909. Vol. 45 Congressional Record, p. 225.

¹ Supp. Fed. Stat. Ann., 1909, p. 560; 35 Stat. L. 639.

homestead laws of the United States may enter, by legal subdivisions, under the provisions of this Act, in the States of Colorado, Montana, Nevada, Oregon, Utah, Washington, and Wyoming, and the Territories of Arizona and New Mexico, 320 acres, or less, of non-mineral, non-irrigable, unreserved, and unappropriated surveyed public lands which do not contain merchantable timber, located in a reasonably compact body, and not over one and one-half miles in extreme length: *Provided*, that no lands shall be subject to entry under the provisions of this Act until such lands shall have been designated by the Secretary of the Interior as not being, in his opinion, susceptible of successful irrigation at a reasonable cost from any known source of water supply.

"Sec. 2. That any person applying to enter land under the provisions of this Act shall make and subscribe before the proper officer, as required by Section 2290 of the Revised Statutes, and in addition thereto shall make affidavit that the land sought to be entered is of the character described in Section 1 of this Act, and shall pay the fees now required to be paid under the homestead laws.

"Sec. 3. That any homestead entryman of lands of the character herein described, upon which final proof has not been made, shall have the right to enter public lands, subject to the provisions of this Act, contiguous to his former entry which shall not, together with the original entry, exceed 320 acres, and residence upon and cultivation of the original entry shall be deemed as residence upon and cultivation of the additional entry.

"Sec. 4. That at the time of making final proofs as provided in Section 2291 of the Revised Statutes, the entryman under this Act shall, in addition to the proofs and affidavits required under said section, prove by two credible witnesses that at least one-eighth of the area embraced in his entry was continuously cultivated to agricultural crops other than native grasses, beginning with the second year of the entry, and that at least one-fourth of the area embraced in the entry was so continuously cultivated beginning with the third year of the entry.

"Sec. 5. That nothing herein contained shall be held to affect the right of a qualified entryman to make homestead entry in the States named in Section 1 of this Act under the provisions of Section 2289 of the Revised Statutes, but no person who has made such entry under this Act shall be entitled to make homestead entry under the

provisions of said Section, and no entry made under this Act shall be commuted.²

"Sec. 6. That whenever the Secretary of the Interior shall find that any tracts of land, in the State of Utah, subject to entry under this Act, do not have upon them such a sufficient supply of water suitable for domestic purposes as would make continuous residence upon the lands possible, he may, in his discretion, designate such tracts of land, not to exceed in aggregate two million acres, and thereafter they shall be subject to entry under this Act without the necessity of residence: *Provided*, that in such event the entryman on any such entry shall in good faith cultivate not less than one-eighth of the entire area of the entry during the second year, one-fourth during the third year, and one-half during the fourth and fifth years after the date of such entry, and that after entry and until final proof the entryman shall reside within such distance of said land as will enable him successfully to farm the same as required by this section."

Relative to the last clause of the above section, it is held by the Secretary of the Interior that there is no authority for establishing a fixed and arbitrary limit to be measured by distance or time from the land so entered, and it is said by the Secretary: "In the regulations issued by the department for the guidance of registers and receivers in the administration of this law, it was stated that no attempt would be made at that time to determine how far from the land an entryman would be allowed to reside, as it was believed that a proper determination of that question would depend upon the circumstances of each case."³

"The department is unable to find in the language of the section any authority or justification for an arbitrary rule fixing a definite distance from the land within which such an entryman must reside

² For regulations of the Secretary of the Interior under the above Act, see Circular, 37 Land Dec. 546; Instructions, 37 Land Dec. 697, 707; 38 Land Dec. 361.

A homesteader who has made entry under the general law, upon which patent has issued, is not entitled to an additional entry under Sec. 3 of the Act of Feb. 19, 1909.

See, also, William P. Wall, 38 Land Dec. 566.

A married woman is not by reason of her marriage disqualified to make entry under Sec. 3 of the enlarged homestead Act, as additional to an entry made by her prior to her marriage. Alice C. St. John, 38 Land Dec. 577.

³ See 38 Land Dec. 364, 365.

or to fix a period of time within which he must be able to reach his claim, as it is believed, as stated in the regulations, that each case should be decided upon its own merits when actually presented to the department upon final proof, protest, or contest through the regular official channels. However, I think it is proper to state that the entry provided for by this law is a homestead entry. It is so declared in the statute, and the entryman is required to possess the qualifications of a homesteader, notwithstanding the fact that the entryman is excused from actually residing on the land entered. Nevertheless, the law requires that he shall reside within such distance from it 'as will enable him to successfully farm the same, as required by this section.' It is believed that Congress used this language advisedly, and that it was intended that the entryman himself should personally farm the land or personally supervise such farming. Otherwise, the use of the language employed by Congress has no meaning whatever."⁴

By the Act approved June 17, 1910, the "Dry Farm Act" was extended to the State of Idaho, including the provisions of Section 6, above quoted, with the exception that the Secretary of the Interior was authorized to segregate for the purposes of the Act only 320,000 acres.⁵

§ 1311. "The Dry Farm Act"—Construction of the Act.—Lands containing merchantable timber, mineral lands, and lands within a National reclamation project, or lands which may be irrigated at a reasonable cost from any known source of water supply, can not be entered under the Act. However, it is held by the Secretary of the Interior that minor portions of a legal subdivision sus-

⁴ W. L. Roberts, 39 Land Dec. 166.

Lands embraced in entries under the general homestead law are, if the facts justify such action, subject to designation under Section 6 of the enlarged homestead Act, and entrymen will not, after such designation, be required to reside thereon. Instructions, 38 Land Dec. 548.

One who in good faith makes a homestead entry of lands designated under Sec. 6 of the enlarged homestead Act, as not containing a suffi-

cient supply of water suitable for domestic purposes, and therefore subject to entry free from the necessity of residence, will not be required to establish residence should a sufficient supply of water be subsequently obtained. Web. Green, 38 Land Dec. 586. They are, however, required to reside within such a distance as will enable them to successfully cultivate and improve the land.

⁵ See Public, No. 214; 36 Stat. L. 531.

ceptible of irrigation from natural sources, as, for instance, a spring, will not exclude such subdivision from entry under the Act, provided that no one entry shall embrace in the aggregate more than forty acres of such irrigable lands. In order to make the lands subject to entry under the Act, they must have first been designated by the Secretary of the Interior as not being, in his opinion, susceptible of successful irrigation at a reasonable cost from any known source of water supply. Therefore, until the lands have been so "designated" by the Secretary, no applications to enter can be received. Again, the fact that lands have been designated as subject to entry is not conclusive as to the character of such lands. But each entryman must furnish the affidavit required by Section 2 of the Act, and should it afterward develop that the lands are not of the character contemplated by the Act, the entry will be canceled or the area reduced, as the circumstances may warrant.

The sixth section of the Act applies alone to the State of Utah and to lands which do not have upon them sufficient water for domestic purposes as will render continuous residence upon such lands possible, in which case the entryman of such lands will not be required to prove continuous residence thereon. The Act provides in such cases that all entrymen must reside within such distance of the land entered as will enable them to successfully farm the same as required by the Act. Just why an exception should be made in this respect for the State of Utah, we are unable to determine, as the physical features of these lands of the character contemplated in the Act are the same in all parts of the arid West. Perhaps it was due to the astuteness of the members of Congress from Utah, and to Senator Smoot in particular, that this State was particularly favored by the Act.¹

¹ For the regulations of the Land Department under the Act, see Instructions, and cases referred to in the last section, No. 1310.

CHAPTER 67.

THE CAREY LAW.

- § 1312. Scope of chapter.
- § 1313. The law—In general.
- § 1314. Cause of the enactment of the Carey Act.
- § 1315. Full text of Act of August 18, 1894.
- § 1316. Acts amendatory—Act of June 11, 1896.
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- § 1318. Amendatory Acts—Acts of March 1, 1907, and February 24, 1909, relating to Indian lands.
- § 1319. Acts amendatory—Act of March 27, 1908, granting additional land to Idaho and Wyoming, and Act of February 18, 1909, extending the law to New Mexico and Arizona.
- § 1320. Amendatory Acts—Act of March 15, 1910, relating to temporary withdrawals.
- § 1321. Amendatory Acts respecting coal lands—Acts of March 3, 1909, and June 22, 1910.
- § 1322. Amendatory Acts—Act of February 21, 1911, relative to furnishing Carey Act projects with surplus water acquired by the Reclamation Service.
- § 1323. Particular features of the Acts and their operation.
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- § 1325. Acceptance of the grant made by the Carey Act by the States named.
- § 1326. The powers of the State board.
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- § 1328. Proceedings under State laws—Application to board for selection of lands.
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- § 1330. Proceedings under State laws—The entry and settlement of the land by settlers.
- § 1331. Proceedings under State laws—Duties of settlers.
- § 1332. Proceedings under State laws—Assignment of entries.
- § 1333. Proceedings under State laws—Lands can be disposed of only to actual settlers.
- § 1334. Proceedings under State laws—The lien for the water rights.
- § 1335. Proceedings under State laws—Rights of way for canals and other works.
- § 1336. The proceeds from sale of lands to constitute a State reclamation fund.

§ 1312. **Scope of chapter.**—There is another method which the United States has for disposing of the desert lands of the public domain, and under the scheme of which the lands must be reclaimed by irrigation, and that is by what is popularly called the “Carey Act.”¹ This Act properly comes under the subject of donations of lands by the Government to the States named for internal improvement;² but owing to the fact the acquisition of title to these lands also involves the question of the acquisition of the right to the use of water for their reclamation, and in order to discuss these subjects together, we will include the whole subject of the Act in this chapter, both as relating to the acquisition of the title to the lands and to the water rights.

§ 1313. **The law—In general.**—The Carey Act, approved August 18, 1894, at this writing, has now been in force for eighteen years.¹ As first passed, few, if any, of the States to which it was applicable were in a position to avail themselves of its benefits. The States had no money to construct the great works necessary, or were powerless under their constitutions to do so. So the Act was amended to meet the conditions and needs of the respective States, and, in effect, to enable the States to act as the agents of the General Government, and to authorize the State to make contracts with individuals or corporations who would furnish the financial aid necessary for the construction of the works, and at the same time to give ample security to the parties who furnished the money for the same. Again, for the purpose of securing the necessary money the construction company is permitted to mortgage its equity in the project, to issue bonds, or to assign its contracts with the settlers for the purchase of the water right, which is practically the price the settler pays for his land, the State charging but a nominal price for the same. The only conditions imposed upon the settlers are that they shall occupy, improve, and cultivate the land entered by them, until they secure their patents, which they may obtain upon final proof that the lands have been so occupied, improved, and cultivated, and by paying the balance due the State.² They must then

¹ For full text of the Act, see Sec. 1315. and its amendments, see Secs. 1315-1322.

² For the donation of lands for internal improvement, see Secs. 427, 428. ² For the final proof, see Secs. 1330, 1332.

¹ For the full text of the Carey Act 150—Kin. on Irr.

keep up their annual payments with the construction company, for which the company is given a lien until the water right is fully paid for. In many instances it is also provided that when all of the lands have been so entered and full payments for the same have been made, together with the full payments for the water rights, the title to the entire project, together with that of the necessary works, passes to the ownership of the settlers themselves, who thereafter own and control the same, and the original stockholders of the corporation are superseded by them.

The results of this law have been beneficial in the extreme, as may be seen in the States which have taken advantage of its benefits. Millions of acres have been reclaimed through its means, and thousands of homes have been furnished. The popularity of the law seems to arise from the fact that it furnishes absolute security to all the varying interests involved in the problem of reclamation of lands under this system. To be sure, mistakes have been made, as was especially true during the formative period of the law and its workings. But the problems for its successful outcome have been rapidly solved during the eighteen years of its existence. One feature which indicates its successful working is the fact, as will be noticed in the succeeding sections of this chapter, of the comparatively little litigation, as compared with other special laws for the reclamation of the arid lands.

The amount of land actually reclaimed and under irrigation under the Carey Act, according to the preliminary census results of the thirteenth census, 1910, is 288,553 acres. The acreage enterprises capable of irrigation in 1910, under the Carey Act, is given as 1,089,677 acres. The acreage included in enterprises completed or under construction in 1910, under the same Act, is given as 2,573,874 acres.³

Those most familiar with the practical operation and workings of the Carey law, and who have had the best opportunity to study its scope and field of usefulness are its most enthusiastic advocates, and predict that in the end the development of the arid region will be better promoted and the interests of communities better conserved through the agency of this law than through the National Reclamation Act, which law we have discussed in a preceding chapter.⁴

³ For the irrigation district laws, see Secs. 1386-1432.

⁴ For the National Reclamation Act, see Chap. 65, Secs. 1235-1286.

§ 1314. Cause of the enactment of the Carey Act.—The law under discussion in this chapter and commonly known as "The Carey Act," was approved August 18, 1894, Senator Carey of Wyoming being the author of the original Act. This Act was afterward amended by the Acts of June 11, 1896, March 3, 1901, and February 18, 1909.¹

The passage of the Carey Act may be ascribed to two distinct causes, one physical and the other political. The physical cause was that at the time of the passage of the Act the desert lands still owned by the United States and open to settlement were becoming more and more inaccessible from the waters of the natural streams. The homestead and pre-emption laws had been in force for many years; and as there was no limitation as to the exact locality in reference to the natural streams of the lands under these laws which might be taken up, it is natural that the early settlers chose those lands which were the nearest or most accessible to the streams. The desert land law had also been in force for seventeen years. This law prescribed that the lands must not be watered by the natural streams, in order to bring them within the character of the lands which might be filed upon under the Act. But it was natural that the settlers should choose those lands which were the nearest to water, as the law prescribed that the water must be conducted upon the lands in order to reclaim them.² So, in 1894, at the time when the Carey Act was passed, a great portion of the best of public lands had been taken up by the settlers, and especially those lands where the water for irrigation could be conducted thereon at a moderate amount of expense; at least, with the amount of capital which the average settler or a combination of a settler and his neighbors could command. The desert lands at this time which were open for filing were further back from the streams, and hence required larger irrigation works and longer canals and ditches, and consequently required a large amount of capital to construct the works necessary for their reclamation. Hence it was considered that large companies with plenty of financial backing would take up these irrigation projects, construct the works, and, being backed in a way by

For a comparison of the workings of the National Reclamation Act and those of the Carey Act, see Secs. 1239, 1240.

¹ For the full text of the Act and its amendments, see Secs. 1315-1322.

² See Secs. 1288-1290.

the State wherein the lands were located, a large amount of lands which were then barren and practically inaccessible to water would thus be brought into cultivation. This is exactly what has been the working effect of the law, as we will show in a future discussion of the subject.³

The political cause for the passage of the Act was that the West had long waited for Congress to make some provisions for the construction of the great irrigation works required to irrigate these lands as a National enterprise. Nothing at this time had been done toward that end.⁴ At that time failing in getting the General Government to take up the matter of the construction of the great works necessary for the reclamation of the desert lands, there was a general demand made upon Congress by the West that the remainder of the public lands be granted to the respective States wherein they were situated, in order that the States themselves might provide measures for their reclamation. This movement also failed in its entire accomplishment. But the passage of the Carey Act was a sort of a compromise, the object of which Act was to aid the public land States in the reclamation of the desert lands therein.

§ 1315. Full text of Act of August 18, 1894.—The original Carey Act was enacted as Section 4 of the Act of August 18, 1894, entitled, "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1895, and for other purposes."¹

The full text of the Act, together with the amendatory Acts, is as follows:

"Sec. 4. That to aid the public land States in the reclamation of the desert lands therein, and the settlement, cultivation, and sale thereof in small tracts to actual settlers, the Secretary of the Interior, with the approval of the President, be, and hereby is, authorized and empowered, upon proper application of the State to contract and agree, from time to time, with each of the States in which there may be situated desert lands as defined by the Act entitled

³ See Secs. 1315-1336.

⁴ This is exactly what was done under the National Reclamation Act of 1902, discussed in a previous chap-

ter of this part. See Chap. 65, Secs. 1235-1286.

¹ 6 Fed. Stat. Ann., 1905, p. 397; 28 Stat. L. 422; 2 U. S. Comp. Stat., 1901, p. 1554.

'An Act to provide for the sale of desert land in certain States and Territories,' approved March 3, 1877, and the Act amendatory thereof, approved March 3, 1891,² binding the United States to donate, grant, and patent to the State free of cost for survey or price such desert lands, not exceeding one million acres in each State, as the State may cause to be irrigated, reclaimed, occupied, and not less than twenty acres of each 160-acre tract cultivated by actual settlers, within ten years next after the passage of this Act, as thoroughly as is required of citizens who may enter under the said desert land law.

"Before the application of any State is allowed or any contract or agreement is executed or any segregation of any of the land from the public domain is ordered by the Secretary of the Interior, the State shall file a map of the said land proposed to be irrigated which shall exhibit a plan showing the mode of the contemplated irrigation, and which plan shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops, and shall also show the source of the water to be used for irrigation and reclamation, and the Secretary of the Interior may make necessary regulations for the reservation of the lands applied for by the States to date from the date of the filing of the map and plan of irrigation, but such reservation shall be of no force whatever if such map and plan of irrigation shall not be approved. That any State contracting under this section is hereby authorized to make all necessary contracts to cause the said lands to be reclaimed, and to induce their settlement and cultivation in accordance with and subject to the provisions of this section; but the State shall not be authorized to lease any of said lands or to use or dispose of the same in any way whatever, except to secure their reclamation, cultivation, and settlement.

"As fast as any State may furnish satisfactory proof according to such rules and regulations as may be prescribed by the Secretary of the Interior that any of said lands are irrigated, reclaimed, and occupied by actual settlers, patents shall be issued to the State or its

² The desert land Acts, see Chap. 66, Secs. 1287-1311.

The Act applies to the same States to which the desert land Acts apply, which are: California, Colorado, Idaho, Montana, Nevada, North Da-

kota, South Dakota, Utah, and Wyoming, and by the Act of Feb. 18, 1909, to Arizona and New Mexico. See Supp. Fed. Stat. Ann., 1909, 559; 35 Stat. L. 638.

assigns for said lands so reclaimed and settled: *Provided*, that said States shall not sell or dispose of more than 160 acres of said lands to any one person, and any surplus of money derived by any State from the sale of such lands in excess of the cost of their reclamation shall be held as a trust fund for and be applied to the reclamation of other desert lands in such State."

§ 1316. *Acts amendatory—Act of June 11, 1896.*—The Act was amended in an important particular by Section 1 of the Sundry Civil Appropriation Act of June 11, 1896,¹ which is as follows:

"Sec. 1. . . . That under any law heretofore or hereafter enacted by any State, providing for the reclamation of arid lands, in pursuance and acceptance of the terms of the grant made in Section 4 (of the Act set forth above) a lien or liens is hereby authorized to be created by the State to which such lands are granted, and by no other authority whatever, and when created shall be valid on and against the separate legal subdivisions of the land reclaimed for the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers; and when an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim a particular tract or tracts of such lands, then patents shall issue for the same to such State without regard to settlement or cultivation: *Provided*, that in no event, in no contingency, and under no circumstances, shall the United States be in any manner directly or indirectly liable for any amount of any such lien or liability, in whole or in part."

§ 1317. *Acts amendatory—Act of March 3, 1901.*—The limitation of time in the above quoted Section 4 was modified by Section 3 of the Sundry Civil Appropriation Act of March 3, 1901,¹ which provides as follows:

"Sec. 3. That Section 4 of the Act of August 18, 1894, entitled, etc. (see Section 4, quoted above) is hereby amended so that the ten years' period within which any State shall cause the lands applied for under the Act to be irrigated and reclaimed, as provided in said

¹ 6 Fed. Stat. Ann., 1905, p. 398; ¹ 6 Fed. Stat. Ann., 1905, p. 398;
² U. S. Comp. Stat., 1901, p. 1556; 31 Stat. L. 1188.
²⁹ Stat. L. 434.

section as amended by the Act of June 11, 1896, shall begin to run from the date of approval by the Secretary of the Interior of the State's application for the segregation of such lands; and if the State fails within said ten years to cause the whole or any part of the lands so segregated to be so irrigated and reclaimed, the Secretary of the Interior may, in his discretion, continue said segregation for a period of not exceeding five years, or may, in his discretion, restore such lands to the public domain."²

§ 1318. **Amendatory Acts—Acts of March 1, 1907, and February 24, 1909, relating to Indian lands.**—By the Act of March 1, 1907,¹ the provisions of the foregoing Acts were extended to the desert lands within the former Southern Ute Indian Reservation in Colorado not included in any forest reservation: "*Provided*, that before a patent shall issue for any of the lands aforesaid under the terms of the said Act approved August 18, 1894, and amendments thereto, the State of Colorado shall pay into the Treasury of the United States the sum of \$1.25 per acre for the lands so patented, and the money so paid shall be subject to the provisions of Section 3 of the Act of June 15, 1880, entitled, 'An Act to accept and ratify the agreements submitted by the confederated bands of Ute Indians in Colorado for the sake of their reservation in said State, and for other purposes, and to make the necessary appropriation for carrying out the same.'

"Sec. 2. That no lands shall be included in any tract to be segregated under the provisions of this Act on which the United States

² For instructions governing the extension of time for irrigation and reclamation, under the amendment, see 37 Land Dec. 682, where it is held that applications for extension of time will only be entertained upon the showing of the happening of some event as specified preventing the completion of the reclamation which could not have been reasonably anticipated or guarded against, such as: The destruction of the works by flood or other unavoidable casualties; inability to complete construction of works because of unforeseen structural or physical difficulties encountered; error or mis-

judgment in surveying and locating works, necessitating new surveys and construction; financial failure on the part of the contractor under the State; other reasons not specified but falling within the general scope of the instructions will be considered if presented. In all cases the showing must be made by or through the proper State authorities and clearly and specifically set forth all the facts and reasons which prevented the completion of the contract or reclamation of the land within the ten year period.

¹ 34 Stat. L. 1057.

Government has valuable improvements or which have been reserved for Indian schools or farm purposes."

Also, by the provisions of the Act of February 24, 1909,² the provisions of the foregoing Acts were extended to the desert lands within the former Ute Indian Reservation in Colorado, under the same terms and subject to the same limitations as the provisions of the Act last above extending the provisions of the Acts to the former Southern Ute Indian Reservation.

§ 1319. Acts amendatory—Act of March 27, 1908, granting additional land to Idaho and Wyoming, and Act of February 18, 1909, extending the law to New Mexico and Arizona.—Also, in the Sundry Civil Appropriation Act of March 27, 1908,¹ under the head of "Arid Lands in Idaho and Wyoming," there are the following provisions:

"That an additional one million acres of arid lands within each of the States of Idaho and Wyoming be made available and subject to the terms" of the Carey Act and its amendments, "and that the States of Idaho and Wyoming be allowed under the provisions of said Acts said additional area or so much thereof as may be necessary for the purposes and under the provisions of said Acts."

Again, by the Act of February 18, 1909,² the provisions of the Carey Act and its amendments were extended to the Territories of New Mexico and Arizona, "and that said Territories, upon complying with the provisions of said Act, shall be entitled to have and receive all of the benefits therein conferred upon the States."

§ 1320. Amendatory Acts—Act of March 15, 1910, relating to temporary withdrawals.—Again, by the Act of March 15, 1910,¹ Section 4 of the Carey Act was amended so as to authorize the "Secretary of the Interior, upon application by the proper officer of any State or Territory to which said section applies, to withdraw temporarily from settlement or entry areas embracing lands for which the State or Territory proposes to make application under said section, pending the investigation and survey preliminary to the filing of the maps and plats and application for segregation by the State or Territory: *Provided*, that if the State or Territory shall not pre-

² Public, No. 255.

¹ 35 Stat. L. 317-347.

² Public, No. 244.

¹ Public, No. 87; 28 Stat. L. 372.

sent its application for segregation and maps and plats within one year after such temporary withdrawal the lands so withdrawn shall be restored to entry as though such withdrawal had not been made." ²

To obtain the benefits of this amendatory Act, the State, through its proper official, will be required to file in the local land office an application therefor in the form provided, which shall set forth the name of the individual or corporation proposing to reclaim the lands; that all of the forms and conditions imposed by the State law upon the proposer, prior to segregation, have been complied with; that from the showing made, or other source of information, it is believed that sufficient water to irrigate the whole tract asked to be withdrawn, over and above prior appropriations, is available, and that the proposer has either acquired title to such water, or applied for the same, and that the lands are desert in character. Appended to the application should be a list of the lands asked to be withdrawn; if the lands are unsurveyed, the fact should be set forth, together with a statement that an application has been filed for the survey in the office of the Surveyor-General. Accompanying such application should be filed an affidavit, in the form provided, based upon personal examination, that the lands are desert in character, and are non-mineral. This affidavit should be made either by the proposer, his or its engineer, or by the State engineer, or one of his assistants. Where the lands sought to be withdrawn are situated in more than one land district, a list must be filed in each district, describing the lands in that district.

Upon the filing of such application the register will at once note the same upon his records, and will thereafter reject all applications to enter, purchase, or select any of such lands, excepting when settlement or application to enter, purchase, or select prior to the date of the filing of the State application is alleged, or disclosed of record; he will then at once transmit the application to the General Land Office for further action, first noting thereon the date of filing, over his written signature.

Within three months after the date of filing the application for withdrawal in the local land office, the State must file a corroborated affidavit by the proposer, his or its engineer, or the State engineer,

² For regulations issued under the Act, see those of April 25, 1910, 38 Land Dec. 580.

that the work of surveying and laying out the proposed irrigation system has been actually commenced in the field and is being energetically prosecuted; this affidavit should show the work accomplished and the results. In default of such showing by the State, the withdrawal will be promptly revoked.

In the event that any of the tracts withdrawn are found to be above the proposed irrigation works, or for any other reason not susceptible of irrigation, the fact and description of the non-reclaimable land by smallest legal subdivisions should be at once communicated to the General Land Office, that they may be relieved from the withdrawal. Again, if at any time after withdrawal it is shown that the State is not energetically prosecuting the investigation and survey of the lands, that the same are not reclaimable by the proposed system of reclamation, are not desert in character, or for any reason are not subject to the provisions of the Carey Act, or that the proposer is not proceeding in good faith, the withdrawal will be at once revoked.

The year mentioned in the Act as the period of withdrawal will commence to run from the date of filing the application for withdrawal in the local land office.

§ 1321. Amendatory Acts respecting coal lands — Acts of March 3, 1909, and June 22, 1910.—The Act of March 3, 1909, entitled, "An Act for the protection of the surface rights of entrymen,"¹ provides that any person who has in good faith located, selected, or entered under the non-mineral land laws of the United States any lands which subsequently are classified, claimed, or reported as being valuable for coal, may, if he so elect, and upon making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which shall contain a reservation to the United States of all coal in said lands, and the right to prospect for, mine, and remove the same.

No complete equitable title or interest vests in a State by the approval of a segregation list under the Carey Act; and if subsequent to such approval and prior to the final approval of the patent list lands in the segregation list are classified as coal lands, it is held by the Secretary of the Interior that the department is without

¹ Supp. Fed. Stat. Ann., 1909, p. 563; 35 Stat. L. 844.

For full text of Act, see coal lands, Sec. 442.

authority, so long as such classification stands, to approve or patent such lands to the State, except in accordance with the Act of March 3, 1909; and the State will then be called upon to elect to accept a patent to the lands with a reservation of the coal deposits, or to proceed to a hearing to ascertain and adjudicate the character of the land, at which the burden of sustaining the coal classification will rest upon the Government. If upon such hearing the tracts are determined to be coal lands, the State may still take a patent for the surface, and if non-coal, patent without reservation may issue, all else being regular.²

By the Act of June 22, 1910, entitled, "An Act to provide for agricultural entries on coal lands,"³ it was provided that unreserved public lands of the United States, exclusive of Alaska, which have been withdrawn or classified as coal lands, or are lands valuable for coal, shall be subject to selection under the Carey Act, and for entry under other laws mentioned in the Act, with a reservation of the United States of the coal in such lands and the right to prospect for, mine, and remove the same.⁴

§ 1322. Amendatory Acts—Act of February 21, 1911, relative to furnishing Carey Act projects with surplus water acquired by the Reclamation Service.—By the Act of February 21, 1911, the Reclamation Service was authorized to contract for the impounding, storing, and carriage of water and to co-operate in the construction and use of reservoirs and canals under reclamation projects and for other purposes. The full text of the Act is given in a previous section under our chapter upon the National Reclamation Act.¹ It was especially provided in the Act that surplus water from reclamation projects might be furnished to projects constructed under the law known as the Carey Act, and those constructed by individuals, corporations, associations, and irrigation districts organized for or engaged in distributing the water for irrigation. It was provided

² State of Wyoming, 38 Land Dec. 508; State of Utah, 40 Land Dec. 340.

See, also, Instructions, 37 Land Dec. 489.

³ Public, No. 227; 36 Stat. L. 583.

For full text of Act, see coal lands, Secs. 442, 443.

⁴ That this Act is applicable to desert land entries, see Sec. 1294.

That it is applicable to reservations under the National Reclamation Act, see Sec. 442, 443.

¹ See Sec. 1259.

See, also, 36 Stat. L. 925; Supp. U. S. Comp. Stat., 1911, p. 682.

that a proper charge should be made for the impounding, storing, and carrying of such surplus water by the Secretary, who is to take into consideration the cost of the construction and maintenance of the works by which such water is to be impounded or carried.

§ 1323. Particular features of the Acts and their operation.— It will be noticed from the provisions of the law quoted in the preceding sections,¹ that there are many features of the law in common with the provisions of the desert land laws discussed in the previous chapter.² The intent of the law is evidently to permit the several States named in the Act, by the construction of the irrigation works necessary to aid their citizens in irrigating and reclaiming large tracts of lands which are deemed desert under the Desert Land Acts. The significant features of the original Act are that it calls for reclamation by irrigation, occupation, and cultivation before any patent should pass from the United States to the State or to its assigns. Another feature worthy of note is that the States are not authorized to lease or use or dispose of the lands selected in any way whatever, except to secure their reclamation, cultivation, and settlement. Patents are to be issued by the Government when the lands shall be reclaimed and occupied by actual settlers. Very little seems to have been done under the original Act except that some of the States passed statutes accepting the benefits of the grant and made provisions by various methods for the beginning of the work looking to the reclamation of arid tracts of lands within their boundaries. As early as November 22, 1894, rules and regulations were drawn up by the General Land Office, as provided for in the Act, governing the selection and withdrawal of lands under the Act.³ And as the law has been amended from time to time, so the regulations have also been amended.⁴

By the Act of June 11, 1896, a very important amendment was made to the original Act.⁵ One object of the amendment was that it had been ascertained that the States named in the Act, and which

¹ See Secs. 1315-1322.

² See Chap. 66, Secs. 1287-1311.

³ See Regulations, 20 Land Dec. 440.

⁴ See Regulations of March 15, 1898, 26 Land Dec. 480; Sept. 20, 1898, 27 Land Dec. 635.

⁵ For text of this amendment, see Sec. 1316.

For the discussion of the amendment in the House, see 28 Cong. Record, pp. 622 *et seq.*

were expected to take advantage of the same, either had not the means or were prohibited by their constitutions from lending their credit to the construction of the large canals and irrigation works necessary to reclaim large tracts of land; and that it was necessary to make some provision by which persons or corporations having ample means, and acting for the States in the construction of these works, should be made secure by a lien or liens on the lands and water rights for the large sums of money necessarily advanced by them. In the discussion in the House upon the amendment, referred to in our note, it was distinctly pointed out that this amendment, in the form in which it finally passed, would necessarily result in the acquisition by wealthy individuals and corporations of large bodies of land, to the exclusion of the settler. This result was practically conceded by the friends of the measure, but it was also pointed out that in no other manner could the law be made to operate beneficially, and that in any event the desert lands which were then practically worthless would become valuable to the States, even though held by large corporations, and that the States and the citizens would not be damaged by the reclamation of these then worthless lands even if the large corporations and wealthy individuals were given a lien upon them for the money advanced by them for the construction of the works.

This amendment was a distinct departure in some respects from the theory of the original Act. As above pointed out, emphasis was laid in the original Act upon the settlement, occupation, and reclamation by irrigation, and that the actual settlers would receive patents for the separate parcels of land, not exceeding 160 acres, as fast as the same were reclaimed. The amendment contains but two provisions, but they are important, and were sufficient to change the theory of the original Act of 1894. The first is the authorization of a lien or liens to be created by the State to which such lands are granted under the original Carey Act, and by no other authority whatever, and when created shall be valid on and against the separate legal subdivisions of the land reclaimed for the actual cost and necessary expenses of reclamation and reasonable interest thereon until disposed of to actual settlers. This provision was evidently in contemplation of the fact that the States must necessarily procure individuals or corporations to act as the construction agents of the irrigation works, construct such works at their own expense, and that

the liens so authorized by the various States upon the lands and water rights are liens operating for the benefit of these construction agents as security for the money advanced by such agents. The second provision is that when an ample supply of water is actually furnished in a substantial ditch or canal to reclaim a particular tract or tracts of such lands, then patents shall issue for the same to such States, without regard to settlement or cultivation. This second provision is a decided departure from the requirements of the original Act, in that the State is not required to await the actual settlement, occupation, or cultivation of the lands before demanding from the General Government a patent therefor. All that is required is that the State produce the proper evidence of the reclamation of the land, or rather that an ample supply of water is actually furnished in "a substantial ditch or canal, or by artesian wells or reservoirs," to reclaim the lands. The necessary result of this provision is that the State may obtain a patent for the entire tract of land selected by it under the original Act before a single settler had gone upon the land. This is also the construction of the amendment by the Land Department.

Subsequent to the passage of the amendment of 1896 a question arose as to its proper construction, and on January 22, 1898,⁶ Secretary Bliss, in a communication to the Commissioner of the General Land Office, held that, under this amendment, patents for desert lands may issue to the States when an ample supply of water is actually secured, without regard to the settlement and cultivation, and that this provision is not limited to lands on which liens have been placed under the amendment, but is applicable to all lands donated by the original Act of August 18, 1894.⁷ It therefore fol-

⁶ State of Washington, 26 Land Dec. 74.

⁷ The following language is used in the opinion: "A construction should not be put upon the Act which discriminates in favor of lands irrigated by the expenditure of money obtained through a lien, as against lands irrigated by the use of money derived from other sources. The purpose and object of the law is to enable the State to reclaim the lands as an inducement to their settlement and cul-

tivation by actual settlers in small tracts, and it is immaterial whether the money expended in such reclamation is obtained through the instrumentality of a lien or otherwise. The Act of 1896 is remedial in its purpose and should receive such construction, consistent with the language there employed, as will best tend to accomplish the ultimate and great purpose of this legislation. The Act of 1896 should be treated as amending the Act of 1894 by authorizing a lien to be

lows that should the State have the power and see fit to advance the money itself for the reclamation of the lands selected, it will be entitled to a patent to the same, as well as though the lands had been reclaimed by the means of the liens authorized by the State for the benefit of the construction company. It will be noted that there is no attempt in the amendment of June 11, 1896, to repeal any portion of the original Carey Act of August 18, 1894. Therefore, so far as the latter Act is not inconsistent with the former, both will necessarily stand together. It must also be borne in mind that the original Carey Act as amended is still in force, to the effect that the State shall not dispose of more than 160 acres of land to any one person, and this provision stands side by side with the latter provision by which the entire control of the lands may, upon their reclamation, as provided in the amendment, be turned over to the State through and under a patent legally issued.

§ 1324. *Regulations by the Secretary of the Interior.*—Under the original Carey Act ¹ the Secretary of the Interior is given the power to make necessary regulations for the reservation of the lands applied for by the States, and the following is an abstract of the latest regulations promulgated by him under this authority, under date of April 9, 1910: ²

"1. Under the provisions of the Acts quoted the States and Territories are allowed ten years from the date of the approval of the application for the segregation of the land by the Secretary of the Interior in which to irrigate and reclaim them. The Secretary of the Interior may, however, in his discretion, extend the time for irrigating and reclaiming the lands for a period of five years, or he may restore to the public domain the lands not reclaimed at the expiration of the ten years, or of the extended period.

"2. The lands selected under these Acts must all be desert lands as defined by the Acts of 1877 and 1891, and the provisions and regulations of this department therein provided for." ³

placed upon the lands as an aid in the accomplishment of their reclamation, and as also amending the original Act in the matter of patenting the lands to the States, by dispensing with proof of settlement and cultivation of the reclaimed lands according

to the expressed purpose of the first Act."

¹ For text of Act, see Sec. 1315.

² See 37 Land Dec. 624.

³ That is to say, "All lands exclusive of timber lands and mineral lands which will not, without artif-

Lands which produce native grasses sufficient in quantity, if unfed by grazing animals, to make an ordinary crop in usual seasons are not desert lands. Lands which will produce an agricultural crop of any kind in amount sufficient to make the cultivation reasonably remunerative are not desert. Lands containing sufficient moisture to produce a natural growth of trees are not to be classed as desert lands.

Lands occupied by *bona fide* settlers and lands containing valuable deposits of coal or other minerals are not subject to selection.⁴

"3. The second paragraph of Section 4, before quoted, provides that before the application of any State is allowed or any contract or agreement is executed, or any segregation of any of the land from the public domain is ordered by the Secretary of the Interior, the State shall file a map of the land selected and proposed to be irrigated, which shall exhibit a plan showing the mode of contemplated irrigation and the source of the water."

However, under the provisions of the amendatory Act of March 15, 1910, public lands may be temporarily withdrawn upon proper application of the beneficiary State that proper surveys may be prepared and investigation made preliminary to the filing of the application by such State for the segregation of such lands. If such application is not filed within one year from the date of withdrawal, the lands so withdrawn will, as directed by the Act, be immediately restored to entry. No provision is made for the extension of such temporary withdrawal.⁵

In accordance with the requirements of the Act, the State must give full data to show that the proposed plan will be sufficient to thoroughly irrigate and reclaim the land and prepare it to raise ordinary agricultural crops, for which purpose a statement by the

cial irrigation, produce some agricultural crop, shall be deemed desert land." Circular, Dec. 15, 1902, 31 Land Dec. 228; Regulations, Sept. 20, 1898, 28 Land Dec. 635; Instructions, Dec. 5, 1901, 31 Land Dec. 149; State of Oregon, 33 Land Dec. 374, where it was held that the burden of proof was upon the State to show that the lands selected are of the character contemplated by the Act.

See, also, State of Oregon, 36 Land Dec. 509, where it was held that in

cases where lands had been patented to the State not of the character contemplated in the Act, that suit should be brought to cancel the patent to those particular tracts.

For instructions relative to the inspection as to the character of the land selected, see 37 Land Dec. 489.

⁴ But see the Acts of March 3, 1909, and June 22, 1910, Secs. 442, 443.

⁵ For the text of the Act of March 15, 1910, and regulations thereunder, see Sec. 1320.

State engineer of the amount of water available for the plan of irrigation will be necessary. The other data required can not be fully prescribed, as it will depend upon the nature of the plan submitted. All information necessary to enable this office to judge of its practicability for irrigating all the land selected must be submitted. Upon filing the map showing the plan of irrigation and the lands selected, such lands will be withheld from other disposition until final action is had thereon by the Secretary of the Interior. If such final action be a disapproval of the map and the plan, the lands selected shall, without further order, be subject to disposition as if such reservation had never been made.

4. This section prescribes the rules for the drawing of the map and for the field notes which must be submitted. The map and field notes must also show full data to admit of retracing the lines of the survey of the irrigation works on the ground.

"5. The map must bear an affidavit of the engineer who made or supervised the preparation of the map, and also of the officers authorized by the State to make its selections. The map must also be accompanied by a list in triplicate of the lands selected, designated by legal subdivisions, properly summed up at the foot of each page, and at the end of the list. The party appearing as agent of the State must also file with the register and receiver written and satisfactory evidence, under seal, of his authority to act in the premises; such evidence once filed need not be duplicated during the period for which the agent was appointed. When a township has not been subdivided, but has had its exteriors surveyed, the whole township may be designated, omitting, however, the sections to which the State may be entitled under its grant of school lands. When the records are in such condition that the proper notations may be made, a section, or part of a section, of unsurveyed land may be designated in the list, but no patent can issue thereon until the land has been surveyed."

It is held that no preference right of selection inures to a State by virtue of an application for survey of lands under the Carey Act where the State fails to publish notice of the application as required by the Act.⁶

⁶ State of Idaho v. Northern Pacific R. Co., 39 Land Dec. 343; *Id.*, 39 Land Dec. 583.

151—Kin. on Irr.

See, also, Opinion of Attorney General, Jan. 30, 1911, 39 Land Dec. 482.

6. This section provides for the contract to be executed by and between the Secretary of the Interior, for and on behalf of the United States, party of the first part, and by the duly authorized officer for and on behalf of the State, party of the second part, according to the form prescribed and furnished.⁷

"7. The lists must be carefully and critically examined by the register and receiver and their accuracy tested by the plats and records of their office. When so examined and found correct in all respects, they will attach a certificate at the foot of each list according to the form prescribed."⁸

The section then provides for the making of the records in the local land office, and the transmission of all papers and maps to the General Land Office.

"For rejected selections a new list will be required, upon which the register will note opposite each tract the objections appearing on the records and indorse thereon his reasons in full for refusing to certify the same. The State will be allowed to appeal in the manner provided for in the Rules of Practice.

"8. When the canals or reservoirs required by the plan of irrigation cross public land not selected by the State, an application for a right of way over such lands under Sections 18-21, Act of March 3, 1891 (26 Stat., 1095), should be filed separately, in accordance with the regulations under said Act.⁹

"9. Upon approval of the map of the lands and the plan of irrigation, the contract is executed by the Secretary of the Interior and approved by the President, as directed by the Act. Upon the approval of the map and plan, the lands are reserved for the purpose of the Act, said reservation dating from the date of the filing of the map and plan in the local land office. A duplicate of the approved map and plan, and of the list of lands, is transmitted for the files of the local land office, and a triplicate copy of the list is forwarded to the State authorities.¹⁰

⁷ For form of this contract, see 37 Land Dec. 634, form 5.

Under the provisions of the State statute accepting the terms of the Act, a contract on behalf of the State, with the United States, executed by the commissioner of arid lands for the State of Washington, is not valid if not approved by the Governor and

the Attorney General of the State. State of Washington, 25 Land Dec. 33.

⁸ For form of the certificate, see 37 Land Dec., p. 634, form 4.

⁹ For the provisions of said Act, see rights of way over public lands, Secs. 937-950.

¹⁰ The approval or rejection of an application by a State to select lands

"10. When patents are desired for any lands that have been segregated, the State should file in the local land office a list, to which is prefixed a certificate of the presiding officer of the State Land Board, or other officer of the State who may be charged with the duty of disposing of the lands which the State may obtain under the law, in the form furnished;¹¹ to the effect that the laws of the said State relating to the said grant from the United States have been complied with in all respects, and followed by an affidavit of the State Engineer or other State officer whose duty it may be to superintend the reclamation of the lands, in the form furnished,¹² to the effect that he has examined the lands designated on the foregoing list, and that an ample supply of water has been actually furnished (in a substantial ditch or canal, or by artesian wells or reservoirs) for each tract in said list, sufficient to thoroughly irrigate and reclaim it, and to prepare it to raise the ordinary agricultural crops.

"11. The certificate of Form 6 is required in order to show that the State laws accepting the grant of the lands have been duly complied with.

"12. The affidavit of the State Engineer is required to show compliance with the provisions of the law, that an ample supply of water has been actually furnished as required by the Act, and as above set forth. A separate statement by the State Engineer must also be furnished, giving all the facts as to the water supply and the nature, location, and completion of the irrigation works.¹³

"If there are some high points which it is not practicable to irri-

under the provisions of the Acts is a matter wholly within the discretion of the Land Department. *State of Wyoming*, 36 Land Dec. 399; *Yakima Dev. Co. v. Washington*, 34 Land Dec. 453.

It is held by the Federal Court of Oregon that a suit brought by a State to annul a grant under the Carey Act is removable to the Federal Court as a suit involving some title, right, privilege, or immunity upon which the recovery depends, and which will be defeated by one construction of the Constitution or laws of the United States, and sustained by the opposite con-

struction. *State of Oregon v. Three Sisters Irr. Co.*, 158 Fed. Rep. 346.

¹¹ For form of certificate, see 37 Land Dec. 636, No. 6.

¹² For the form of the affidavit, see 37 Land Dec. 637, No. 7.

¹³ As is the case of individual desert land entries, there must be an ample supply of water for the land actually secured; then and not until then will a patent be issued to the State. The terms of the Act itself are explicit upon this point. "When an ample supply of water is actually furnished in a substantial ditch or canal, or by

gate, the nature, extent, location, and area of such points should be fully stated. If no part of a legal subdivision is susceptible of irrigation, such legal subdivision must be relinquished. Lands upon which valuable deposits of coal or other minerals are discovered will not be patented to the State under these Acts.

"13. These lists will be called 'lists for patent,' and should be numbered by the State consecutively, beginning with No. 1.

"14. Upon the filing of such list the local officers will place thereon the date of filing and note on the records opposite each tract listed, 'List for patent, serial No. —, filed — — —,' giving the date.

"15. When the said list is filed in the local land office there shall also be filed by the State a notice, in duplicate, prepared for the signature of the register and receiver, describing the land by sections, and portions of sections, where less than a section is designated, according to the form prescribed.¹⁴ This notice shall be published at the expense of the State once a week in each of nine consecutive weeks, in a newspaper of established character and general circulation, to be designated by the register, as published nearest the land. One copy of said notice shall be posted in a conspicuous place in the local land office for at least sixty days during the period of publication.

"16. At the expiration of the period of publication the State shall file in the local office proof of the said publication and of the payment for the same. Thereupon the register and receiver shall forward the list for patent to the General Land Office, noting thereon any protests or contests which may have been filed, transmitting such papers, and submitting any recommendations they may deem proper. They will also forward proofs of publication, and of payment therefor, and of the posting of the list in their office.

"17. Before patents are issued for lands within the former Southern Ute and the Ute Indian Reservations in Colorado, the

artesian wells or reservoirs, to reclaim a particular tract or tracts of such lands, then patents shall issue for the same to such State without regard to settlement or cultivation." State of Washington, 26 Land Dec. 74; Yakima Dev. Co. v. Washington, 34 Land

Dec. 453; State of Oregon, 36 Land Dec. 509.

For provisions of the desert land law in this respect, see Sec. 1301.

¹⁴ For the form of this notice, see 37 Land Dec. 637, form 3.

State will be required to pay the price (\$1.25 per acre) fixed by the Acts of March 1, 1907, and February 24, 1909.

"18. Upon receipt of the papers in the General Land Office such action will be taken in each case as the showing may require, and all tracts that are free from valid protest or contest, and respecting which the law and regulations have been complied with, will be certified to the Secretary of the Interior for approval and patenting." ¹⁵

§ 1325. **Acceptance of the grant made by the Carey Act by the States named.**—The first step to be taken by a State which wishes to avail itself of the benefits of the grant made by the Carey Act of the one million acres of land is to accept the terms of the grant and to provide for the machinery for the reclamation of the land. The power of the State is limited to the acceptance of the offer of the United States, and the execution of the trust assumed by the acceptance thereof. Now this acceptance can only be made by an Act of its legislature, in the exercise of its power, and in order to make such acceptance effective.¹

The conditions imposed by the United States in granting the lands under the provisions of the Carey Act to the States entitled thereto have been accepted, and provisions made in order to make such acceptance effective, and governing boards provided in order to fully carry out the details of the law, by Acts of the legislatures of Colo-

¹⁵ It must be noticed that all regulations of the Land Department are often changed to conform with new statutes or decisions of the courts, therefore the last rules promulgated upon any subject should always be consulted.

¹ "We are satisfied that the law is valid. The United States had the power to make the offer to the State, to grant it the lands, provided the State would reclaim them. Now, if the State could accept the offer of the United States at all, it could only act through its legislature, in the exercise of power requisite to making

its offer effective." State *ex rel.* Armington v. Wright, 17 Mont. 565, 44 Pac. Rep. 89.

See, also, Howlett v. Cheetham, 17 Wash. 626, 50 Pac. Rep. 522; State *ex rel.* Nolan v. Marshall, 20 Mont. 510, 52 Pac. Rep. 268, where the decision of the Court was in favor of the validity of the accepting Act, and where it is held that the only limitation imposed upon the commission provided for in the accepting Act in the way of making contracts for the construction of irrigation works is that its acts must be for the benefit of the State.

rado,² Idaho,³ Montana,⁴ Nevada,⁵ New Mexico,⁶ Oregon,⁷ South Dakota,⁸ Utah,⁹ and Wyoming.¹⁰

The acceptance by the States is usually in the following form: That the State hereby accepts the conditions of Section 4 of the Act of Congress, entitled, "An Act making appropriation for sundry civil expenses of the Government for the fiscal year ending June 30, 1895, and for other purposes," approved August 18, 1894, and the Acts of Congress amendatory thereof, together with all grants of land to the State under the provisions of the aforesaid Acts.

§ 1326. **The powers of the State board.**—Under the laws enacted by the respective States accepting the provisions and grant of the Carey law, the selection, management, and disposal of the land selected is vested in the State board named in the Acts. The board is also authorized to make all contracts necessary to carry out the

² See Mill's Ann. Stat., 1905, Secs. 3662a-3662x.

Governing Board: State Board of Land Commissioners, consisting of Governor, Secretary of State, Attorney General, Superintendent of Public Instruction, Registrar of Land Department.

³ See Rev. Codes of Idaho, 1908, Secs. 1613-1634.

Governing Board: State Board of Land Commissioners, consisting of Governor, Attorney General, Secretary of State, Superintendent of Public Instruction, Registrar of Land Department.

⁴ See Rev. Code, Mont., 1907, Secs. 2255-2282.

Governing Board: Carey Act Board, consisting of the State Engineer, Secretary of State, State Examiner.

⁵ Laws, 1911, Chap. 205, p. 439; Laws, 1911, p. 452; Rev. Laws, 1912, Secs. 3063-3097.

⁶ Governing Board: Carey Act Land Board, consisting of the Governor, Commissioner of Public Lands, Territorial Engineer.

⁷ See Bellinger & Cotton's Codes, 1902, Secs. 3283-3293; L. O. L., Secs. 3860-3877.

Governing Board: Desert Land Board, consisting of the Governor, Secretary of State, Treasurer, Attorney General, State Engineer.

⁸ See Laws S. D., 1909, p. 135.

Governing Board: Carey Land Act Board, consisting of the State Engineer, State Auditor, Commissioner of School and Public Lands.

⁹ See Comp. Laws of Utah, 1907, Secs. 2372-2388, as amended by Laws Utah, 1909, Chap. 31, p. 29.

Governing Board: State Board of Land Commissioners, consisting of five resident citizens appointed by the Governor, with the consent of the Senate.

¹⁰ See Rev. Stat. Wyo., 1910, Secs. 661-696.

Governing Board: State Board of Land Commissioners, consisting of the Governor, Superintendent of Public Instruction, Secretary of State.

provisions of the Acts of Congress and the Acts of the legislature, and may make such rules not in conflict with the said Acts of Congress or the Acts of the legislature as it may deem best. In fact, the only limitation imposed on the board is that their acts must be in conformity with the Acts of Congress, the Act of the State under which they are working, and their acts must be for the benefit of the State.¹

§ 1327. **The acquisition of a water right for projects.**—The party contracting with a State must acquire a water right under some of the laws of the State in which the project is being constructed. This water right may be acquired by appropriation, purchase, or by some other legal method of acquisition, and the water must be sufficient to irrigate and reclaim the amount of land segregated for the purposes of the project. The question of the acquisition of water rights has been discussed in previous chapters under the old rule of appropriation, and will be discussed in a subsequent chapter of this part under the new water or irrigation codes adopted by many of the States.¹

In most of the code States, as a means of protection of the rights of all interested parties, it is provided that the State Engineer or some board have a sort of supervisory control, and the project may be rejected if for any reason it should be found to be detrimental to public interests or that the project is not feasible for any physical reasons or the proposed use would be a menace to the safety and welfare of the public. These are wise provisions, as in the early history of the law a great many wild-cat schemes were projected, which neither had the water right to irrigate the land or the irrigable or cultivable lands to irrigate. However, under these protecting provisions this feature of the operations under the law is eliminated, and the projects are rejected by the officers placed in

¹ *State ex rel. Nolan v. Marshall*, 20 Mont. 510, 52 Pac. Rep. 268; *State ex rel. Armington v. Wright*, 17 Mont. 565, 44 Pac. Rep. 89.

A relinquishment on the part of a State of desert lands in a contract under the Carey Act, to be effective, must be executed by the officers desig-

nated by the State legislature to manage and dispose of such lands. *State of Wyoming*, 24 Land Dec. 562.

¹ For the appropriation of water, see Secs. 706-732.

For the acquisition of water rights under code procedure, see Chap. 68, Secs. 1337-1387.

authority, should it be found that they were detrimental in any way to the public interests, as above set forth.²

§ 1328. Proceedings under State laws—Application to board for selection of lands.—Having discussed in the preceding sections the Acts of Congress and the regulations of the Secretary of the Interior thereunder, and how the title to the lands selected under the provisions of the Acts passes from the United States to the State selecting them, we will now proceed to discuss how the title to the lands passes from the State to the individual, and in order to do this we shall have to go back to the very inception of the proceedings, which begin usually with the individual or company.

The State statutes provide that any person, company, association, or corporation desiring to construct ditches, canals, reservoirs, or other irrigation works to reclaim lands under the provisions of the Acts shall file with the board an application for the selection of the lands to be reclaimed, designating the lands by legal subdivisions. This application shall be accompanied by a proposal to utilize or extend an irrigation system already constructed, or one in process of construction, or the rights to construct which have been acquired, or to construct ditches, canals, reservoirs, or other irrigation works for the complete reclamation of the lands so designated. The proposal shall be prepared in accordance with the rules of the board,¹ and the regulations of the Department of the Interior,² which shall state the source of the water supply, whether the right to the same has been acquired or is sought to be acquired; the location and dimensions of the works already constructed or in process of construction, or the location and dimensions of the proposed works, with estimated cost of such works, the maximum price and terms per acre at which perpetual rights will be sold to settlers on the land to be reclaimed, and the maximum price per acre for the maintenance tax, and all other facts prescribed by the rules of the board of the State where the application is made. In case a corporation is the applicant, it shall state the name of the corporation, the purpose of

² See *Cookinham v. Lewis*, 58 Ore. 484, 114 Pac. Rep. 88.

¹ These rules can be obtained upon request to the boards named in the note to Sec. 1325, and should always

be consulted before an application is filed.

² For the last regulations of the department, see Sec. 1324.

the incorporation, the names and places of residence of its directors and officers, the amount of its authorized and paid-up capital, where incorporated, and the other facts required by the rules. If the applicant is not a corporation, the proposal shall set forth the name or names of the parties, and such other facts as shall enable the board to determine as to their financial ability to carry out the proposed enterprise.

There is nothing in the State Acts or in the Acts of Congress which prevents the application from being made by individuals, but the benefits of the Carey Act, in so far as they relate to the segregation of lands and the acquisition of title, apply in the same degree to the individual who may wish to construct his own irrigation plant to furnish water for 160 acres of land for himself, or to an association of persons who may desire to co-operate toward this end. Some small tracts have been taken up from time to time by this method by separate individuals, or by two or three individuals combined. In fact, the statutes of Colorado, Montana, and South Dakota specially provide for the entry and reclamation of land under the Acts by individuals duly qualified, either acting singly or together; but owing to the fact that the greater amount of settlement occurs upon the larger tracts of land, and the fact of the great cost necessary for the construction of the works, the greater amount of lands is segregated and set aside to corporations or associations of individuals controlling large capital.

A certified check is required by the statute, in such a sum as is named therein, and must accompany the application or proposal, the same to be held as a guaranty for the execution of the contract with the State in accordance with its terms, by the party submitting such proposal, in case of the approval of the same and the selection of the land by the board, and to be forfeited to the State in case of failure of said parties to enter into a contract with the State in accordance with the provisions of the law.

In some States it is required that the party or parties making the application shall have filed with the State Engineer an application for a permit to appropriate water for the reclamation of the lands described in the request to the board. This is particularly applicable to the States which have the provisions for State control, and where all appropriations of water must be made by an application to the State Engineer or to the governing board. The application to

appropriate water must be made in accordance with the rules of the Board of State Control.³

Upon receipt of the application mentioned above, the board shall examine the same, and if it does not comply with the regulations of the Department of the Interior and the rules of the board, it must be returned to the applicant for correction; but if it does so comply, the board shall determine whether the reclamation of the land applied for can be secured by means of the irrigation system proposed to be constructed, and whether there are or there may be sufficient water rights secured for the reclamation of the same. And at this point the most of the statutes require that the matter shall be referred to the State Engineer who is required to make a full detailed report thereon to the board. And no request on which the State Engineer has reported adversely, either as to the water supply, the feasibility of the construction, or capacity of the works, or as to the character of the lands sought to be irrigated, shall be approved by the board. Time is then given the applicant to file another application and proposal.

Notice of the application must be given as provided by the statute. Written objections to the application may be then filed with the board within the time specified in the statute, and the board shall consider and decide upon the merits and sufficiency of such objections.

Upon the filing of such application, the board shall forthwith file a list of the lands contained in the application in the local land office with a request for the withdrawal of the land described therein from entry.⁴

§ 1329. Proceedings under State laws—Contract between State and applicant.—Upon the withdrawal of the land by the Department of the Interior, it is made the duty of the board to enter into a contract with the applicant, which contract must contain complete specifications of the works to be constructed, and the estimated cost of the same, and the maximum price and terms per acre at which perpetual water rights shall be sold to settlers, and the maximum

³ For State Control and the appropriation of water thereunder, see Chap. 68, Secs. 1337-1367.

⁴ For the statutes accepting the pro-

visions of the Carey Act and providing for its operation, see Part XIV, under the various States.

cost per annum for the maintenance tax, and the price and terms upon which the State is to dispose of the land to settlers, and other provisions and conditions as the board may direct.¹ This contract must not be entered into until the withdrawal of the lands by the Department of the Interior and the filing of a satisfactory bond upon the part of the proposed contractor, in the penal sum fixed by the statute, and to be conditioned for the carrying out of the provisions of the contract with the State.

In some States it is provided that, in the discretion of the board, the contract may provide that the sale to a settler of a tract of land with a permanent water right shall include a *pro rata* interest in the irrigation works equal to the proportion that the tract of land purchased by him bears to the entire tract to be reclaimed by the said irrigation system; and that upon the full payment of the purchase price of the said land and water right, capital stock of the corporation representing such interest shall be transferred to such settler. If the said irrigation system be constructed by a corporation, or if by a person or company then such interest shall be conveyed to the settler by the person or company constructing the said irrigation system.

The time within which the work must be commenced is fixed by the statute; also the work must be prosecuted diligently and continuously to completion, and that a cessation of the work under a contract for the period fixed by the statute shall forfeit to the State all rights under said contract and the penal sum named in the bond; provided, that no property or right which was vested in the applicant or contractor at the date of the contract shall be forfeited. Provisions are also made as to how the contracts and the rights acquired thereunder may be declared forfeited.

The statutes of the respective States differ where an actual forfeiture has been worked and duly declared. In Colorado, it is provided that nothing in the Act shall be construed as authorizing the board to obligate the State to pay for any work constructed under any contract, or to hold the State in any way responsible to settlers for the failure of contractors to complete the work according to the terms of their contracts with the State.² But in Utah, after a for-

¹ For the further provisions of these contracts, see the rules and regulations of the State board, to be had upon application.

² Mill's Ann. Stat., Sec. 3662n.

feiture has been worked, the board may advertise for proposals to complete the work and may, in proper cases, contract with the bidder who will pay the original contractor the highest sum for the works partially completed, and complete the said works and supply the water rights to the settlers on the lands to be reclaimed, for the price and upon the terms stated in the original contract. If no bid shall be received for the completion of said works and furnishing water rights to such settlers, for the price and upon the terms stated in the original contract, then the board shall bring the proper action for recovering the amount of the bond of the contractor.³

§ 1330. **Proceedings under State laws**—The entry and settlement of the land by settlers.—In all the States, the statutes thereof provide how the lands shall be opened for settlement. In the majority of the States it is provided that immediately upon the withdrawal of any land by the Department of the Interior, and the inauguration of the work by the contractors, it is made the duty of the board to give notice as provided that the lands are open to settlement. But, owing to the fact that the work has often been delayed, and a longer time has elapsed than was first anticipated before the water was brought upon the land so that it might be used by the settlers, the rules of the boards of Idaho, Utah, Montana, and New Mexico provide that the lands may be thrown open from time to time as the construction proceeds, and the application to enter such lands by any one qualified will be received after notice has been given that the land is open to entry.

The qualifications prescribed for the entry of such land are that any citizen of the United States, or any person having declared his intention to become a citizen, may make an application to the board to enter any of such lands, not exceeding 160 acres. In Oregon, Wyoming, and Utah married women are permitted to file; in Montana they may file if they are heads of the families; but in Idaho and Colorado they are not permitted to file. The right to enter

³ Comp. Laws, Utah, 1907, Sec. 2381. For construction of contracts between a State and the applicant or contractor, see *McKinney v. Big Horn Basin Development Co.*, 167 Fed. Rep. 770, 93 C. C. A. 258; *State of Oregon v. Three Sisters Irr. Co.*, 158 Fed. Rep.

346; *State v. Twin Falls Canal Co.*, — Idaho —, 121 Pac. Rep. 1039; *Sommerville v. Idaho Irr. Co.*, — Idaho —, 123 Pac. Rep. 302; *Hanes v. Idaho Irr. Co.*, — Idaho —, 122 Pac. Rep. 859; *Cookinham v. Lewis*, 58 Ora. 484, 114 Pac. Rep. 88.

land under these Acts is not restricted by the general land laws of the United States, and persons are qualified to enter land under their provisions even if they have exhausted all of their right under the general land laws of the United States.

The lands must be entered according to the legal subdivisions. Therefore, settlers may take up 40, 80, 120, or 160 acres—160 acres being the maximum. In the most of the States, one filing by a person for a less amount than 160 acres may be succeeded by others provided the maximum of 160 acres be not exceeded; but in Utah, it is provided "no settler shall be entitled to make more than one entry."

The usual method in all of the States of throwing the lands open for settlement is by a drawing, under the supervision of the board. In all States, applications are required to be made out on special blank forms, furnished by the board, setting forth that the application is made for the purpose of actual reclamation, cultivation, and settlement; that the applicant has never received the benefits of the Act to an amount greater than 160 acres, including the amount specified in the application. Such application must be accompanied by a certified copy of a contract for a perpetual water right made by the applicant with the person or corporation authorized by the board to furnish water for the reclamation of such lands,¹ together with 25 cents per acre for the land applied for, and containing the declaration that he will settle upon and improve said land. If said application is allowed, the board shall cause to be issued a certificate of location to the applicant. In case the application is rejected the money advanced must be refunded to the applicant. In Montana, South Dakota, Utah, and Wyoming, where the company fails to furnish water to any settler under any provisions of its contract with the State, the State shall refund to such settler all payments that he shall have made to the State.

The price of the land charged by the States varies. In Colorado, Idaho, New Mexico, Utah, and Wyoming the price is fixed at 50 cents per acre, payable 25 cents per acre at the time of filing and 25 cents per acre when the final proof is offered. The Montana and

¹ For the construction of settlers' contracts with the applicant or contracting party, see *Hanes v. Idaho Irr. Co.*, — Idaho —, 122 Pac. Rep. 859.

See *Sommerville v. Idaho Irr. Co.*, — Idaho —, 123 Pac. Rep. 302.

South Dakota statutes provide for the appraisal of the land, and for the payment of 25 cents per acre at the time of filing, and provision is made for the payment of any balance when final proof is offered. The Oregon Statute of 1909 ² states that: "Each application shall be accompanied by a payment of not less than \$1 per acre, to be made by the contractor out of the applicant's first payment and to be returned if the application be not approved." In Montana the regulations provide for a maximum price of \$1 per acre and the payment in full at the time of making the application.

§ 1331. **Proceedings under State laws—Duties of settlers.**—Either the statutes or the rules of the board of all the States require that within one year after the party contracting with the State to construct the irrigation works shall have notified the settlers who have taken up lands under such works, that he or it is prepared to furnish water, the settler shall cultivate and reclaim not less than one-sixteenth part of the land filed upon; and within two years after such notice the settler shall have actually irrigated and cultivated not less than one-eighth of the land filed upon, and within three years from the date of said notice the settler shall appear before the board or some designated officer thereof and make final proof of reclamation, settlement, and occupation. The entryman must give notice of his intention to make his final proof by publication as provided either by the statute or by the regulations. And, upon making his final proof of reclamation, settlement, and occupation in accordance with the regulations of the Department of the Interior, the statutes of the State and the rules of the board, and upon final payment for the land entered by him, the State shall issue its patent for the land to the settler. And in all of the States it is provided that the water rights acquired to all lands under the provision of the Acts shall attach to and become appurtenant to the land as soon as the title passes from the United States to the State.

The statutes or the rules of the board provide that the rights of the entryman shall be subject to forfeiture for the following: Failure to take up residence on the lands; failure to submit annual and final proof; failure to make payments for the water rights as they become due, or the failure to redeem to water right or the shares sold

² Lord's Ore. Laws, Secs. 3872, 3873.

by the sheriff within the time provided by law in the event of the foreclosure of the lien against said water right.

In Idaho, Montana, and Wyoming an entryman may obtain leave of absence upon application to the State board but must in all respects comply with the law requiring cultivation and reclamation. The maximum length of time for which leave of absence may be granted is six months. In other States leave of absence from the land may also be granted by the board for a limited time.

In some of the States it is specified by the rules as to the character of the house which shall be constructed by the entryman. In Idaho it is provided that no final proof shall be accepted where the entryman established residence in a tent or a house covered with canvas. Wyoming requires a house that is "habitable regardless of its character where the entryman shows good faith by his continuous residence." Montana requires simply a dwelling regardless of character. In Oregon, where the residence on the land has been continuous, so long as the settler's affidavit of final proof states "that he has built a house," it is sufficient regardless of its character. But if the alternative proof of thirty days' residence is made,¹ then a substantial house of at least four rooms is required to have been constructed before final proof.

In Colorado, Idaho, Montana, Oregon, Utah, and Wyoming actual cultivation by some one upon behalf of the entryman is permitted, provided that the entryman, in person, complies with the requirements as to settlement and residence.

§ 1332. **Proceedings under State laws—Assignment of entries.**—In Colorado, Idaho, Montana, New Mexico, Oregon, and Utah it is provided either by statute or by the rules of the board that the original entryman may assign his entry and all rights which have accrued thereunder, both to the land and the water, to another person; but the assignee shall possess all the qualifications of the original entryman. Such assignee must file a certified copy of the deed of assignment of all the rights of the original entryman together with evidence in writing from the construction company of the transfer to him of all interests in the canal system contracted for by the original entryman. The assignment of entries up to 160 acres

¹ Oregon rules of the Desert Land Board, 9-A; see, also, annual and final proof.

in those States where more than one entry is allowed up to that amount of land bars the assignor from making any further entry under the Acts. In Utah, where but one entry is allowed regardless of the amount of land, an assignment of any entry for a smaller amount also bars the original entryman from making any further entries. In Wyoming assignments of entries as such are not permitted, but an entryman is permitted to relinquish his entry to the State, thereby forfeiting his first payment to the State. He may then assign the credit for water charges already paid to the company to a subsequent entryman on the same land, or he may arrange with the company for a refunding of payments already made. The original entryman may then make a new filing upon land up to the maximum of 160 acres of land, as though the original entry had not been made.

§ 1333. Proceedings under State laws—Lands can be disposed of only to actual settlers.—Since the amendatory Act of June 11, 1896,¹ the presence of actual settlers prior to the issuance of the patent by the United States to the State is not necessary. A conditional title may pass to the State before there is an actual settler on the ground. But the requirement that the State must sell the land thus acquired to actual settlers is still in force. The amendatory Act, in addition to changing the conditions precedent to patent, authorizes the State to create a lien on the reclaimed land from the date of its reclamation "until disposed of to actual settlers." Therefore, after the State has complied with the conditions precedent, and reclaimed the land, by furnishing an ample supply of water in a substantial ditch or canal, or by artesian wells, or reservoirs, there is still another condition which must be complied with, before an absolute title to the land can vest, and that is that the land must be disposed of only to actual settlers, as specified in the amendatory Act. It therefore follows that, where a State attempts to dispose of the land to others than to actual settlers as specified in the Act, it subjects itself to liability to forfeiture of the lands for conditions broken.² Under the Act, the United States, even after patent to a

¹ For the full text of this Act, see Secretary of the Interior; State of Sec. 1316. Washington, 26 Land Dec. 74.

² State of Oregon, 36 Land Dec. The phrase, "actual settlers," so 509, opinion by Pierce, First Assistant often used in the Federal and State

State, exercises a supervisory control over the lands, to the extent of enforcing a full compliance with the law by the State; and each State is required to furnish the Secretary of the Interior annually a statement of the lands patented each year by the State to individuals.³

§ 1334. **Proceedings under State laws**—The lien for the water rights.—By the amendatory Act of Congress of June 11, 1896,¹ it was provided "that under any law heretofore or hereafter enacted by any State" for the reclamation of the lands in question, "a lien or liens is hereby authorized to be created by the State to which such lands are granted and by no other authority whatever, and when created shall be valid on and against the separate legal subdivisions of the land reclaimed, for the actual cost and necessary expenses of reclamation and interest thereon from the date of reclamation until disposed of to actual settlers." It therefore devolves upon the State in order to take advantage of this provision to enact laws providing for such a lien and its enforcement. This all of the States accepting the benefits of the Carey Act have provided for, in effect, as follows: Any person or corporation furnishing water for any tract of land acquired under the law shall have a first and prior lien on the said water rights and the land upon which the said water is used, for all deferred payments for said water rights, and said lien to be in all respects prior to any or all other liens created or attempted to be created by the owner and possessor of the land, and shall remain in full force and effect until the last deferred payment for the water rights is fully paid and settled according to the terms of the contract under which the said water rights were acquired. The contract for the water rights giving this lien must be recorded in the office of the county official as provided by the statute. Upon the default

laws regarding the disposal of the public lands, has a well defined meaning, involving the idea of *actual residence*. State of Oregon, *supra*; Gavitt v. Mohr, 68 Cal. 506, 10 Pac. Rep. 337; Mosley v. Torrence, 71 Cal. 318, 12 Pac. Rep. 430; Baker v. Millman, 77 Tex. 46, 13 S. W. Rep. 618; Bratton v. Cross, 22 Kan. 673; Turner v. Fer-
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guson, 58 Tex. 6; Rene v. Pendergast, 17 Land Dec. 385; United States v. Atterbury, 10 Land Dec. 36, 8 Land Dec. 173; Samuel M. Frank, 2 Land Dec. 628.

³ Instructions, March 30, 1908, 36 Land Dec. 342.

¹ For text of Act, see Sec. 1316.

of any deferred payments secured by any such lien, the person or corporation holding or owning said lien may foreclose the same according to the terms and conditions of the contract and such foreclosure shall be either in the manner that mortgages are foreclosed in the State where the lien is sought to be enforced, or in the manner specially provided by the statute in these cases. The time within which the redemption may be made is provided for and also the manner of the same.

§ 1335. Proceedings under State laws — Rights of way for canals and other works.—The statutes of all the States provide that the maps in the office of the board shall show the location of the canals or other irrigation works, and that all State lands entered under the provisions of the Acts shall be subject after entry to the rights of way of such canals or irrigation works. The said right of way is to embrace the entire width of the canals and such additional width as may be required for its proper operation and maintenance. No deductions can be made to the settlers for the amount of land taken by such rights of way.

§ 1336. The proceeds from sale of lands to constitute a State reclamation fund.—The original Carey Act provides that any surplus of money derived by any State from the sale of lands under the Acts in excess of the cost of their reclamation, shall be held as a trust fund by such State and be applied to the reclamation of other desert lands in such State. The statutes of all the States therefore provide in effect that all moneys received by the board from the sale of lands selected under the provisions of the Acts shall be deposited with the State Treasurer, and such sums as may be necessary shall be available for the payment of the expenses of the board in carrying out the provisions of the Acts, and such expenses shall be paid in a warrant drawn by the State Auditor in the manner that other expenses of the board are paid; and any balance remaining over and above the expenses necessary to carry out the provisions of the Acts shall constitute a trust fund to be used for the reclamation of other desert lands. This reclamation fund is a trust fund as provided by the Act of Congress. The State can not make it a fund of its own, to be dealt with as are the other funds which are owned by the State. No

control can be exercised over it beyond such as is consistent with the Act of Congress in the execution of the trust, which is to aid the State in the reclamation of desert lands, and the settlement, cultivation, and the sale thereof to other actual settlers.¹

¹ State *ex rel.* *Armington v. Wright*, 17 Mont. 565, 44 Pac. Rep. 82.

CHAPTER 68.

THE LAWS OF STATE CONTROL.

- § 1337. Scope of chapter.
- § 1338. The laws of State control—In general.
- § 1339. State constitutions providing for the law of State control or State administration.
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- § 1346. Water commissioners—Water masters—Under assistants—Supervisors.
- § 1347. The determination of existing rights.
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- § 1349. Proceedings to appropriate—Effect of application for permit—Notice—Relation.
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- § 1351. Proceedings to appropriate—Action to be taken upon application—State Engineer must approve or reject.
- § 1352. Proceedings to appropriate—Permit and effect of.
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- § 1354. Forfeiture of rights and cancellation of permit.
- § 1355. Proceedings to appropriate—Certificate of appropriation.
- § 1356. Proceedings to appropriate—Consummation of an appropriation—Effect of the certificate to appropriate.
- § 1357. Appropriation by actual diversion and use as affected by the laws of State control.
- § 1358. Relation as applied to laws of State control.
- § 1359. Officers under State control have only ministerial, administrative, or judicial powers.
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- § 1363. Annual State license tax.
- § 1364. Place of diversion, how changed—Place of use, how changed.
- § 1365. Statutes for prorating in times of scarcity.

§ 1366. Vested rights can not be impaired by procedure under the laws of State control.

§ 1367. Criticism of the laws of State control.

§ 1337. **Scope of chapter.**—In the previous chapters we have discussed the appropriation and use of waters under the older method of appropriation, and without codes.¹ During the recent years many of the States have passed elaborate irrigation or water codes for the control and regulation of waters flowing within their respective boundaries.² And in this chapter we will discuss in detail the laws of State control, as far as they relate to the administrative or executive features of the laws of waters.

§ 1338. **The laws of State control—In general.**—As we have seen in previous parts of this work each State has the power, either by legislative enactment or by court decision, to adopt such a rule governing the waters flowing within its boundaries as it sees fit.¹ It may adopt the common law rule of riparian rights or a modification of that rule.² It may entirely abrogate the common law of riparian rights and adopt in lieu thereof the Arid Region Doctrine of appropriation.³ Or, again, it may retain the common law of riparian rights and at the same time adopt the doctrine of appropriation, and thus have dual systems of laws governing the subject of waters flowing within its jurisdiction. And, as far as the Government of the United States is concerned, as decided by the Supreme Court of the United States, "Congress can not enforce either rule upon any State."⁴ The sole power of governing and controlling the waters within its boundaries being vested entirely with the State, the legislatures of many of the States of the arid and semi-arid regions have, within recent years, enacted elaborate Irrigation Codes, or Water Codes, regulating in detail how the rights to the use of water may be acquired, and how the same may be permanently held

¹ See Chaps. 31-40, Secs. 585-756.

² For the statutes of the respective States, see Part XIV.

¹ See Secs. 507, 593.

² For the common law of riparian rights, see Chaps. 21-30, Secs. 450-551.

³ For the Arid Region Doctrine of appropriation, see Secs. 585-594.

⁴ *Kansas v. Colorado*, 206 U. S. 48, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655.

as against all others. They specify with great particularity how an appropriation may be instituted, after the passage of the Act, how and within what period the work must be begun and completed, how the water must be used and the preference uses to which it must be put, and what acts are necessary upon the part of the appropriator for the continuance of the right, and the extent of the failure to perform which shall be deemed a forfeiture of his right to the use.⁵ The administration of these laws is placed in the hands of some governing board, or in the hands of some State official designated by the Act, usually the State Engineer, whose duties are to receive applications to appropriate the water, to determine the priorities, and to award certificates to the lawful claimants, which specify in detail the amount of water to which each is entitled, the source from which it is to be taken, the beneficial use or purpose to which it is to be applied; and, in some States, to hear in a judicial capacity contests as to conflicting rights, and to determine the parties who are the lawful claimants therefor. The Acts also provide for dividing of the States into divisions, and over each division there is what is called a division engineer, or a division superintendent; however, in some of the States they are given another title, but all are subordinate to the State Engineer.⁶ Again, under the authority of these Acts, persons called water commissioners, water masters, under assistants, or supervisors, are appointed, whose duties are to see that the water is properly divided among the lawful claimants according to their respective rights, and to protect the valid rights of one claimant against the wrongful invasion of others.

The States which have adopted these laws of State control are, first, Wyoming;⁷ afterward, Colorado;⁸ afterward, copying after one or both of the States named and adapting the law to their own particular conditions, are the States of Idaho,⁹ Nebraska,¹⁰ Ne-

⁵ For forfeiture of right, see Secs. 1118-1120.

For the Irrigation and Water Codes, see Part XIV.

⁶ For the duties and powers of division superintendents and engineers, see Sec. 1345.

⁷ For laws of Wyoming, see Chap. 104.

⁸ For the laws of Colorado, see Chap. 87.

⁹ For the laws of Idaho, see Chap. 89.

¹⁰ For the laws of Nebraska, see Chap. 92.

vada,¹¹ North Dakota,¹² Oklahoma,¹³ Oregon,¹⁴ South Dakota,¹⁵ Utah,¹⁶ and New Mexico.¹⁷

In their main features these laws are largely alike and only differ as to details. It will be found from an examination of these laws that their scope was mainly for the purpose of accomplishing three objects: First, the adjudication or the determination of existing rights; second, the supervising the acquirement of new rights, and, third, the controlling and supervising the distribution of water.

§ 1339. **State constitutions providing for the law of State control or State administration.**—The constitutions of a number of the States of the West provide for the enactment of laws of State control, or State administration, of the waters flowing within their respective boundaries.

In California, the first constitution contained no such provisions, but in the amended constitution adopted in 1879 and which went into effect the first day of January, 1880, it is provided that: "The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law."¹ But, outside of the law relative to the State control of water rates, which is provided for in the constitution, and discussed in the next chapter, and the Water Power Act of 1911,² the legislature of California has passed no laws providing for a State administrative system, as the same is understood and discussed in the present chapter. In regard to the declaration that the use of the water is a public use, the court holds that the use being public, the State may by law regulate it.³ The same construction may also be applied to

¹¹ For the laws of Nevada, see Chap. 93.

¹² For the laws of North Dakota, see Chap. 95.

¹³ For the laws of Oklahoma, see Chap. 96.

¹⁴ For the laws of Oregon, see Chap. 97.

¹⁵ For the laws of South Dakota, see Chap. 100.

¹⁶ For the laws of Utah, see Chap. 102.

¹⁷ For the laws of New Mexico, see Chap. 94.

¹ Cal. Const., Art. 16, Sec. 1.

For the other provisions of the California Constitution, see Chap. 86.

² See Sec. 1373.

For the statutes of California, see Part XIV.

For the water power Act of California, see California, Chap. 86.

³ Fresno etc. Co. v. Park, 129 Cal. 437, 62 Pac. Rep. 87, where it is said:

the similar provisions of the constitutions of other States, an abstract of which will be found herein. The word "appropriated" as used in the section, is held to mean only such waters as are appropriated for sale, rental, or distribution.⁴

In Colorado, the constitution provides: "The water of every natural stream, not heretofore appropriated, within the State of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the State, subject to appropriation as herein provided."⁵

In Idaho, it is provided that: "The use of all waters now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, also all water originally appropriated for private use, but which, after appropriation, has heretofore been, or may hereafter be, sold, rented, or distributed, is hereby declared to be a public use, and subject to the regulation and control of the State in the manner prescribed by law."⁶

In Montana: "The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, distribution, or other beneficial use . . . shall be held to be a public use."⁷

In New Mexico, Article 16 of the new constitution provides as follows: "Sec. 2. The unappropriated water of every natural stream, perennial or torrential, within the State of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the State. Priority of appropriation shall give the better right.

"Sec. 3. Beneficial use shall be the basis, the measure, and the limit of the right to the use of water.

"Sec. 4. The legislature is authorized to provide by law for the organization and operation of drainage districts and systems."

"The clause merely declares that the use of water appropriated for distribution, etc., is a public use, and that the State may by law regulate it."

⁴ *Hildreth v. Montecito etc. Co.*, 139 Cal. 22, 72 Pac. Rep. 395; *Mahoney v. American etc. Co.*, 2 Cal. App. 186, 83 Pac. Rep. 267.

⁵ Colo. Const., Art. 16, Sec. 5.

For other provisions of the Colorado Constitution, see Chap. 87.

⁶ Idaho Const., Art. 15, Sec. 1.

For other constitutional provisions of Idaho, see Chap. 89.

⁷ Montana Const., Art. 3, Sec. 15.

For other constitutional provisions of Montana, see Chap. 91.

In North Dakota: "All flowing streams and natural water courses shall forever remain the property of the State for mining, irrigating, and manufacturing purposes." ⁸

In Washington: "The use of the waters of this State for irrigation, mining, and manufacturing purposes shall be deemed a public use." ⁹

The most extensive and elaborate provisions relative to the subject of State control are to be found in the constitution of Wyoming. It is provided that: "Water being essential to industrial prosperity, of limited amount and easy of diversion from its natural channels, its control must be in the State, which, in providing for its use, shall equally guard all the various interests involved." ¹⁰ It is furthermore provided that the water of all natural streams, springs, lakes, or other collections of still water, within the boundaries of the State, are declared to be the property of the State. A board of control is provided for, to be composed of the State Engineer and the superintendents of the water divisions, which shall, under such regulations as may be prescribed by law, have the supervision of the waters of the State, and of their appropriation, distribution, and diversion, and of the various officers connected therewith, its decisions to be subject to review by the courts of the State. The legislature is directed to divide the State into four water divisions and to provide for the appointment of the superintendents thereof. Provisions are also made for the appointment by the Governor of a State Engineer, his qualifications, and duties; that he shall be president of the board of control and "shall have general supervision of the waters of the State, and of the officers connected with its distribution." ¹¹

§ 1340. General statutory declarations preliminary to the laws of State control.—In many of the statutes of the States of the arid and semi-arid West, there are preliminary declarations to the effect that the waters within their respective jurisdictions are

⁸ North Dakota Const., Art. 17, Sec. 210.

See, also, Chap. 95.

⁹ Washington Constitution, Art. 21, Sec. 1.

See, also, Chap. 103.

¹⁰ Wyoming Const., Art. 1, Sec. 31.

See, also, Chap. 104.

¹¹ Wyoming Const., Art. 8, Secs. 1-5.

For the full provisions of the Wyoming Constitution, see Chap. 104.

For the duties of the State Engineer, see Sec. 1343.

public, and subject to the appropriation and use as may thereafter be provided by law.

Arizona: "All rivers, creeks, and streams of running water in the Territory of Arizona are hereby declared to be public, and applicable to the purposes of irrigation and mining as hereinafter provided." ¹

California: By the Act of April 8, 1911, amending Section 1410 of the Civil Code, it is provided: "All water or the use of water within the State of California is the property of the people of the State of California." ²

Idaho: "All waters of the State, when flowing in their natural channels, including the water of all natural springs and lakes within the boundaries of the State, are declared to be the property of the State." ³

Nebraska: "The water of every natural stream not heretofore appropriated, within the State of Nebraska, is hereby declared to be the property of the public, and is dedicated to the use of the people of the State, subject to appropriation, as hereinbefore provided." ⁴

Nevada: "All water courses and natural lakes and the waters thereof which are not held in private ownership, belong to the State, and are subject to appropriation for beneficial uses." ⁵

New Mexico: "All natural waters flowing in streams and water courses, whether such be perennial, or torrential, belong to the public and are subject to appropriation for beneficial use." ⁶

North Dakota: In this State, in addition to the constitutional provision quoted in the preceding section,⁷ the statute has the following: "All waters within the limits of the State from all sources of water supply belong to the public." ⁸

¹ Arizona Stat., 1901, Sec. 4174.

For the laws of Arizona, see Chap. 85.

² Kerr's Bien. Supp. Ann., 1911, p. 584; Stats. & Amdts., 1911, p. 421.

See, also, Chap. 86.

³ Revised Codes of Idaho, 1908, Sec. 3240.

See, also, Chap. 89.

⁴ Comp. Stat. Neb., 1911, Sec. 6450.

For the laws of Nebraska, see Chap. 92.

⁵ Rev. Laws Nev., 1912, Sec. 4672;

Comp. Laws Nev., 1900, Sec. 354.

For the laws of Nevada, see Chap. 93.

⁶ Laws N. M., 1907, p. 73, Sec. 1.

For the laws of New Mexico, see Chap. 94.

⁷ See Sec. 1339.

⁸ Laws N. D., 1905, Chap. 34, Sec. 1; Rev. Codes, 1905, Sec. 7604.

For the laws of North Dakota, see Chap. 95.

Oklahoma: "The unappropriated waters of the ordinary flow or underflow of every running stream or flowing river, and the storm or rain waters of every river or natural stream, canyon, ravine, depression, or watershed within those portions of the State of Oklahoma in which, by reason of the insufficient rainfall or by reason of the irregularity of the rainfall, irrigation is beneficial for agricultural purposes, are hereby declared to be the property of the public, and may be acquired by appropriation for the uses and purposes and in the manner as hereinafter provided." ⁹

Oregon: "The use of the water of the lakes and running streams of the State of Oregon, for general rental, sale, or distribution for purposes of irrigation, and supplying water for household and domestic consumption, and watering live stock upon dry lands of the State, is a public use, and the right to collect rates or compensation for such use is a franchise." ¹⁰

South Dakota: "All the waters within the limits of the State from all sources of water supply belong to the public, and except as to navigable waters, are subject to appropriation for beneficial use." ¹¹

Texas: In Texas it is provided that waters "are hereby declared to be the property of the public," etc. ¹²

Utah: "The waters of all streams and other sources in this State, whether flowing above or under the ground, in known or defined channels, are hereby declared to be the property of the public, subject to all existing rights to the use thereof." ¹³

Washington: "The right to the use of water in any lake, pond, or flowing spring in this State, or the right to the use of water flowing in any river, stream, or ravine of this State, for irrigation, mining, or manufacturing purposes, or for supplying cities, towns, or villages with water, or for waterworks, may be acquired by appropria-

⁹ Compiled Laws of Okla., 1909, Sec. 3915.

See Chap. 96.

¹⁰ Lord's Ore. Laws, Sec. 6525; Bal. & Cot. Ann. Codes, Sec. 4993; see, also, Sec. 5022.

For the laws of Oregon, see Chap. 97.

¹¹ Laws S. D., 1907, p. 737, Sec. 1. See, also, Chap. 100.

¹² Sayles' Civ. Stats., 1900, Sec. 3115; Rev. Civ. Stat., 1911, Sec. 4991.

For the laws of Texas, see Chap. 101.

¹³ Comp. Laws Utah, 1907, Sec. 1288x18.

For the laws of Utah, see Chap. 102.

tion, and as between appropriations, the first in time is the first in right." ¹⁴

§ 1341. **Power of the legislature to regulate the use of water—Police power.**—The power of a State legislature to enact laws for State control and for the government of the waters flowing within its boundaries and the regulation of their use is unquestioned. This comes strictly within the police power of the State, which is a most comprehensive branch of sovereignty, extending as it does to every person, every public and private right, everything in the nature of property, every relation in the State, in society, and in private life.¹

Relative to the use of the waters flowing within the boundaries of a certain State, this police power is the authority to establish such rules of good conduct, which are calculated to prevent a conflict of rights and to insure to each owner of a right the uninterrupted enjoyment of his own, so far as reasonably consistent with the corresponding enjoyment by others of their rights. Whatever right one has, even in his own, is subject to that well-established principle that his use shall not be injurious to the similar rights of others.² Such being the law as to private rights, to a much greater extent does the police power of a State apply to rights which are public, as is the case of the waters within its boundaries, the right to the use of which is common to a large portion of the community. And, in this respect, it is the unanimous consensus of authority that the use of water in the arid region of the West, especially for the irrigation and reclamation of land, is a public use, in which the general public are directly interested. And, holding to this view, the Supreme Court of the United States has gone to the extent that even one person might condemn a right of way through the lands of others for a ditch the purpose of which was to conduct therein water for the irrigation of his own private land.³ Therefore, legislation by a State in relation to the waters flowing within its boundaries directly affects the public welfare, and the right to legislate in re-

¹⁴ Rem. & Ball. Ann. Codes, 1910, Sec. 3616.

¹ Cooley, Const. 227; Cooley, Const. Lim. 572; 4 Bla. Com. 162.

² *Ex parte Elam*, 6 Cal. App. 233, 91 Pac. Rep. 811.

See, also, power of legislature to

regulate the use of water from artesian wells, Sec. 1172.

³ *Clark v. Nash*, 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; affirming 27 Utah 158, 75 Pac. Rep. 371, 1 L. R. A., N. S., 208, 101 Am. St. Rep. 953.

gard to its use, regulation, and conservation is referable to the police power of the State.⁴

As was well said in a late Colorado case:⁵ "The laws of the State providing for officials to distribute the waters of our streams for agricultural uses according to adjudicated priorities were passed for the purpose of securing an orderly distribution of such waters and to prevent breaches of the peace which would inevitably ensue if the owners of priorities were permitted to divert and divide the waters of our streams according to their ideas of their adjudicated

See, also, *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; reversing *Id.*, 68 Fed. Rep. 948.

See, also, for "public use," for which the right of eminent domain may be exercised, Secs. 1063-1074.

⁴ Such an Act is a proper exercise of the police power of the State to prevent personal conflicts by treating the decrees rendered in the several districts as *prima facie* correct, and regulating the distribution of water accordingly, until the rights of the parties can be adjudicated. *Farmers' Ind. D. Co. v. Agricultural D. Co.*, 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149, and in which the Court said: "This Court has repeatedly held that statutes like the one under consideration may be enacted in the exercise of the police power of the State."

"The authority of the general assembly to enact laws regulating the distribution of water to actual appropriators, providing they do not substantially affect constitutional or vested rights, is undoubted." Mr. Justice Elliott in *Farmers' etc. Co. v. Southworth*, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767.

"This Act therefore relates to waters, the right to the use of which is

common to a large portion of the community, and affects the general public right. Legislation in relation thereto affects the public welfare, and the right to legislate in regard to its use and conservation is referable to the police power of the State." *Ex parte Elam*, 6 Cal. App. 233, 91 Pac. Rep. 811.

"These Acts have been called police regulations, and they are intended to regulate the distribution of the water among the inhabitants of a stream so as to insure to each his rightful proportion according to the extent of his appropriation." *Hoge v. Eaton*, 135 Fed. Rep. 411, 141 Fed. Rep. 64, 72 C. C. A. 74.

See, also, *Farm Inv. Co. v. Carpenter*, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918; *White v. Farmers' etc. Co.*, 22 Colo. 191, 43 Pac. Rep. 1028, 31 L. R. A. 828; affirming 5 Colo. App. 1, 31 Pac. Rep. 345; *Louden etc. Co. v. Handy D. Co.*, 22 Colo. 102, 43 Pac. Rep. 535; *Farmers' Irr. Dist. v. Frank*, 72 Neb. 136, 100 N. W. Rep. 286; *Wiley v. Decker*, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939; *Cummings v. Hyatt*, 54 Neb. 37, 74 N. W. Rep. 411.

⁵ *McLean v. Farmers' High Line etc. Co.*, 44 Colo. 184, 98 Pac. Rep. 16.

rights and needs. These laws must be strictly enforced and observed, and the courts have no power to annul them."⁶

And, in general, it may be said that the right of the legislatures of the States to regulate the use and prohibit the destruction of property extends, not only to that class of property over which the State, as sovereign, has a qualified ownership, but includes every species of property in the preservation and use of which the public has an interest, either because of its nature, or because the public health, the public safety, the public morals, or the general public welfare in any respect is involved.

In relation to the subject of waters, as was stated by the Supreme Court of the United States:⁷ "The reason for the creation of statutory provisions of this and kindred character undoubtedly is, as said in *Farm Investment Co. v. Carpenter*,⁸ 'to be found in the inability of the ordinary procedure and processes of the law to meet the necessities pertaining to the segregation by various individuals or companies of water from the same stream by separate ditches or canals, and at different points along its course, under rights by appropriation to so divert and use the water.'"⁹

Under the police power of the State, the legislature has also provided for the punishment of the unlawful interference of water rights, the waste of water, or the obstruction of the work of officials in the performance of their duty.¹⁰

§ 1342. **Governing boards—Powers and duties of.**—Some of the States adopting the law of State control of the waters within their respective jurisdictions have placed primarily the administration of

⁶ The State has control of the public water of the State and may prescribe rules and regulations whereby they may be appropriated and applied to a beneficial use. *Idaho etc. Co. v. Stephenson*, 16 Idaho 418, 101 Pac. Rep. 821.

See, also, *Speer v. Stevenson*, 16 Idaho 707, 102 Pac. Rep. 365.

⁷ *Montezuma Canal Co. v. Smithville Canal Co.*, 218 U. S. 317, 54 L. Ed. 1074, 31 Sup. Ct. Rep. 67.

⁸ *Wyo.* 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918.

⁹ See, also, *Hamp v. State*, — Wyo. —, 118 Pac. Rep. 653.

¹⁰ For the criminal statutes for the respective States upon the above subject, see Part XIV.

In Wyoming it was held in a recent case that in a prosecution for unlawfully interfering with the headgate of an irrigation ditch contrary to the statute, the question of the ownership of the ditch and headgate was immaterial. *Hamp v. State*, — Wyo. —, 118 Pac. Rep. 653.

those laws in the hands of special tribunals, or governing boards, created by the Acts for that purpose.

In Wyoming, the first to provide for such a tribunal, when it was admitted as a State in 1890, the outlines of the system were embodied in the constitution, which provided that the legislature should by law divide the State into four water divisions, and provide for the appointment of superintendents thereof; that there should be a State Engineer, who should be appointed by the governor, and who, with four division superintendents, should compose the "Board of Control," and of which the State Engineer should be president.¹ Pursuant to the constitutional requirements, the first State legislature passed an Act entitled, "An Act providing for the supervision and use of the waters of the State," approved December 22, 1890,² and in which the provisions of the constitution were fully complied with as above set forth. The system thus adopted in the State of Wyoming at that time, and still in existence, with only minor changes, was founded upon a new principle of American irrigation law. It contained two radical departures from the existing practice in this country. These were: First, the acquirement of rights to the use of water through an application to a public board, or official, who had the power to refuse it under certain circumstances, rather than the old system of appropriation, discussed in previous chapters;³ and, second, the adjudication of the rights of claimants to the use of water by an administrative board.⁴

In Idaho the State constitution provides for State control of the waters flowing within its boundaries.⁵ For the purpose of administering and controlling the waters within the State, it is divided into three water divisions, and for each of these divisions there is a water commissioner appointed by the Governor and confirmed

¹ See Const. Wyo., Art. 8, Secs. 1-5.
See, also, Const. Wyo., Sec. 1339.

² See Comp. Stat. Wyo., 1910, Secs. 761-798.

See, also, laws of Wyoming, Chap. 104.

³ For Arid Region Doctrine of appropriation, see Chap. 31, Secs. 585-594.

For the appropriation of water, see Chap. 38, Secs. 706-732.

For the details as to the application, see Sec. 1350.

⁴ For the adjudication of water rights by the board, see Chap. 80.

⁵ See Const. Idaho, Art. 15, Sec. 45.
See, also, for Constitution of Idaho, Sec. 1339.

See, also, Chap. 89.

by the senate. The State Engineer, also appointed in the same manner, and the three water commissioners constitute the "State Board of Irrigation." This board has the power to make rules in regard to the making proof of the completion of the works and the application of the water to beneficial purposes, and also all needful rules for the distribution of the water. The board has nothing to do with the acquirement of the rights. But before the construction, enlargement, or extension, or change in the point of diversion of any ditch, canal, or other distributing works, an application must be made to the State Engineer for a permit.⁶ Neither the board nor the State Engineer has any power under the law to make adjudications of rights, but this is left to the courts.⁷

In 1895, the legislature of Nebraska adopted a system of public control similar in outline to the Wyoming system, but differing considerably in detail. It provided for the administrative adjudication of existing rights, for the acquirement of rights under State supervision, and for the distribution of water by State officials.

A board called the State Board of Irrigation was at the head of the system, but in 1911 the law was amended and there was created "a State Board of Irrigation, Highways, and Drainage." And it was provided that the new board shall exercise the powers and perform the duties of the old board. This board differs from the Wyoming "Board of Control" in that it is composed of State officers having other duties than officers having to do only with the administration of water laws. The board is composed of the Governor, the

⁶ Rev. Codes of Idaho, 1908, Secs. 3275 *et seq.*

For applications, see Sec. 1350.

See Idaho Stat., 1903, p. 223, Sec. 1, as amended, 1905, p. 357.

For the laws of Idaho, see, also, Chap. 89.

⁷ For the adjudication of water rights, see Chap. 78.

The Code of Civil Procedure, 1901, Sec. 3791, provided as to the determination of existing priorities that, where the waters of any stream had not yet been adjudicated, that the water commissioners must bring suit in the District Court against any and

all claimants whose rights were unadjudicated, serving summons by publication. This was declared unconstitutional in the case of *Bear Lake County v. Budge*, 9 Idaho 703, 75 Pac. Rep. 614, 108 Am. St. Rep. 179, the Court holding: "Under the police power of the State the legislature can not authorize a public officer to bring a suit to settle private rights to the use of water or the priority of such rights." The Court also held that the provisions for the service of summons was clearly in violation of the provisions of Section 26, Article 5, of the State Constitution.

Attorney-General, and the Commissioner of Public Lands and Buildings. The board elects a Secretary, who must be a hydraulic engineer, and is commonly called the State Engineer. The board has the power of making determinations of all existing water rights. The State is divided into two water divisions, and the control of each division rests with an assistant secretary, who must also be an engineer.⁸

In Nevada the statute declares that: "All natural water courses and natural lakes and the waters thereof which are not held in private ownership belong to the State, and are subject to appropriation for beneficial uses."⁹

In this State, in 1901, there was created by the legislature a "State Board of Irrigation," composed of the Governor, the Surveyor-General, and the Attorney-General. The office of the State Engineer was created in 1903, and in 1905 he was made a member of the board. The duties of the board are to divide the State into water divisions and districts, to appoint water commissioners over the same, and to make such rules as to the acquisition and use of water as it shall deem advisable. The principal duties as to the acquisition of water rights and the adjudication of existing priorities fall upon the State Engineer, who is, in fact, the executive officer of the board.¹⁰

In North Dakota the State Engineer is appointed by the Governor. Complete records of his work must be kept in his office for public inspection. He has the power to make all necessary rules and regulations to carry into effect the duties of his office. It is made his duty to make hydrographic surveys of each stream system, obtaining and recording all valuable data for the determination, development, and adjudication of the water supply of the State. He also has jurisdiction of the applications to appropriate water.¹¹

In South Dakota, for the distribution of water, the State is divided into three divisions, for each of which there is a water com-

⁸ Compiled Stat. of Neb., 1911, Secs. 6409-6430.

⁹ Rev. Laws Nev., 1912, Sec. 4672; Comp. Laws, 1900, Sec. 354; see, also, Stat., 1907, p. 30, Sec. 1.

¹⁰ Rev. Laws Nev., 1912, Secs. 4679-4685, 4706; Laws Nev., 1907, p. 30, Secs. 21 *et seq.*

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As to the duties of the State Engineer, see Sec. 1343.

For the Laws of Nevada, see Chap. 93.

¹¹ Revised Codes N. D., 1905, Secs. 7608-7617; see, also, Secs. 7622-7629.

For the laws of North Dakota, see Chap. 95.

missioner appointed by the Governor. These commissioners and the State Engineer form the "State Board of Water Commissioners," who have the general supervision and control over the waters of the State, and may adopt such rules and regulations for the acquisition of water rights and the use of the water as they may see fit. The adjudication of all water rights is left to the courts, in either suits brought by private parties or in those brought by the Attorney-General, and in which all rights to the use of the water of any certain stream may be determined.¹²

In New Mexico the Act of the legislature of 1907 provides for the division of the Territory into stream systems, over which the engineer appoints water masters. The engineer has the general supervision of the apportionment and distribution of the water in the Territory. The acquisition of new rights must be made by an application to the Engineer, who may approve or reject the application. The adjudication of existing water rights is left to the courts.¹³

It will be noticed that even in States which have governing boards that large powers are granted to the State Engineer, who is made a member of the board itself, and is the executive officer thereof, and upon whom the greater portion of the duties in administering the law devolves.

§ 1343. **The State Engineer—Duties of.**—The office of the State Engineer is peculiar to the Western States, and of these States to those which have adopted the laws of State control of the waters flowing within their respective boundaries. His duties are chiefly with the question of waters, and more especially with the use of water for the irrigation and reclamation of land. His powers and duties vary greatly in the different States from merely the making of hydrographic surveys, as is the case in Oregon, to practically the complete control of the water supply, including judicial powers, as is the case in Nevada. In all of these States, whether there are governing boards or not,¹ he is the chief administrative and execu-

¹² Laws S. D., 1907, p. 385, Sec. 41.

For the laws of South Dakota, see Chap. 100.

¹³ Laws N. M., 1907, p. 92, Secs. 43 *et seq.*

For the laws of New Mexico, see Chap. 94.

¹ For the duties and powers of governing boards, see Sec. 1342.

tive officer and whatever there is of State control of waters centers in his office. For the purposes of this work we will briefly make a comparative statement of the powers and duties of the State Engineers as prescribed by the statutes of their States, leaving the more extended statement to the laws of the respective States themselves, an abstract of which will be found in another part of this work.²

This statement would not be complete without reference to the State of California. Although this State has no State Engineer at present, it was originally the first to have one. The office was created in 1878, and was for the purpose of collecting information³ as to the water resources and irrigable lands. The office, however, was abolished in 1887.⁴ The legislature of the State again recreated the office of the State Engineer in 1907,⁵ but few powers were given to the State Engineer beyond those of co-operating with the United States Reclamation Service. In 1909 the legislature passed an Act providing for the hydrographic survey of the State.⁶ In 1911 the California legislature again provided for a State Engineer and a Board of Irrigation, but confined the duties of both to an investigation of the resources of the State.⁷

Colorado was the pioneer State in providing for the distribution of water by public officials, and the State Engineer is at the head of the system. This office was created in 1881, and the engineer was given general charge of the distribution of water through the State. The Act also provided for the filing of new claims with the county clerk and the State Engineer. The provision for the filing of the new claims was, however, declared void by the court because of defective title.⁸ No judicial powers were given him, but these were left entirely to the courts. Under this plan the engineer is considered a purely administrative officer, and his duties were con-

² For the laws of the various States, see Part XIV.

³ Stats. and Amdts., 1877-1878, p. 634.

⁴ See the reports of Wm. Ham Hall on Irrigation in Italy, Spain, and France, and on San Diego, San Bernardino, and Los Angeles counties, California.

⁵ Stats. and Amdts., 1907, Chap. 83.

⁶ California Stats. and Amdts., 1909, Chap. 704.

⁷ For the California statutes upon the subject, see Part XIV.

⁸ Lamar etc. Co. v. Amity etc. Co., 26 Colo. 370, 58 Pac. Rep. 600, 77 Am. St. Rep. 261; Rio Grande etc. Co. v. Prairie etc. Co., 27 Colo. 225, 60 Pac. Rep. 726; Beaver etc. Co. v. St. Vrain etc. Co., 6 Colo. App. 130, 40 Pac. Rep. 1066; Mohl v. Lamar C. Co., 128 Fed. Rep. 776.

fined to the general supervision of the distribution of waters after the rights had been adjudicated. However, by an Act passed by the legislature in 1903, he was given additional powers in the matter of the acquisition of new rights, and the approval of the plans therefor, which must be filed with him within sixty days after beginning the construction work.⁹

In Idaho the office of State Engineer was created in 1895, in connection with the acceptance of the conditions of the Carey Act.¹⁰ His duties are to examine plans submitted under that Act and to determine whether they are feasible and beneficial to the public. Since 1901 irrigation district plans are also subject to the approval of the State Engineer; since 1903 he has also had control of the acquisition of all new rights, and any party wishing to acquire the right to the use of any of the waters of the State must make an application in proper form to the State Engineer.¹¹ The State Engineer as the head of the State Board of Irrigation also practically has full charge of the distribution of the water to the lawful claimants, the determination of whose rights is left entirely to the courts, and, therefore, the engineer has no judicial powers to determine existing rights.¹²

In Montana, while the office of State Engineer was created in 1903 in connection with the acceptance of the Carey Act, he has nothing to do with the control of the waters of the State. His duties are confined to the examination of State lands to determine their irrigability, and to examine and measure the streams of the State. He is also required to examine the land applied for under the Carey Act and to determine the feasibility of its reclamation, and to exercise general supervision over the carrying out of the plans. He has no judicial powers.¹³

In Nebraska, under the law of 1895, the State Board of Irrigation

⁹ For the laws of Colorado, see 325; *Trade Dollar M. Co. v. Fraser*, 148 Fed. Rep. 587, 79 C. C. A. 37. Chap. 87.

For the duties of the State Engineer of Colorado, see *Colo. Stats. Ann.*, Morr. Ed., 1911, Secs. 3321-3332. ¹² *Rev. Codes Idaho*, 1908, Secs. 149-153.

¹⁰ For the Carey Act, see Chap. 87, Secs. 1312-1336. For the laws of Idaho, see Chap. 89. ¹³ *Stats. of Mont.*, 1911, Chap. 128, p. 352.

¹¹ This part of the Act was held constitutional in *Boise etc. Co. v. Stewart*, 10 Idaho 38, 77 Pac. Rep. 25, Chap. 91. For the laws of Montana, see

elects a secretary, who must be a hydraulic engineer, and is commonly called the State Engineer. He has all the powers and duties commonly given to State Engineers, and more than is granted in some States. It is made the duty of the secretary to measure, or cause to be measured, the flow of streams of the State; the State board, through its secretary, has general authority over the distribution of the water, and a party wishing to acquire a water right is required to file an application with him for the same, and he is required to refuse an application if there is no unappropriated water in the source of supply, or if it is deemed detrimental to the public welfare. This, as will be seen, gives him great power. Appeal from the rulings of the secretary, or from the board, may be had to the District Court, and from there to the Supreme Court. But the Court holds that the power of the secretary is practically absolute to approve or reject applications.¹⁴ Probably the greatest power granted the secretary, or the State Engineer, is the power to define or to determine existing rights. No method of making adjudications was prescribed by the Act, and this matter was left entirely to the board. Rules were at once adopted under which the adjudication is to be made by the secretary, from whose decision appeal may be had to the board; but in case there is no appeal the board merely adopts the report of the secretary. Appeals may then be had from the rulings of the board to the courts.¹⁵

In Nevada, the office of the State Engineer was created in 1903, and in 1905 he was made a member of the State Board of Irrigation. In this State also he is given great powers. He has the general supervision of the distribution of waters in the State. Parties wishing to appropriate water must file a proper application with him for the same; written protests against the granting of the application, stating the reasons therefor, may be filed by other parties. The engineer may, in his discretion, then hear evidence in support of or against any application, and shall then take such action thereon as he deems to be proper and just. Under the Act of 1907, no right of appeal from his decision is given, but the Act provides that any party feeling himself aggrieved by the decision of the State Engi-

¹⁴ Comp. Laws Neb., 1911, Secs. 6415-6417; *Farmers' Irr. Dist. v. Frank*, 72 Neb. 136, 100 N. W. Rep. 286.

¹⁵ For the laws of Nebraska, see Chap. 92.

neer may bring an action, within sixty days after his notice in writing of such decision, in the court having the proper jurisdiction against the State Engineer and all parties having interests adverse to him, and the matter "shall be tried *de novo* by the court."¹⁶ The State Engineer is also given absolute power to determine existing water rights in the first instance. But any party feeling himself aggrieved by the decision of the State Engineer is given the right to bring an action against such engineer and all parties having interests adverse to him at any time within one year after the record of the list of the priorities and awards has been recorded.¹⁷

In New Mexico the office of Territorial Engineer was first created in 1905, but no provision was made for salary and expenses, and the law proved in this respect ineffective. Later, in 1907, the legislature again created the office and provided for salary. Under this law he is given full supervision of the apportionment of the water in the State; applications for future rights must be made to him, and he is given the power to approve or reject the same. He is given no judicial powers as to existing water rights.¹⁸

In North Dakota, in 1905, the office of State Engineer was created, and he was given "general supervision of the waters of the State and of the measurements and appropriation thereof." The distribution of the water is directly under the four water commissioners appointed by the Governor, according to licenses issued by the State Engineer. All applications for the future appropriation of water must be made to him in the proper form, and he may ap-

¹⁶ Rev. Laws Nev., 1912, Sec. 4701; Laws Nev., 1907, p. 30, Secs. 24-29.

¹⁷ Rev. Laws Nev., 1912, Sec. 4690.

See Laws Nev., 1907, p. 30, Secs. 17-19.

See, also, for the adjudication of water rights, Chap. 79.

¹⁸ Laws N. M., 1907, p. 78, Secs. 4 *et seq.*

For laws of New Mexico, see Chap. 94.

By the Supreme Court of New Mexico it was held that the jurisdiction of the Territorial Engineer, under Section 12 of the Act of 1907, only related to public unappropriated waters

within the Territory, and had no application to seepage or spring water arising on the land of a proprietor from an unknown source. *Vanderwork v. Hewes*, 15 N. M. 439, 110 Pac. Rep. 567.

It was also held that the Territorial engineer is without authority to issue a permit for a project to irrigate lands in New Mexico from the waters of a natural stream running from Colorado into New Mexico, when the point of diversion, the headgate, and about six miles of the irrigation ditch are in Colorado. *Turley v. Furman*, — N. M. —, 114 Pac. Rep. 278.

prove or reject such application. Appeal may be had from his decision to the courts. He is given no power to determine or adjudicate existing water rights.¹⁹

In the State of Oklahoma, the water code refers to the State Engineer all through its provisions. But there is no statutory provision for the creation and maintenance of an office of State Engineer. However, by statute it is made the duty of the secretary of the State Board of Agriculture to perform all the duties assigned to the State Engineer in the code. The said secretary is empowered by and with the advice and consent of the Governor to temporarily employ the services of a technically qualified and experienced engineer for the purpose of examining, investigating, or determining upon any professional engineering questions.²⁰

In Oregon the office of State Engineer was created in 1906, but he was given little control of the waters of the State, his duties being confined almost entirely to making hydrographical and topographical surveys. He was given no power over the distribution of water throughout the State.²¹ But under the Act of 1909 the State Engineer and the superintendent of the two water divisions constitute the Board of Control, which "have the supervision of waters of the State and of their appropriation, distribution, and diversion, and of the various officers connected therewith."²²

In South Dakota the office of State Engineer was created in 1900, and he, with the aid of the water commissioners under him, has general supervision of the distribution of the waters of the State. For the future acquisition of rights an application must be filed with the engineer, who has the power to approve or reject such application. No judicial powers are granted as to existing rights.²³

In Utah the office of State Engineer was first created in 1897, but at first he was given practically no powers as to the control of the water supply. His duties were principally to make the surveys and to submit plans and estimates for reservoirs and supervise the construction of reservoirs by the State. Under this Act there was no

¹⁹ Rev. Codes, 1905, Secs. 7608-7617.

For the laws of North Dakota, see Chap. 95.

²⁰ Compiled Laws of Okla., 1909, Sec. 3982.

²¹ For laws of Oregon, see Part XIV.

²² L. O. L., Secs. 6598-6602.

²³ Laws, 1907, pp. 374-376, Secs. 5-14.

For laws of South Dakota, see Chap. 100.

element of State control. In 1901 the powers and duties of the State Engineer were considerably enlarged, and the authority of the State to regulate the use of water was recognized, and the State Engineer was placed at the head of the system. By the Act of 1903 a complete system of State control was adopted, and the State Engineer was given "general supervision of the waters of the State and of their measurement, apportionment, and appropriation." By the Act of 1905, as amended by the Acts of 1907 and 1909, the system was still further perfected. He has power to supervise the distribution of water throughout the State, and acts through the superintendent of the water divisions and the supervisors of the water districts. He has general supervision of the appropriation of all surplus or unappropriated water, and those desiring to appropriate water must file the proper application with him, which he may approve or reject, and from his decision there is no appeal. However, any applicant who is dissatisfied with the action of the State Engineer may bring an action in the District Court and have the question adjudicated by the court. It is held that he has discretionary power to extend the time within which the construction of the works must be completed, if the time is kept within the maximum allowed by law.²⁴ The State Engineer has no judicial powers, either for the determination of existing rights or for the determination of the rights of applicants for the appropriation of water where protests have been filed. The law of 1903 provided for a hearing on a protested application, but the Court held that the provision was unconstitutional as attempting to confer judicial power upon the State Engineer. The protests, however, may be made by affidavits, to which the applicant may file reply affidavits.

In Washington there is no State Engineer, but under a bill that was submitted to the legislature in 1911 a complete law upon the theory of State control was proposed. This bill provides for a State Engineer, who is to be a hydraulic engineer.²⁵

The State of Wyoming, although last alphabetically, was the first State to adopt the complete system of State control of the waters flowing within its boundaries. This was accomplished under the

²⁴ *Pool v. Utah etc. Co.*, 36 Utah 508, 105 Pac. Rep. 289.

²⁵ For abstract of proposed bill, see

criticism of the Washington laws, Chap. 103.

See, also, Laws, 1911, p. 658, House Bill No. 284.

direct influence and supervision of that astute hydraulic and irrigation engineer, Mr. Elwood Mead, who was appointed the first State Engineer under the Act of 1886. Under this system the State Engineer is given full control and supervision of the distribution of the waters within the State, which is more directly accomplished by division superintendents and by the water commissioners. Relative to the acquirement of new rights, the person wishing to acquire a right must, before beginning construction, make application to the State Engineer. The engineer has the authority to refuse an application when there is no unappropriated water in the source of supply or when its granting would be contrary to public policy, and since 1895 the applicant is required to show his financial ability to carry out the proposed project. Full judicial power is granted to the State Board of Control, of which the State Engineer is president, to determine existing rights upon testimony taken by the board or by the division superintendents. It was even provided that the cases pending in the courts when this law took effect might be turned over to the board, and this was done in a few instances. The Board of Control may grant a rehearing or an appeal may be taken to the courts. This law, as will be noticed from the above abstract of laws of the various States, has been followed by a number of the other States in its main features, and this system is often referred to as the "Wyoming System" of State control.²⁶

§ 1344. **The State Engineer—Power and authority of.**—As will be seen from the abstract of the laws of the various States adopting the law of State control, as given in the preceding section,¹ the powers granted the State Engineers vary from that of merely making geographical and topographical surveys and stream measurements to those of almost absolute control of the distribution of the waters of the State, the granting of permits to make future appropriations, and the adjudication and determination of existing rights. In the States of Wyoming, Nebraska, and Nevada, his powers, together with those of the governing board, of which he is either the acting member or the president, are almost absolute, as far as those granted by statute are concerned, upon the question of the appropriation and use of the water within their respective jurisdictions

²⁶ Wyo. Comp. Stat., 1910, Secs. 761-798.

See, also, Chap. 104.

¹ See Secs. 1339, 1340.

and the adjudication of existing rights. In the hands of a capable and honest engineer the granting of this autocratic power may work out all right, but in the hands of one not familiar with hydraulic engineering or the duties of the office, and appointed merely, as is too often the case, for political purposes, it is entirely too great a power to grant to one man, having as he does one of the principal natural elements under his absolute control, which in turn, in a number of instances, controls the greatest industry of the State—agriculture.²

Although the courts of these States have in the main upheld the statutory law granting these excessive powers to one person as constitutional,³ in a number of instances these powers have been limited by Court decisions. In Wyoming it was held that where the law declared that an appeal should lie from a decision of the commissioner to the district superintendent, from him to the State Engineer, and from his decision to the Circuit Court, a decision of a commissioner and superintendent, though not appealed from, was not an adjudication conclusive on the courts.⁴ In Nebraska the power to adjudicate the rights of uncompleted ditches was denied by the Supreme Court.⁵ In Idaho, although the State Engineer is given the power of approving or rejecting applications to appropriate water, it is held that this right is purely ministerial, and that he acts *ex parte*, and that such action is subject to judicial inquiry by the courts.⁶ And it is further held that, upon proper proof of the application of water sought to be applied to a beneficial use, the State Engineer is required to issue a license confirming the right to such use of water for the specified beneficial purpose; and where

² "In Wyoming charges of favoritism were made against the engineer, and the exercise of this authority has given him a great deal of trouble." R. P. Teele, in *The State Engineer and His Relation to Irrigation*, 1906, Bulletin No. 168, U. S. Dept. of Agriculture.

³ *Farm Inv. Co. v. Carpenter*, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918; *Whalon v. North Platte etc. Co.*, 11 Wyo. 313, 71 Pac. Rep. 995; *Boise City etc. Co. v. Stewart*, 10 Idaho 38, 77 Pac.

Rep. 25; *Pool v. Utah County etc. Co.*, 36 Utah 508, 105 Pac. Rep. 289.

See, also, *Gay v. Hicks*, — Okla. —, 124 Pac. Rep. 1077.

⁴ *Ryan v. Tutty*, 13 Wyo. 122, 78 Pac. Rep. 661.

⁵ *Farmers' Irr. Dist. v. Frank*, 72 Neb. 136, 100 N. W. Rep. 286.

⁶ *Waha etc. Co. v. Lewiston etc. Co.*, 158 Fed. Rep. 137; *Trade Dollar etc. Co. v. Fraser*, 148 Fed. Rep. 587, 79 C. C. A. 37; *Lockwood v. Freeman*, 15 Idaho 395, 98 Pac. Rep. 295; *Speer v. Stephenson*, 16 Idaho 707, 102 Pac. Rep. 365.

the engineer refuses to do this, he may be compelled to perform the ministerial duties of his office by a writ of mandate.⁷ In Utah the law passed in 1903 provided for a hearing by the State Engineer on a protested application, but when the engineer attempted to hold such a hearing he was prohibited by an order of the District Court, on the ground that that provision of the law was unconstitutional, for the reason that it attempted to confer judicial power on the State Engineer. Since that time the law has been repealed in this respect, and all determination of rights must be by the courts.

§ 1345. Division engineers and division superintendents.—In the most of the States adopting the laws of State control the State is divided into two or more divisions, and in these States the officer next in rank to the State Engineer is the division engineer or the division superintendent, or some other officer in charge of a division. In Nebraska these division officers are styled "under secretaries,"¹ and in South Dakota "water commissioners,"² and the same in North Dakota.³ In Colorado the law first provided for "division superintendents," but this was changed to "irrigation division engineers," who are to be appointed by the Governor upon a competitive examination.⁴ These officers have the more direct control of the waters of their respective divisions, and as a general thing they are hydraulic engineers, and are second in authority and assistants to the State Engineer,⁵ and the power conferred upon them is a part of the police power of the State.⁶ The law presumes that

⁷ Idaho etc. Co. v. Stephenson, 16 Idaho 418, 101 Pac. Rep. 821.

¹ See Neb. Comp. Stat., 1911, Secs. 6419 *et seq.*

² S. D. Laws, 1907, p. 384, Secs. 39 *et seq.*

³ N. D. Rev. Codes, 1905, Secs. 7640-7644.

⁴ 3 Colo. Stat. Ann., Morr. Edition, 1911, Secs. 3335 *et seq.*; Revised Stat. Colo., 1908, Secs. 3335 *et seq.*

⁵ "By the Act the superintendent is made a subordinate of, and assistant to, the State Engineer. His acts are not conclusive unless acquiesced in. The State Engineer is made the re-

sponsible party." Farmers' Ind. D. Co. v. Maxwell, 4 Colo. App. 447, 36 Pac. Rep. 556.

⁶ For police power of State to enact such laws, see Sec. 1341.

For duty of division superintendents, see McLean v. Farmers' High Line Canal and Res. Co., 44 Colo. 184, 98 Pac. Rep. 16, in which it is said: "It is the duty of the superintendent of a water division to make such distribution by direction to the water commissioners under his control." Citing Lower Latham D. Co. v. Louden I. C. Co., 27 Colo. 267, 60 Pac. Rep. 629, 83 Am. St. Rep. 80.

public officials discharge their duties in conformity with the statutes, and the burden of showing to the contrary rests with him who relies thereon. In Wyoming the power of the division superintendents is extended to that of having quasi-judicial power over the rights within their respective jurisdictions, and the four division superintendents, with the State Engineer, constitute the Board of Control.⁷ In some of the States the division engineer or division superintendent is paid by the State by salary designated by the Act. In Wyoming his salary is fixed at \$1200 per annum. In most of the States, however, they are paid by the State at a per diem rate. In some of the States his salary is paid by the counties over which he has jurisdiction. This is true in Colorado, and it is held that where a county has no land which is irrigated within a certain irrigation division, it is not liable for any part of the salary of the superintendent of that division.⁸

§ 1346. **Water commissioners—Water masters—Under assistants—Supervisors.**—For the more complete control and supervision of a State the water divisions mentioned in the last section¹ are divided into water districts. Usually these districts include only some branch or tributary of the main stream, from which the water is taken by the various ditches and canals. It must be noted here that these districts have no connection with the irrigation districts provided for in some of the States following in form the irrigation districts of California, organized under the "Wright Law," and which will be discussed in a future chapter.² In the State of Wash-

⁷ Comp. Stat. Wyo., 1910, Secs. 753 *et seq.*

For governing boards, and their duties and powers, see Sec. 1342; *Farm Inv. Co. v. Carpenter*, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918.

⁸ *Chew v. Board of County Commrs. of Fremont Co.*, 18 Colo. App. 162, 70 Pac. Rep. 764; *Chapman v. Board of County Commrs. of Phillips Co.*, 17 Colo. App. 236, 68 Pac. Rep. 134.

In Wyoming, mandamus was held maintainable to compel a State auditor to issue a warrant on the treas-

urer for relator's salary as superintendent of a water division, after relator's alleged improper removal from such office and the appointment of his successor. *State ex rel. Hamilton v. Grant*, 14 Wyo. 41, 81 Pac. Rep. 795.

¹ See Sec. 1345.

² See Chap. 70, Secs. 1386-1432.

An early statute of California (Cal. Stat., 1854, p. 76) provided for commissioners whose duties were to apportion and divide the water among the various users. These provisions are now obsolete, although not having been repealed.

ington by statute each county is made an irrigation district.³ In Wyoming the State Board of Control is given the power to create "water districts" as the necessity arises.⁴ In North Dakota,⁵ South Dakota,⁶ Oklahoma,⁷ and Utah,⁸ the statute provides that the water divisions shall be subdivided into districts by the State Engineer, which districts shall be so constituted as to secure the best protection to the water users and the most economical supervision on the part of the State. In Colorado these districts are created by statute.⁹ In Nebraska the State Board of Irrigation may create these water districts when necessary, upon a petition of the parties interested.¹⁰ In Idaho the same board creates the districts,¹¹ and in Nevada the board is given the power to divide the State into "water subdivisions."¹²

Over each of these water districts the laws provide for the appointment, sometimes by the Governor, but usually by the State Engineer, of an officer under whose direct supervision the water is distributed to the various users within his jurisdiction. These officers are termed "water commissioners," "water masters," "under assistants," or "supervisors." In authority these division officers are subject to the direction of the division engineer, who, in turn, is under the State Engineer. His duties consist of the apportionment of the water in the natural stream or streams in his district among the several ditches, in accordance with their priorities. He must see that the water is not used by those not entitled thereto where the rights of those lawfully entitled thereto are injured. He must also see that the water is not wastefully used by those entitled to rights. In many of the States these officers are vested with the power of deputy sheriffs or constables, and may make arrests for the unlawful in-

See *Lux v. Haggis*, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; *Strong v. Baldwin*, 154 Cal. 150, 97 Pac. Rep. 178, 129 Am. St. Rep. 141; *Charnock v. Rose*, 70 Cal. 189, 11 Pac. Rep. 625.

³ Rem. & Bal. Ann. Codes, Sec. 6350.

⁴ Comp. Stat. Wyo., 1910, Secs. 799 *et seq.*

⁵ Rev. Code, 1905, Sec. 7645.

⁶ Laws, 1907, p. 385, Sec. 43.

⁷ Comp. Laws Okla., 1909, Secs. 3960-3964.

⁸ Comp. Laws, 1907, Sec. 1286.

⁹ 3 Colo. Stat. Ann., Morr. Edition, 1911, Secs. 3353-3426; Revised Stat. Colo., 1908, Secs. 3353-3426.

¹⁰ Comp. Stat., 1911, Secs. 6441 *et seq.*

¹¹ Rev. Codes, 1908, Secs. 3274, 3275, 3284; Laws, 1903, p. 240, Sec. 23.

¹² Laws Nev., 1907, p. 30, Secs. 22, 23; Rev. Laws, 1912, Secs. 4693, 4694.

terference with the water. Their duties are, in fact, in the nature of water police, whose duties are to protect the rights of the lawful appropriators, and to arrest those who unlawfully infringe upon their rights. They are usually equipped with sufficient knowledge to make immediate measurements of the water under the rules furnished by the State Engineer, and can thus ascertain whether each party is getting the water to which he is entitled. They are usually paid by the counties in which their respective districts are situated such a sum *per diem* as is fixed by the statute.¹³ Being on a *per diem* compensation in most of the States, it is provided that these officers shall not begin their work until they have been called upon by two or more owners or managers of ditches, by application in writing, and they shall not continue to perform services after the necessity therefor shall cease. In Idaho in a recent case this provision of the statute was held to be mandatory, and that the water master had no authority to begin his work until he had been so called upon, and until so called upon he could not draw pay for his services.¹⁴

¹³ For the general powers and authority of such officers, see *Boulder v. Hoover*, 48 Colo. 343, 110 Pac. Rep. 75; *Hamp v. State*, — Wyo. —, 118 Pac. Rep. 653; *Stetham v. Skinner*, 11 Idaho 374, 82 Pac. Rep. 451; *Robertson v. People ex rel. Soule*, 40 Colo. 119, 90 Pac. Rep. 79; *Cache La Poudre etc. Co. v. Hawley*, 43 Cal. 32, 95 Pac. Rep. 317.

See *Board of County Commrs. v. Locke*, 2 Colo. App. 508, 31 Pac. Rep. 351, holding that it devolved upon each county within a district to pay an equal part of the commissioner's compensation.

See, also, *Board of County Commrs. v. Gould*, 6 Colo. App. 44, 39 Pac. Rep. 895, holding that where a water commissioner appointed by the Governor under the law, qualified as required by statute, and began the performance of his duties, the presumption of a compliance with all the conditions authorizing the appointment is con-

clusive, as against collateral attack, and the judgment to recover for services is affirmed.

¹⁴ Until called upon, "the water master has no authority whatever to begin work as such water master. Said water master, having no authority whatever to begin such work as such water master, could not draw pay as water master." *Walker v. Elmore County*, 16 Idaho 696, 102 Pac. Rep. 389.

See, also, *Board of Commrs. v. Hider*, 47 Colo. 443, 107 Pac. Rep. 1068, as to the rule in Colorado; *Chapman v. Board of Commrs. of Phillips County*, 17 Colo. App. 236, 68 Pac. Rep. 134; *Fravert v. Board of Commrs. of Mesa County*, 39 Colo. 71, 88 Pac. Rep. 873; *Chew v. Board of Commrs. of Fremont County*, 18 Colo. App. 162, 70 Pac. Rep. 764; *Board of Commrs. of Clear Creek County v. McLean*, 50 Colo. 602, 115 Pac. Rep. 525.

§ 1347. **The determination of existing rights.**—One of the features of the laws of State control, or State administrative laws, is the method provided for the statutory adjudication, or determination, in the first instance, of existing water rights. And in this respect there are two systems provided for this purpose in the respective States which have adopted these laws. These are: First, that method adopted by the statutes of Colorado, and the States largely following those statutes, provided for such adjudication in the first instance by actions brought in the courts having proper jurisdiction, either upon the instigation of private parties or by some public officer authorized by statute; and, second, that method adopted by the statutes of Wyoming, and the States largely following those statutes, providing for proceedings brought in the first instance before some public official—usually the State Engineer—or before some governing board or board of control, upon their own motion, with right of appeal from the decision of such officer or board to the courts.¹ These statutory actions or proceedings stand in a class by themselves, or are *sui generis*, and do not always follow the rules of equity procedure, but are entirely governed by the respective statutes of the States adopting the same. These actions and proceedings will be discussed in full when we come to the chapters upon the subject of the adjudication of existing rights.

§ 1348. **The distribution of the water according to the determination of rights.**—The States adopting the laws of State control and providing for the determination of the rights of the respective parties either by the State Engineer or governing board, or by the courts, also provide that the water shall be divided by the officers in charge of the distribution of the same, in accordance with the decision of the administrative officers, or in accordance with the decrees of the Court. As we have seen in a previous section,¹ the general supervision of the distribution comes under the duties of the State Engineer, and under him come the division engineers, who have the more direct supervision of the distribution of the waters in

¹ For the statutory adjudication of water rights by courts, see Chaps. 78, 79.

For the determination of water rights by boards, see Chap. 80.

For the adjudication of water rights by actions in equity, see Chap. 78.

¹ See Sec. 1347.

their respective divisions. But the officers who make the distribution are the water commissioners, water masters, under assistants, or supervisors, as they are at times termed under the respective laws.² The statutes of all of these States prescribe that the water shall be so distributed and used without waste. Therefore, large discretionary powers are vested in the officers in charge as to when to turn on the water and shut it off from any user. The interference with the gates by any party is made a misdemeanor, and the officer in charge is given the power to make arrests for any such violation of the law.

§ 1349. Proceedings to appropriate—Effect of application for permit—Notice—Relation.—The effect of the application to appropriate water filed with the State Engineer, or another official, prescribed by the statute does not alone constitute an appropriation any more than a notice of appropriation, under the old rule, constitutes one.¹ The ultimate end for which the appropriation is made must be attained, and the appropriation, under the laws of State control, as well as under the older laws of appropriation, can be finally consummated only by the application of the water to some beneficial use or purpose. It therefore follows that the effect of an application so filed is deemed in law as a mere notice of appropriation. This must be so or the very object of these laws of State control for the regulation and use of the waters of a State would be defeated, and one, by the mere filing of his application, could create a monopoly of the waters of certain streams, and hold them for future speculation.² Therefore, if the proposed appropriator is not able to complete and finally establish his appropriation by applying the water to and using it for the beneficial purpose for which it was proposed to be appropriated, either by himself or through the agency of some user, his appropriation fails. "He may not file his application, construct his works, and then hold the water and wait for something to happen."³

² See Sec. 1346.

¹ For the notice of appropriation, and effect, see Secs. 711-716; *Coray v. Holbrook*, — *Utah* —, 121 Pac. Rep. 572.

² For the appropriation of water for speculation, see Sec. 705.

For the final consummation of an appropriation, see Secs. 725-728.

For the acts necessary under laws of State control, see Secs. 1350-1356.

³ *Sowards v. Meagher*, 34 *Utah* 212, 108 Pac. Rep. 1112, in which the Court also said: "But we think the

In most of the States it is required that duplicate maps must accompany the application as a part thereof. These maps must be drawn to a scale, and must show, as far as possible, all the details of the project.⁴ In some of the States, however, these maps need not be filed until after the approval of the application.⁵

It is also provided in Colorado that the State Engineer shall approve the designs and plans for the construction and repair of all dams or reservoir embankments which are built within the State which equal or extend ten feet in vertical height.⁶

§ 1350. Proceedings to appropriate—Application for permit.—Having generally discussed the laws of State control in preceding sections of this chapter,¹ and for that purpose the subdivisions of the States into divisions and water districts, and the officers over each and their duties and powers,² we will now take up the question of the proceedings necessary to make a valid appropriation under these laws.

filing of the written application with the State Engineer, as required by the statute, is but declaring, or giving notice of, an intention to appropriate unappropriated water. The final step, and the most essential element to constitute a completed valid appropriation of water, is the application of it to a beneficial purpose. Whatever else is required to be done, until the actual application of the water is made for a beneficial purpose, no valid appropriation has been effected. This was so before the statute, and it is still so under the statute. The filing of the application with the State Engineer, as required by the statute, does not establish an appropriation of water. It but takes the place of, and is the preliminary notice of intention to appropriate."

See, also, *Speer v. Stephenson*, 16 Idaho 707, 102 Pac. Rep. 365, where it is held that the same rule holds good, even after a permit has been issued to appropriate water.

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See, also, *Jarvis v. State Bank*, 22 Colo. 309, 45 Pac. Rep. 505, 55 Am. St. Rep. 129; *Toyano etc. Co. v. Hutchins*, 21 Tex. Civ. App. 274, 52 S. W. Rep. 101; *Idaho etc. Co. v. Stephenson*, 16 Idaho 418, 101 Pac. Rep. 821; *United States v. Rickey*, 164 Fed. Rep. 496; *Rasmussen v. Blust*, 83 Neb. 678, 120 N. W. Rep. 184; *Pool v. Utah etc. Co.*, 36 Utah 508, 105 Pac. Rep. 289.

⁴ 3 Colo. Stat. Ann., Morr. Ed., 1911, Secs. 3181-3187; Revised Stat. Colo., 1908, Secs. 3181-3187.

⁵ For Nebraska, see Comp. Stat., 1911, Secs. 6437, 6470; Rev. Laws Nev., 1912, Sec. 4695; Nev. Stat., 1907, p. 30, Sec. 28; Utah Comp. Laws, 1907, Sec. 1288x15, as amended by Laws, 1909, p. 84.

⁶ 3 Colo. Stat. Ann., Morr. Ed., 1911, Sec. 3323; Revised Stat. Colo., 1908, Sec. 3323.

¹ See Secs. 1338-1349.

² See Secs. 1342-1346.

The first step necessary for one desiring to appropriate water under this method is for the party to file with the proper officer, which is usually the State Engineer, but in some States with the governing board, an application for a permit to appropriate water. This rule, however, is subject to one exception. In the State of Colorado, where, within sixty days after the commencement of the work, the appropriator must file with the State Engineer two duplicate maps, in a form satisfactory to him, showing the essential facts.³ The forms for these applications are furnished by the State Engineer, and can be had from him upon request.⁴

The essential facts necessary to be shown in the application are: The name and address of the person, corporation, or association making the application; the nature of the proposed use for which the appropriation is intended; the quantity of water computed in the standard of measurement adopted by the State; the time during which it is to be used each year; the name of the stream or other source of supply from which the water is to be diverted; the place on the stream or other source of supply where the water is to be diverted; the dimensions, grade, shape, and nature of the proposed diverting channel; and such other facts as will fully define the full purpose of the proposed appropriation. If the proposed use is for irrigation, the application must show, in addition to the above required facts, the legal subdivisions of the land proposed to be irrigated, with the total area thereof, and the character of the soil. If the proposed use is for the development of power, the application must show, in addition to the above required facts, the number, size, and kind of waterwheels to be employed; the head under which each wheel is to be operated; the extent of the power to be produced, and the purposes for which and the places where it is to be used; also, the point where the water is to be returned to the natural stream or source. If the proposed use is for mining, the application shall show, in addition to the above required facts, the name of the mine and the mining district in which it is situated, the county wherein

³ 3 Colo. Stat. Ann., Morr. Ed., 1911, Secs. 3181-3187; Rev. Stat., 1908, Secs. 3181-3187.

⁴ NOTE.—Owing to the fact that these forms for applications, and others, are all furnished by the State En-

gineers of the respective States, and that they are subject to constant changes as the law and procedure is being developed, this work will not be encumbered with any forms.

the mine is situated, the nature of the material mined, the particular use to which the water is to be put, and the place where the water is to be returned to the natural stream or other source of supply. The place of the diversion and the place of the return of the water must be designated with reference to the United States land corners or mineral monuments when either the point of diversion or the point of return is situated within a certain distance fixed by the statute of the nearest United States land corner or mineral monument. Such in detail are the essential facts which are generally required to be set up in the application for a permit by the most of the States. Some of the requirements named may not be necessary in certain States while others must be stated. This can be readily ascertained by consulting the last statutes upon the subject.⁵

If the applications are defective in any way, permission is usually allowed to amend them.⁶ Upon the applicant finally completing his appropriation, his rights under the doctrine of relation ⁷ relate back to the date of his filing of the original application.⁸

In Colorado an Act was passed by the legislature providing, among other things, for the filing of such applications. The law was declared void upon the constitutional ground that it contained more than one subject, which was not clearly expressed in the title. It was therefore held that all applications filed in pursuance to the Act were void.⁹

The nature of an application to the State Engineer for permission to appropriate public water, as held by the Supreme Court of Utah,¹⁰ is merely notice of intent to appropriate, and does not establish an appropriation.

In all of the acts providing for the appropriation of water under the so-called laws of State control are to be found schedules of fees which are payable to the officers or to the State for services rendered or for the rights granted.

⁵ For the laws of the various States, see Part XIV.

⁶ See *Pool v. Utah etc. Co.*, 36 Utah 508, 105 Pac. Rep. 289.

⁷ For the doctrine of relation, see Secs. 742-755.

⁸ *Whalon v. North Platte etc. Co.*, 11 Wyo. 313, 71 Pac. Rep. 995.

⁹ *Lamar C. Co. v. Amity etc. Co.*,

26 Colo. 370, 58 Pac. Rep. 600, 77 Am. St. Rep. 261; *Great Plains etc. Co. v. Lamar C. Co.*, 31 Colo. 96, 71 Pac. Rep. 1119; *Mohl v. Lamar C. Co.*, 128 Fed. Rep. 776; *Blake v. Boye*, 38 Colo. 55, 88 Pac. Rep. 470, 8 L. R. A., N. S., 418.

¹⁰ *Sowards v. Meagher*, 34 Utah 212, 108 Pac. Rep. 1112.

§ 1351. **Proceedings to appropriate—Action to be taken upon application—State Engineer must approve or reject.**—Upon the receipt of an application by the State Engineer it is his duty to make an endorsement of its receipt, and to make a record of the same in a book kept in his office for that purpose. Many of the applications are imperfect in not setting forth all of the required facts. If this is so, it must be returned to the applicant for correction, and time is given for the refileing of the same. When the corrections are made it is refiled, and it takes priority as of the date of its original filing. If not corrected as required, no further proceedings shall be had on such application.

Some notice must be given to the public that the application is pending. The laws usually provide that when a valid application is filed with the State Engineer he shall at once, at the expense of the applicant, publish, in some newspaper having a general circulation within the boundaries of the water system from which the appropriation is to be made, a notice setting forth the essential facts of the application.¹

It then devolves upon the State Engineer to examine the facts in the case and to pass upon the application. In the most of the States the power is granted to approve or to reject an application after he has made such an examination. Where the State Engineer finds that there is no unappropriated water in the proposed source of supply, or where the proposed use will conflict with the prior applications or with existing rights, it is made the duty of the engineer to reject such application. In some of the States it is also provided that the engineer may reject the application, when "its granting would be contrary to public policy," as is the case in Wyoming, or "if it is deemed detrimental to the public welfare," as is the case in Nebraska. In some of the States it is also required, as a condition of the approval of the application, that the applicant or his backers have the financial ability to carry out the proposed work, and that the application was made in good faith.

The feasibility of the project is also made a subject of investigation as to whether or not the permit should be granted.²

¹ See statutes of the respective States, Part XIV.

² See for the statutes of the various States upon the subject, Part XIV.

In a New Mexico case, decided in 1910,³ it was held that where the Territorial Engineer was given the authority to deny an application if in his opinion the approval will be contrary to public interests, it does not give him the authority to reject a prior application for a project financed by outside capital and grant a permit to a subsequent application financed by local capital. The Court said: "We do not say this circumstance should have no weight in determining the question of public interest, but whether it should not outweigh the other considerations to which we have referred."

In another case it was said: "The question of feasibility is one of prime importance, of which there should be absolutely no doubt."⁴

In a recent Oregon statute, the State Engineer is given the power to reject all applications for water within the State for use outside of the State if the other State refuses diversions for use in Oregon.⁵

In some States, however, the State Engineer is required to approve all applications which are in proper form, thus relieving him of all responsibility of determining the rights of the adverse parties and leaving that to an adjudication by the courts. In some of the States provisions are made for the protesting of applications by interested parties, and the engineer is given judicial powers to take testimony and decide the controversy according to the evidence.⁶ In some States an application may be contested upon the ground that it is not in the public interest, and that the contestant has a plan for the same project which is of larger scope or which is more in the nature of public interest.⁷

§ 1352. Proceedings to appropriate—Permit and effect of.—After an application has been once approved by the State Engineer, he must make a record of the same in his office, and issue to the applicant what is called a "permit" to make the appropriation ap-

³ Young & Norton v. Hinderlider, 15 N. M. 666, 110 Pac. Rep. 1045.

⁴ Turley v. Furman, — N. M. —, 114 Pac. Rep. 278.

See, also, Cookinham v. Lewis, 58 Ore. 584, 114 Pac. Rep. 88.

⁵ See Oregon Stat., 1911, Chap. 224, p. 204.

⁶ For the duties and powers of State Engineers, see Sec. 1344.

For the adjudication of water rights by State Engineer, see Chap. 80; see, also, Nevada, Chap. 93.

⁷ Cookinham v. Lewis, 58 Ore. 584, 114 Pac. Rep. 88; Young & Norton v. Hinderlider, 15 N. M. 666, 110 Pac. Rep. 1045.

plied for. This permit usually consists of simply the endorsement of approval upon the duplicate application, which is returned to the applicant. The effect of such a permit is simply that of a license or permission upon the part of the State that the applicant may proceed with the construction of his works, the diversion of the water, and the final consummation of the appropriation. It is in no sense an appropriation or evidence of an appropriation, but it is simply the consent of the State given in the manner provided by the statute for the appropriator to proceed with the construction of his works and the other acts necessary under the law to perfect his right. The right given by such a permit may ripen into a completed appropriation, or it may be defeated by the failure of the holder thereof to comply with the requirements of the statute.¹

Until the permit is granted the applicant can do nothing toward the further compliance with the laws. Therefore, an applicant for the appropriation of water for irrigation can not prosecute the work and condemn a right of way for his ditches and canals until he has a permit either from the State Engineer or the governing board, as the case may be.²

These permits are property, and may be sold and assigned by the original applicant to another party, who must proceed with the construction of the works and the other conditions required by the law to the final consummation of the appropriation; otherwise all rights thereunder will be forfeited.³

§ 1353. Proceedings to appropriate—Construction of works.— One of the most essential conditions required of the applicant, or the owner of a permit to appropriate water, under the laws of State

¹ Under the provisions of the Act of March 11, 1903 (Laws, 1903, p. 223), the permit when granted as therein provided for, gives the applicant an inchoate right, which will ripen into a legal and complete appropriation only upon the completion of the works, and the application of the water to a beneficial use. *Speer v. Stephenson*, 16 Idaho 707, 102 Pac. Rep. 365; *So-wards v. Meagher*, 34 Utah 212, 108 Pac. Rep. 1112.

See, also, *Idaho etc. Co. v. Stephenson*, 16 Idaho 418, 101 Pac. Rep. 821; *Ada County Farmers' Irr. Co. v. Farmers' Canal Co.*, 5 Idaho 793, 51 Pac. Rep. 990, 40 L. R. A. 485; *Pool v. Utah etc. Co.*, 36 Utah 508, 105 Pac. Rep. 289.

² *Castle Rock etc. Co. v. Jurisch*, 67 Neb. 377, 93 N. W. Rep. 690.

See, also, *Rasmussen v. Blust*, 83 Neb. 678, 120 N. W. Rep. 184.

³ *Whalon v. North Platte etc. Co.*, 11 Wyo. 313, 71 Pac. Rep. 995.

control, is that the construction of the works necessary to perfect the appropriation, as specified in the application, within a certain time fixed by the statute after the permit is granted, must be commenced. The only exception to this rule is in Colorado, where the proceedings are reversed, and the work must be commenced first and the maps or application must be filed with the State Engineer within sixty days thereafter.¹ The time after the approval of the application or the issuance of the permit within which the work must be commenced in the most of the States is six months, and a common provision found in most of the statutes is that the work of construction must be prosecuted with diligence and that at least one-fifth of the work must be completed within one-half of the time allowed by the statute for the full completion of the same. In Nevada the time for beginning the work is left to the discretion of the State Engineer.² In Wyoming the construction of the works must commence within a time fixed by the State Engineer, not to exceed six months from the approval of the application.³ In Idaho works having a capacity of less than 25 cubic feet per second must be begun within sixty days from the approval of the application, and the holder of a permit for more than 25 cubic feet per second must, within sixty days of the issuance of the permit, file a bond, the amount of which is fixed by the State Engineer, not to exceed \$10,000, and conditioned upon faithfully carrying to completion within the maximum time fixed by the statute the works specified in the permit.⁴

The statutes provide that if the work is not commenced within the time specified, and that if one-fifth of the work is not completed within one-half of the time allowed, all rights under the permit shall be forfeited. Citations are usually issued to the applicant, and proceedings had thereon to show cause why the rights under the permit should not be declared forfeited.

The statutes also provide the period within which the construction of the works must be fully completed. The usual period is five years from the date of the approval of the application or the issuance of the permit. A number of the statutes, however, give the State Engineer the power to fix a shorter time than the maximum

¹ Colo. Stat. Ann., 1911, Morr. Ed., Secs. 3181-3187; Rev. Stat., 1908, Secs. 3181-3187.

² Laws, 1907, p. 30, Sec. 26.

³ Comp. Stat. Wyo. 1910, Sec. 732.

⁴ Stat., 1903, p. 223, Secs. 2, 3, as amended, 1905, p. 357.

limit fixed by the statute. Where this is the case the statute also provides that, upon good cause shown, the State Engineer may extend the time originally fixed by him for the completion of the works to a longer period, but he must keep within the maximum limit as fixed by the statute.

The statutes also provide a maximum limit within which the works must be fully completed. This period is usually five years, although it is usually prescribed that the State Engineer may fix a shorter time.⁵ Where this is the case it is held that where he has fixed a time for completing the works required to perfect the appropriation, and the work is commenced within the statutory time and prosecuted in good faith and with due diligence, the State Engineer may extend the time if not beyond the final limit fixed by the statute, although the application therefor was made after the time first fixed by him had expired.⁶

These laws also provide that proof of the completion of the works must also be made in the manner and within the time when it is prescribed therein. And here the State Engineer is given large discretion in the manner in which the proof shall be submitted. But in some of the States a detailed method is prescribed by the statute, and where this is the case the statutory rules must be followed.⁷

§ 1354. Forfeiture of right and cancellation of permit.—The statutes of all the States adopting the laws of State control provide that in case the applicant does not comply with the conditions of his application or permit that the State Engineer or board may declare a forfeiture of his rights and cancel the permit issued to him. As was said in a late Idaho case:¹ “Under the statute the permit is granted upon application setting forth certain facts. It may be canceled upon petition setting forth certain facts with proof by affidavit, and aided by the examination of the State Engineer. The power and duties of the engineer with reference to hearing the con-

⁵ For the laws of the various States in this respect, see Part XIV.

⁶ *Pool v. Utah County etc. Co.*, 36 Utah 508, 105 Pac. Rep. 289; but it was stated by Mr. Justice Frick, in rendering the opinion, that: “We do not wish to be understood that the

State Engineer may arbitrarily extend the time limits fixed by him at any time and under all circumstances.”

⁷ See laws of various States on subject, Part XIV.

¹ *Speer v. Stephenson*, 16 Idaho 707, 102 Pac. Rep. 365.

test and canceling the permit are pure matters of administration. He is in no way authorized to decide or determine water rights, if any, the permit holder has acquired under the permit, or by virtue of any acts taken in connection with the construction of the works authorized by the permit, or the diversion or appropriation of water in connection therewith."

In some of the States the applicant is cited to appear before the engineer or the board and show cause why his permit should not be canceled for failure to comply with the terms of the same or the law upon the subject. This is the case in Utah under an Act of the legislature of 1911.²

By a recent Act in Idaho³ it was enacted that one who fails to be on time with his works, proofs, etc., "shall be deemed to have abandoned all right under his permit."

In States where the law provides that at least one-fifth of the work must be completed in one-half of the time, it is held that the decision of the State Engineer canceling or refusing to cancel a permit is subject to review by the courts, and that an appeal taken from his decision must be considered as an original action, and where other essential facts exist is subject to removal to the Federal courts.⁴

§ 1355. Proceedings to appropriate—Certificate of appropriation.—When the final proof is made that the works are completed, a certificate of appropriation or a "certificate of completion" is issued by the State Engineer to the owner of the permit. This certificate must set forth the full details of the appropriation as originally applied for in the application for the same.¹ These certificates

² See Laws, 1911, Chap. 3, p. 2, amending Compiled Laws of Utah, 1907, Sec. 1288x14.

³ See Revised Codes of Idaho, 1908, Sec. 3254, as amended by Laws, 1911, Chap. 64.

⁴ *Waha etc. Co. v. Lewiston etc. Co.* (Idaho), 158 Fed. Rep. 137.

See, also, upon the subject of the power of State control, relative to the completion of permits, *Pool v. Utah etc. Co.*, 36 Utah 508, 105 Pac. Rep. 289; *Sowards v. Meagher*, 34 Utah

212, 108 Pac. Rep. 1112; *Vanderwork v. Hewes*, 15 N. M. 439, 110 Pac. Rep. 567; *Trade Dollar etc. Co. v. Fraser*, 148 Fed. Rep. 587, 79 C. C. A. 37; *Lockwood v. Freeman*, 15 Idaho 395, 98 Pac. Rep. 295; *City of Pocatello v. Bass*, 15 Idaho 1, 96 Pac. Rep. 120; *Idaho etc. Co. v. Stephenson*, 16 Idaho 418, 101 Pac. Rep. 821; *Speer v. Stephenson*, 16 Idaho 707, 102 Pac. Rep. 365.

¹ For the application, see Sec. 1350.

are numbered according to the date of the original application, and thus the priority of the appropriation is retained, which, by the doctrine of relation, is as of the date of the filing of the application.² Complete records are also kept of these certificates in the office of the State Engineer, and the owner of the certificate is required to file and have the same recorded in the office of the county recorder where the water is diverted, and usually with one or more other officials, such as the division superintendents or engineers, in order that a record may be had for the distribution of the water.³ The details for the issuance of the certificate and the office where the same must be recorded vary somewhat in the different States.⁴ In some of the States, however, the certificate of appropriation is not issued upon the mere completion of the works, but what is called a "certificate of completion" is issued at this stage, the "certificate of appropriation" being issued only when the water is actually applied to the beneficial purpose. We will discuss this in the next section.⁵

§ 1356. Proceedings to appropriate—Consummation of an appropriation—Effect of the certificate to appropriate.—Under the laws of State control, as is the case with the older method of appropriation, all of the water claimed under the appropriation must be applied to a beneficial use or purpose, economically and without waste.¹ In some of the States the completion of the works is considered the consummation of the appropriation, and the certificate of appropriation is issued forthwith upon the proof of their completion. Under the statutes providing for this mode of procedure the actual use of the water does not enter into the making of the appropriation as one of the essential elements. But the failure to use the water for a beneficial purpose thereafter is either treated as an abandonment of the quantity of the water not used or it is treated as a

² For relation, see Secs. 742-756, 1358.

³ The word "certificate," as used in the Act of 1903 (Laws, 1903, p. 223, Rev. Codes, 1909, Secs. 3253 *et seq.*) relating to the appropriation of public waters, and regulating the issuance of a certificate and license after inspection by the State Engineer, applies to the paper to be issued upon

proof of the completion of the works. Idaho Power etc. Co. v. Stephenson, 16 Idaho 418, 101 Pac. Rep. 821.

⁴ For the laws of the various States upon the subject, see Part XIV.

⁵ See Sec. 1356.

¹ For the application of the water to a beneficial use, see Secs. 725, 877.

For the economical use and suppression of waste, see Secs. 874-916.

forfeiture of the right under some section of the statute, providing that in case of the failure to use the water claimed within a specified time the claimant shall be deemed to have forfeited the right to the use of the quantity not used.² But under this rule it has been ascertained that considerable time, and in some cases a number of years, have elapsed before the water was actually applied to a useful purpose. Therefore, in some of the more recent legislation upon the subject in some of the States, notably in Idaho, North Dakota, South Dakota, Oklahoma, and Utah, it is provided that the final certificate of appropriation shall not be issued when the works are completed, but shall only be issued upon proof of the actual application of the water to the use for which the application is made, which must be before a definite time fixed by the statute. And a failure to make proof of beneficial use on or before the date set therefor shall cause the postponement of the priority of the right from the date fixed theretofore to the date when the proof of beneficial use of the water is made, and applications subsequent in time shall have the benefit of such postponement of priority.³ In other words, under this better rule the appropriation is not finally consummated until the water is actually applied to a beneficial purpose, upon which the final certificate of appropriation is issued.⁴

The legal effect of a certificate of appropriation is to give to the owner thereof, as long as the other conditions of the law are complied with, the right or license from the State to divert the quantity of water named therein, and to use the same for the purpose named.

² For abandonment, see Secs. 1100-1117.

For the forfeiture of rights, see Secs. 1118-1120.

³ Laws, Utah, 1909, p. 89, Sec. 1288x16.

⁴ *Sowards v. Meagher*, 34 Utah 212, 108 Pac. Rep. 1112, where Mr. Chief Justice Straup said: "He may not file his application, construct his works, and then hold the water and wait for something to happen. He can not withhold the water from the proposed beneficial use. He must not only be diligent in constructing the works, and in making the diversion, but he must also be reasonably diligent

and expeditious in making application of the water to the beneficial use for which the appropriation was proposed, else he loses his inceptive right. His appropriation will be measured by the quantity of water actually used for the proposed beneficial purpose."

See, also, *Idaho etc. Co. v. Stephenson*, 16 Idaho 418, 101 Pac. Rep. 821, where the word "license," as used in the Act of March 11, 1903, p. 223, Secs. 8 and 9, applies to the paper to be issued upon proof of the application of the waters to a beneficial use.

The statutes also provide that the certificate of appropriation, issued in accordance with the provisions of the statute, shall be *prima facie* evidence of the appropriator's right to the use of the water in the quantity, for the purpose and during the time mentioned therein, and shall be evidence of such right.

The certificate of appropriation issued and recorded in accordance with the statute makes the final step necessary to be taken in the procedure for the appropriation of water under the laws of State control; and the duties of the State officials before whom these steps must be taken end, as far as the appropriation is concerned, but continue as to the distribution of the water under the terms of the appropriation.

§ 1357. **Appropriation by actual diversion and use as affected by the laws of State control.**—In a previous section, we showed how valid and permanent rights to the use of water might be acquired by parties who did not follow the older rules of the Arid Region Doctrine of appropriation as to notice, construction of works, etc., but that such rights might be acquired where the rights of others were not injured by the actual diversion of the water from the natural source of supply, followed by the application of the water to some beneficial purpose.¹ The question now arises, Can permanent rights to the use of water be acquired in this method in those States which have adopted the laws of State control, as discussed in the previous sections of this chapter? ² In answer to this question, we will say that it depends entirely upon the facts of the particular case in which the right is claimed. The laws of no State prohibit in terms the appropriation by actual diversion and use. Again, there is no intention upon the part of the legislature of any State to defeat the honest attempt to acquire the right to the use of water for beneficial purposes, but, upon the contrary, this is encouraged in every way. The progress of many of the Western States depends largely upon the use of all of the available water for useful purposes, and every possible method for this use should be permitted. Therefore, where, before an application has been filed under the provisions of the statute, there has been an actual diversion and use of the water, we see no reason why the right should not be valid as against the later attempt to appropriate the same water

¹ See Sec. 730.

² See Secs. 1338-1356.

by the statutory method. In some of the States, such as Wyoming, Idaho, and Colorado, an appropriator by this method is fully protected by the constitutions. In Wyoming it is provided that "priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interests."³ In all of the statutes of the various States are to be found statutes to the effect that the appropriation of water must be for some useful or beneficial purpose, and as between appropriators, the one first in time shall be first in right.⁴ Therefore where an appropriation has been consummated by the method of diversion and use of the water, which do not in any way interfere with prior rights to the water, and which was prior in time to any steps taken under the statute of State control to appropriate the same water, we see no reason in the law or upon principle why the right thus acquired should not be considered a valid and permanent one. "These statutes were never intended to destroy the right of appropriation by methods other than those defined by them." In the Federal Court it was held that actual diversion and use is as much notice to later comers as the statutory notice or the application for a permit under the laws of State control.⁵

A very recent case decided by the Supreme Court of Idaho,⁶ and after the above was written by us, decides the question as far as that State is concerned. In the opinion, the Court said: "It has never been the intention, so far as we are advised, of the legislature to cut off the right an appropriator and user of water may acquire

³ For the constitutions of the various States, see Part XIV.

⁴ For the statutes upon the subject, see Part XIV.

⁵ *Morris v. Bean*, 146 Fed. Rep. 432; affirmed in 159 Fed. Rep. 651, 86 C. C. A. 519; affirmed in 221 U. S. 485, 55 L. Ed. 821, 31 Sup. Ct. Rep. 703.

See, also, *Denver etc. Co. v. Dotson*, 20 Colo. 304, 38 Pac. Rep. 322; *Speer v. Stephenson*, 16 Idaho 707, 102 Pac. Rep. 365.

"The State Engineer has no authority to deprive a prior appropriator of water from any streams in this

State, and give it to another person." *Lockwood v. Freeman*, 15 Idaho, 395, 98 Pac. Rep. 295.

In a suit by settlers in Wyoming on a stream which rises in Colorado to restrain the diversion of water from such stream in Colorado, complainants need not aver or prove that they have conformed to the police regulations of the State of Wyoming regulating the distribution of water in that State. *Hoge v. Eaton*, 135 Fed. Rep. 411.

⁶ *Nielson v. Parker*, 19 Idaho 727, 115 Pac. Rep. 488.

by the actual diversion of the water and its application to a beneficial use. This constitutes actual notice to every intending appropriator of the water of such a stream. It is like a man being actually in possession of realty; indeed, a water right is realty in this State.⁷ The legislature, however, has provided for a constructive notice, to those who avail themselves of the statute and with this notice there is given a certain period of time in which to commence the construction of diverting works and a further period of time in which to complete such works, and divert the water and apply it to the beneficial use for which the application was made. This is a protection to the claimant; but if he should actually divert the water and apply it to a beneficial use, before the rights or interests of any other person intervene, he would be entitled to the protection of the law in the use and enjoyment of the right thus acquired. He would then be in actual possession of the property to the extent of the diversion and use, and to that extent would need no protection from a constructive notice which a compliance with the statute affords."

§ 1358. *Relation as applied to laws of State control.*—In a previous chapter we saw that under the doctrine of relation, the rights of an appropriator to the use of water related back to the inception of the same, provided he had complied with all the laws upon the subject, toward consummating his rights.¹

In general, we will say that the same rule is applicable under the laws of State control. The principal effect of a valid application upon an appropriation by this method, as is the case with the older rules of appropriation, is that it holds the priority of the right, provided, of course, that the applicant complies with all of the other requirements of the statute, and the rules and regulations promulgated by the State Engineer and the Governing Board within the time specified. In other words, the application protects the applicant in his inceptive or inchoate rights, while he is completing the construction of his works and until the appropriation is finally consummated by the application of the water to the beneficial use or

⁷ Citing Sec. 3056, Rev. Codes; *Ada County Farmers' Irr. Co. v. Farmers' Canal Co.*, 5 Idaho 793, 51 Pac. Rep. 990, 40 L. R. A. 485; *McGinness v.*

Stanfield, 6 Idaho 872, 55 Pac. Rep. 1020; *Hall v. Blackman*, 8 Idaho 272, 68 Pac. Rep. 19.

¹ See Chap. 40, Secs. 742-756.

purpose for which the application is made.² One holding a permit will, by relation, have the better right over another who commenced work earlier without a permit.³

In all States, under the laws of State control, there is a system of numbering of certificates so as to correspond and show the priority or the date when the application was first filed.⁴

§ 1359. **Officers under State Control have only ministerial, administrative, or judicial powers.**—Although it is held by the Supreme Courts of all the States which have adopted the laws of State control that the State Engineer and the Governing Board have only ministerial, administrative, or executive powers under the law, these powers are judicial in character or at least quasi-judicial. In a recent case, decided in Idaho,¹ in defining the powers granted to the State Engineer, under the statute, the Court said: "By this statute, where a permit has been granted by the State Engineer, permission is also granted to any person holding a permit postdated to present facts showing that the holder of the permit has not complied with the law, and authorizes the State Engineer, if he finds that the law has not been complied with, to cancel such permit. This is purely a ministerial duty connected with the administration of the law as it is imposed upon the State Engineer.² . . . The procedure in this case as heretofore held is not judicial, and is not governed by the laws prescribing judicial procedure. This proceeding is purely administrative." A very exhaustive discussion of this question is to be found in the case of *Farm Investment Co. v. Carpenter*,³ in which the Court upheld the constitutionality of the law and also held that the law conferred on the State Engineer and Board of Control only ministerial or administrative powers, having quasi-judicial functions.⁴

² *Sowards v. Meagher*, 34 Utah 212, 108 Pac. Rep. 1112; *Pool v. Utah etc. Co.*, 36 Utah 508, 105 Pac. Rep. 289; *Speer v. Stephenson*, 16 Idaho 707, 102 Pac. Rep. 365.

³ *Whalon v. North Platte etc. Co.*, 11 Wyo. 313, 71 Pac. Rep. 995.

⁴ For the statutes of the various States, see Part XIV.

¹ *Speer v. Stephenson*, 16 Idaho 707, 102 Pac. Rep. 365.

² Citing *Boise Irr. Co. v. Stewart*, 10 Idaho 38, 77 Pac. Rep. 25, 325; *Ada County etc. Co. v. Farmers' Canal Co.*, 5 Idaho 793, 51 Pac. Rep. 990, 40 L. R. A. 485; *Farm Investment Co. v. Carpenter*, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918.

³ *Supra*.

⁴ *Idaho etc. Co. v. Stephenson*, 16 Idaho 418, 101 Pac. Rep. 821; *Willey*

A recent Colorado case holds that the duties of the water officers are ministerial only, and that they can not settle the rights between owners.⁵

§ 1360. **Effect of decisions of administrative officers—Not binding upon the courts.**—As discussed in the preceding section, the officers under the laws of State control having but ministerial, administrative, or executive powers, it therefore follows that although they are at times given quasi-judicial powers, their decisions are not binding upon the courts.¹ And it may be said in general that their decisions may be attacked directly, collaterally, or by appeal, and when so attacked, the question is tried *de novo* by the courts. This question, however, relates more particularly to the question of the determination of existing rights by boards, and will be discussed in a subsequent chapter of this work.²

§ 1361. **The right of appeal from decisions of officers.**—In all the statutes of State control, it is provided that the right of appeal may be had from the decision of the State Engineer or the decision of the board to the courts.

Under the recent statute of Nevada, no right of appeal is pro-

v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939; Ryan v. Tutty, 13 Wyo. 122, 78 Pac. Rep. 661; Crawford Co. v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Lockwood v. Freeman, 15 Idaho 395, 98 Pac. Rep. 295; City of Pocatello v. Bass, 15 Idaho 1, 96 Pac. Rep. 120; Waha etc. Co. v. Lewiston etc. Co., 158 Fed. Rep. 137; Trade Dollar etc. Co. v. Fraser, 148 Fed. Rep. 587, 79 C. C. A. 37.

⁵ Boulder etc. Co. v. Hoover, 48 Colo. 343, 110 Pac. Rep. 75.

¹ Farm Investment Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918; Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939; Ryan v. Tutty, 13 Wyo. 122, 78 Pac.

Rep. 661; Whalon v. North Platte etc. Co., 11 Wyo. 313, 71 Pac. Rep. 995; Waha etc. Co. v. Lewiston etc. Co., 158 Fed. Rep. 137; Speer v. Stephenson, 16 Idaho 707, 102 Pac. Rep. 365.

But see Crawford Co. v. Hathaway (Hall), 60 Neb. 754, 84 N. W. Rep. 271; *Id.*, 61 Neb. 317, 85 N. W. Rep. 304; *Id.*, 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Rasmussen v. Blust, 85 Neb. 198, 122 N. W. Rep. 862, 133 Am. St. Rep. 650; *Id.*, 83 Neb. 678, 120 N. W. Rep. 184; Cline v. Stock, 71 Neb. 70, 98 N. W. Rep. 454, 102 N. W. Rep. 265; McCook Irr. Co. v. Crews, 70 Neb. 115, 102 N. W. Rep. 249; Farmers' Canal Co. v. Frank, 72 Neb. 136, 100 N. W. Rep. 286.

² See Chap. 80.

vided from the decisions of the State Engineer, but any party feeling aggrieved has one year within which to bring an action in the court to determine his rights.

Any party aggrieved by the action of the State Engineer is then given the right to either appeal from his decision to the governing board, and from its decision to the courts, or he may appeal direct to the courts, according to the terms of the statute. Or, again, he may bring an original action in the court for the determination of the questions involved in the proceedings before the State Engineer, and the court may decide the case regardless of any decision of the State Engineer.¹ The better rule, however, and the one most commonly adopted, is for the parties interested to bring their actions in court. In all jurisdictions, the State Engineer may make a personal investigation of the flow of the stream from which the water is to be taken, the lands to be irrigated, the proposed works, and all other facts in connection with the project, using all of the available data and records obtainable, and especially as to adjudicated water rights upon the same source of supply, and the affidavits of witnesses as to the facts under consideration.

§ 1362. State control officers may be sued in their official capacity.—In all the States where the law of State control has been adopted, a State official, alleged to have violated the duties of his office, may be sued in his official capacity, as may any other public official. An action for an injunction will lie against a Water Commissioner or officer to prohibit him from diverting water from the stream, claimed by another.¹

An action in *mandamus* will lie against the State Engineer in case he refuses to issue a certificate where such issuance should have been

¹ *Speer v. Stephenson*, 16 Idaho 707, 102 Pac. Rep. 365; *Farmers' Irr. Dist. v. Frank*, 72 Neb. 136, 100 N. W. Rep. 268; *Ryan v. Tutty*, 13 Wyo. 122, 78 Pac. Rep. 661; *Waha etc. Co. v. Lewiston etc. Co.*, 158 Fed. Rep. 137; *Trade Dollar etc. Co. v. Fraser*, 146 Fed. Rep. 587, 79 C. C. A. 37; *Lockwood v. Freeman*, 15 Idaho 395, 98 Pac. Rep. 295; *Willey v. Decker*, 11 155—Kin. on Irr.

Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939.

¹ *Squares v. Livesey*, 35 Colo. 302, 85 Pac. Rep. 181; *Boulder etc. Co. v. Hoover*, 48 Colo. 343, 110 Pac. Rep. 75; *McLean v. Farmers' etc. Co.*, 44 Colo. 184, 98 Pac. Rep. 16; *Farmers' etc. Co. v. Maxwell*, 4 Colb. App. 447, 36 Pac. Rep. 556.

See, also, for injunctions, Chap. 81.

made under the law. Such a case arose recently in Idaho,² in which the Court said: "The issuance of the certificate is a ministerial duty, and, in case the State Engineer refuses to issue it after the proper fee has been tendered, he may be compelled by writ of mandate to issue it." But the Court in finally deciding the case denied the application for the writ upon the ground that the plaintiff had not paid the fees provided for by statute.

§ 1363. **Annual State license tax.**—All of the Acts providing for the appropriation and use of waters under the laws of State control also provide for a schedule of fees that must be paid from time to time, beginning with the application for a permit to the use of such waters.

One of the States has awakened to the fact that not only may it charge the fees as per the schedule for the acquisition of a right, but it may also charge an annual fee or annual license tax. The Act of 1909, adopting a water code for Oregon,¹ provided the following schedule for an annual license tax for the use of the water for irrigation: Fifteen cents per acre for from 1 to 100 acres; five cents per acre for from 100 to 1000 acres; one cent per acre for 1000 acres and over. The same Act provided for a schedule for an annual license tax for the use of water for power, but this schedule was amended by the Act of the legislature of 1911,² so that it now reads as follows: Ten cents for each and every theoretical horsepower from 1 to 100, inclusive; five cents from 100 to 1000, and one cent in excess of 1000.

The California Water Power Act of 1911³ also provides that there shall be an annual license tax as follows: For the first 100 horse-power there shall be no charge, and for all above 100 horse-power, ten cents for each horse-power. This tax may be also increased or decreased by the Board of Control as it sees fit.

In a previous section we have also seen that the Federal Government also makes an annual license tax for the use of water and power upon National forests.⁴

² Idaho etc. Co. v. Stephenson, 16 Idaho 418, 101 Pac. Rep. 821.

¹ Laws, 1909, Chap. 216, p. 17.

² Laws of Ore., 1911, Chap. 236, p. 418.

³ See Kerr's Bien. Supp., 1911, p. 1468; Stats. and Amdts., 1911, 813.

⁴ See Sec. 962.

§ 1364. Place of diversion, how changed—Place of use, how changed.—As has been seen in previous sections of this work, where the rights of others in the same stream or other source of supply are not materially injured, a change may be made by any owner of a water right in the point of diversion where the water is taken out.¹ However, it having been ascertained by experience that as the rights in a certain source of supply are more and more taken up as settlement progresses, that where the point of diversion is changed from one place to another, more often than otherwise, the rights of others on the same source are injured. Therefore, the statutes of State control in the various States provide just when such a change may or may not be made.² And these statutes also provide for special proceedings, upon notice to all interested parties, as to just how these changes may be effected. In the most of the States these proceedings are had before the State Engineer upon an application filed with him. Upon receiving such an application the engineer must, at the expense of the applicant, give notice thereof in some newspaper having general circulation within the boundaries of the water system; such notice must give the name of the applicant, the quantity of water involved, the stream or source from which the appropriation has been made, the point on the stream or source where the water is diverted, the point to which it is proposed to change the diversion of the water, the place, purpose, and extent of present use, and the place, purpose, and extent of the proposed use. Parties interested are then given the opportunity to protest against the granting of the application for the change. The engineer, after investigation, must approve or reject the application. The statutes then usually provide for an appeal from the decision of the State Engineer to the courts.³ In Nebraska the application must be filed with and decided by the State Board of Irrigation; and the statute requiring the appropriator to obtain permission of the board before changing the place of diversion has been upheld by the court.⁴

¹ For change in point of diversion, see Secs. 857-859.

² See the laws of the various States on subject, Part XIV.

³ See Laws Utah, 1909, p. 90, Sec. 1288x24.

See, also, for the statutes of the other States upon the subject, Part XIV.

⁴ *Farmers' etc. Co. v. Gothenberg etc. Co.*, 73 Neb. 223, 102 N. W. Rep. 437.

Similar proceedings are also provided for the change of the place of use. But it must be remembered that one who has once acquired a permanent right to the use of water has a property right therein, and he therefore has the right to change the place of use or sell the right to others, who may change the place of use of the water.⁵

In the State of Colorado a special proceeding for making the change in the point of diversion to be brought by a suit in the District Court is provided for.⁶ This statute has been before the Supreme Court of the State in a number of cases, and its validity upheld even in cases where the right to change existed prior to the passage of the Act, upon the ground that it was remedial, and, therefore, the proceedings provided for must be followed in all cases.⁷ In each case, if the change is made, a formal decree is rendered by the Court, and the appropriator has the right thereafter to begin and complete his works for the change.

§ 1365. Statutes for prorating in times of scarcity.—When there is a great danger of losing crops from continued drought in the State of Colorado, there is a statute which provides that the water actually received into and carried by any irrigating ditch, canal, or reservoir, to the consumers therefrom, may be prorated among all of such consumers. During these periods the statute temporarily disregards all priorities of rights as a matter of expediency so that all the consumers shall suffer proportionately from

⁵ That a water right is not an inseparable appurtenance to land, see Secs. 1015, 1016.

⁶ 3 Colo. Stat. Ann., Morr. Ed., 1911, Secs. 3227-3232; Revised Stat. Colo., 1908, Secs. 3227-3232.

⁷ *New Cache La Poudre Irr. Co. v. Water Supply etc. Co.*, 29 Colo. 469, 68 Pac. Rep. 781; *Fluke v. Ford*, 35 Colo. 112, 84 Pac. Rep. 469; *New Cache La Poudre etc. Co. v. Arthur Irr. Co.*, 37 Colo. 530, 87 Pac. Rep. 799; *Ashenfelter v. Carpenter*, 37 Colo. 534, 87 Pac. Rep. 800; *Hallet v. Carpenter*, 37 Colo. 30, 86 Pac. Rep. 317; *Farmers' Independent D. Co. v. Agricultural D. Co.*, 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149; *Ft.*

Lyon C. Co. v. Arkansas Valley etc. Co., 39 Colo. 332, 90 Pac. Rep. 1023; *Wadsworth etc. D. Co. v. Brown*, 39 Colo. 57, 88 Pac. Rep. 1060; *Crippen v. Glasgow*, 38 Colo. 104, 87 Pac. Rep. 1073.

Sess. Laws, 1899, p. 235, Chap. 105, providing for the change of the point of diversion, is purely remedial, and one of its objects is to prevent a multiplicity of suits, and not to allow a change to be made until all persons who might be affected thereby are notified and given an opportunity to be heard. *Lower Latham D. Co. v. Bijou Irr. Co.*, 41 Colo. 212, 93 Pac. Rep. 483.

the deficiency of water, and that at least a partial crop may be raised by all, rather than that those having the prior rights should have a full crop, while those who came later could raise nothing. The authority of the legislature to pass such a law has been upheld by the Supreme Court of the State, where they do not substantially affect constitutional or vested rights.¹ However, it is held that the consolidation of two canals having priorities of different dates, in the absence of any agreement to that effect, does not operate to place the rights of the consumers of the old canals upon an equality, and hence the prorating statute can only be applied to the individuals of the respective groups.² The same rule is also applied to cases of the subsequent enlargement of ditches and canals by later comers; the statute does not entitle them to prorate with those whose rights were secured through the original ditch or canal.³

In the State of Washington the statute also provides that at any time any ditch from which water is or shall be drawn for irrigation, shall not be entitled to the full supply of water, the water actually received into and carried by such ditch shall be divided among all the consumers of water from such ditch according to their *pro rata* share.⁴

In spite of the holdings of the Colorado courts as to the constitutionality of these laws for prorating water in times of scarcity, we have always doubted the correctness of their rulings. The Constitution, Article 16, Section 6, provides: "Priority of appropriation shall give the better right as between those using water for the same purpose." Based as a permanent right to the use of the water is, upon a priority of right, how can the taking away of the water from one who has a prior right at the very time when he needs

¹ Farmers' etc. Co. v. Southworth, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767, where Mr. Justice Helm said: "The prorating statute, which we are asked to declare unconstitutional, does not take away the consumer's right to the water; it simply regulates the use of this right."

See, also, for the statute, Mill's Ann. Stat., 1905, Sec. 2267.

The Act providing for prorating water actually carried by an irrigation ditch, among all the consumers there-

from, in times of scarcity, so that all such consumers shall suffer proportionately, does not interfere with priorities, or invalidate, as between the parties, contracts for prorating. Larimer etc. Co. v. Wyatt, 23 Colo. 480, 48 Pac. Rep. 528.

² Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278.

³ Brown v. Farmers' etc. Co., 26 Colo. 66, 56 Pac. Rep. 183.

⁴ 2 Remington & Ballinger's Ann. Codes, 1910, Sec. 6341.

the water the most, and when it is the most scarce, be other than infringing upon his constitutional and vested rights without either due process of law or just compensation?

§ 1366. **Vested rights can not be impaired by procedure under the laws of State control.**—Where rights to the use of water have vested they can not be impaired by any procedure for the acquisition of water rights under the laws of State control by a party who has fully complied with the terms of the statute and has received a license from the State Engineer or governing board to appropriate the same water. Therefore, it was held in a recent Idaho case that when all the water of a stream has been appropriated and put to a beneficial use, the State Engineer can not legally deprive the prior appropriator of such water by granting another and subsequent applicant a license to use the same to the injury of the first appropriator.¹ And the United States Circuit Court of Appeals, in a case arising in Idaho, after referring to the power of the State Engineer, said: "We assume that that officer was authorized to grant the permits to the defendants if they did not interfere with any vested right of the appellant. If they did so interfere, then, manifestly, to the extent of such interference they were and are invalid and of no effect."²

¹ Lockwood v. Freeman, 15 Idaho 395, 98 Pac. Rep. 295, where the Court said: "The State Engineer has no authority to deprive a prior appropriator of the water from any streams in this State, and give it to any other person. Vested rights can not thus be taken away."

² Trade Dollar etc. Co. v. Fraser, 148 Fed. Rep. 585, 79 C. C. A. 37, and holding that the prior appropriator was entitled to protection by injunction against a later appropriator.

See, also, Waha etc. Co. v. Lewiston etc. Co., 158 Fed. Rep. 137; Morris v. Bean, 146 Fed. Rep. 432; *Id.*, 159 Fed. Rep. 651, 86 C. C. A. 519; affirmed, 221 U. S. 485, 55 L. Ed. 821, 31 Sup. Ct. Rep. 703; Hoge v. Eaton, 135 Fed. Rep. 411, 141 Fed.

Rep. 64, 72 C. C. A. 74; Nielson v. Parker, 19 Idaho 727, 115 Pac. Rep. 488; Youngs v. Regon, 20 Idaho 275, 118 Pac. Rep. 499; McLean v. Farmers' etc. Co., 44 Colo. 184, 98 Pac. Rep. 16; Boulder etc. Co. v. Hoover, 48 Colo. 343, 110 Pac. Rep. 75; Cache La Poudre v. Hawley, 43 Colo. 32, 95 Pac. Rep. 317; Pocatello v. Bass, 15 Idaho 1, 96 Pac. Rep. 120; Idaho etc. Co. v. Stephenson, 16 Idaho 418, 101 Pac. Rep. 821; Speer v. Stephenson, 16 Idaho 707, 102 Pac. Rep. 665; Boise etc. Co. v. Stewart, 10 Idaho 38, 77 Pac. Rep. 25, 325; Farmers' etc. Co. v. Cozad etc. Co., 65 Neb. 3, 90 N. W. Rep. 951; Farmers' Investment Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918; Willey v. Decker, 11

In a very late case decided by the Supreme Court of Idaho,³ it was held that the State Engineer by granting a subsequent permit can not interfere in any manner with the vested rights of former permit holders, and upon this subject the Court said: "In *Nielson v. Parker* ⁴ this Court held that the State Engineer had no right, power, or authority to interfere with vested rights or to grant a permit for the appropriation and diversion of the waters of a stream where the same had already been appropriated. The State Engineer has no power or authority to interfere with vested rights under a permit granted by him for the appropriation of water, and thereafter grant a permit which would interfere with such vested rights. It is clear under the law that the rights granted to Peterson under his permits did not interfere with or absorb any of the rights granted to Gard under his permits. The appellants therefore took no title to the rights acquired by Gard through or by Peterson's permits." ⁵

§ 1367. Criticism of the laws of State control.—The laws of State control are modeled somewhat after the laws of Italy and India governing the subject of waters.¹ They are unique in this that the State does not necessarily wait for controversies to arise between the claimants to water, but of its own motion steps in and ascertains just how much water is available for beneficial uses, who are the claimants to the water and their priorities, and then, knowing these fundamental facts, awards the use of the water to the persons entitled to the same; and if there is any water unappropriated provides in detail just how new rights to its use may be acquired. The State then employs its own agents to distribute the water to the parties entitled to the same.

From a study of these laws it is very apparent that the State Engineer and the governing board hold the most important offices in the State, so far as its agricultural interests are concerned, and by a wise and skillful exercise of the powers entrusted to them can bring about great changes for betterment in the development of the

Wyo. 496, 73 Pac. Rep. 210, 100 Am. Idaho 504, 118 Pac. Rep. 1099;
St. Rep. 939; *Vanderwork v. Hewes*, Youngs v. Regan, 20 Idaho 275, 118
15 N. M. 439, 110 Pac. Rep. 567. Pac. Rep. 499.

³ *Gard v. Thompson*, — Idaho
—, 123 Pac. Rep. 497.

¹ For the laws of Italy, see Sec. 145.
For the laws of India, see Secs.

⁴ 19 Idaho, 727, 115 Pac. Rep. 488. 113-117.

⁵ Citing *King v. Chamberlin*, 20

resources of their respective States. This is true not only as regards the acquisition of new rights since the laws were passed, and the distribution of the water to the respective claimants entitled thereto of all rights, but in some States also the determination or adjudication, in the first instance, of all unadjudicated existing water rights in their respective States. In some of the States the power of the State Engineer in this respect is almost absolute, and even in jurisdictions having governing boards he is made a member thereof and the executive officer of the board. In some of the States he is given also what are in effect judicial powers, and may, in the first instance, adjudicate all conflicting rights and render his decision thereon. In these jurisdictions, as far as the subject of water rights is concerned, there are two departments of the government vested in one individual—the judiciary and executive. He institutes proceedings which are tried before himself, and then he executes his own decrees. The question has often arisen as to whether or not, under our form of government, it is not too great a power to vest in one man or set of men. “In Wyoming charges of favoritism were made against the engineer, and the exercise of this authority has given him a great deal of trouble.”² In other States where the State Engineer is given similar powers there are also complaints.³

² The State Engineer and His Relation to Irrigation, by E. P. Teele, Expert, in Irrigation Institutions, 1906, Bulletin No. 168, U. S. Dept. of Agriculture.

³ See, also, for criticism of the adjudication features of the law of State control, Chap. 80.

CHAPTER 69.

STATE CONTROL OF WATER RATES.

- § 1368. Scope of chapter.
- § 1369. Excessive water rates—And their effect.
- § 1370. The general right to fix water rates comes within the police powers of a State under the common law.
- § 1371. The history of the regulation of water rates—States have full control.
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- § 1380. The nature and effect of decisions by boards fixing rates—Judicial interference.
- § 1381. Right of companies to contract where rates are not fixed by law.
- § 1382. Power of legislature to regulate water rates—Impairment of contracts.
- § 1383. Contracts for discriminatory rates.
- § 1384. Charges of "royalty" or "bonus" not permitted.
- § 1385. Terms of payment.

§ 1368. **Scope of chapter.**—In this chapter we will discuss all phases of the subject of the regulation by a State of the charges which may be made for water rights by parties or corporations where the right is originally acquired for sale or other disposal for the purpose of irrigation and other beneficial uses, with the exception of the right to fix water rates by city ordinance where the water is furnished to a municipality and its inhabitants. This subject we will discuss in another chapter.¹

¹ For control by municipal corporations, see Chap. 71, Secs. 1433-1448. For right to fix water rates by city ordinance, see Sec. 1444.

§ 1369. **Excessive water rates—And their effect.**—From the experience of the past, beginning with the early history of the Arid Region Doctrine of appropriation, it has been ascertained that it was the tendency of many companies and corporations which had acquired water rights for the express purpose of selling or otherwise disposing of such rights for irrigation or for other beneficial purposes, to make excessive charges for the use of such water by the actual consumers. It has therefore been found necessary that the State take the matter up, and in some manner regulate the charges for the use of water which may be made.

The sole object of a company of individuals or a corporation that invests large sums of money in an irrigation project is to make as much money as it can by way of profits for the promoters and stockholders of the same. These companies are by no means eleemosynary concerns, but they go into these enterprises for what they can make out of it. The money is usually furnished by Eastern or foreign capitalists. These companies take up certain projects where there are available water and irrigable land, acquire the right to make the appropriation, construct their works largely upon borrowed money, for which they issue bonds secured by mortgages. They then wait for settlers to come and take up the land under their water system or to purchase the land from the company, should it own the same. Great inducements are held out to the settlers by the means of advertisements and agents as to the peculiar advantages of the particular project. By these means the settlers are prevailed upon to come and settle upon the lands under the project, and which are wholly dependent upon it for the water supply. Oftentimes these settlers are from the East, and know absolutely nothing about the cultivation of land by the means of irrigation, but who have all of these things to learn from experience. After a person has once settled upon these lands, constructed his house and the other necessary improvements, prepared his land for cultivation, including the construction of his ditches, it has been sometimes found that he was absolutely at the mercy of the company. And, although many companies have acted fairly in the matter, others have taken advantage of the absolute necessities of the settlers, and have exacted an unreasonable tribute by the way of annual cost, expenses for the maintenance of the works, and other unreasonable charges. This was true to the extent that the settler oftentimes

found out to his sorrow that, instead of building a home and acquiring property for himself and family, he was working solely for the company which furnished the water for his land, and which, instead of treating him fairly, had reduced him, by means of ever-increasing indebtedness, to the condition of abject slavery. And at times it has become the question whether the settler would give up all that he had acquired and move to some new place or to toil on, ever hoping that some time in the future, by some change in the turn of affairs, he would be enabled to get from under the clutches of the company and to save the property which he had made such great efforts to acquire. It is a serious matter for a settler to give up his home, after having lost his right to file on new land by his filing upon these, and to move to some new locality. Yet many a settler who had settled upon lands which were wholly dependent upon the water furnished by certain companies, has been face to face with this very proposition. "All is not gold that glitters." Neither are all advertisements nor the statements of agents concerning these projects absolutely truthful. The gold that glitters is only that which glitters in the coffers of some of these companies, or in those of their stockholders or promoters. The wise man will carefully investigate all of these matters before he exhausts his homestead or other rights and takes up land wholly dependent for its water upon these companies. It must be distinctly understood that these remarks do not apply to many of the companies in existence at the present time; but they do apply to some. Enterprises for the irrigation of lands present opportunities for large returns upon the capital invested, and this industry has been invaded by wild-cat propositions for that reason, as well as has the mining industry.

§ 1370. The general right to fix water rates comes within the police powers of a State under the common law.—As we have seen in a previous section, the right of a State to regulate the use, distribution, and to control all of the waters flowing within its boundaries comes within the police powers of the State.¹ So, also, the general right of a State to fix the maximum rate for the use of water which may be charged by irrigation or water companies against those who are furnished the water thereby comes under the police powers of the State. The laws of every State of the West permit the

¹ For police powers to regulate, see Secs. 1340, 1341.

acquisition of water rights for the sale and rental of the water.² Although water may be appropriated for this purpose by an individual, the usual method is by means of companies of individuals, or corporations. Where the object of these companies is for the sale or disposal of the water to others who are actual consumers thereof, these companies or corporations are considered in law as quasi-public, or, as sometimes referred to, "public service" companies or corporations.³ This being so, each State has, at common law under its general police powers, the right to fix the maximum charge which may be made "for services rendered, accommodations furnished, and articles sold."⁴ These powers "are nothing more or less than the powers of government inherent in every sovereignty—that is to say, the power of governing men and things."⁵ This power of a State is applied where the property in question is strictly private, under the maxim, *Sic utere tuo ut alienum non laedas*;⁶ therefore, to a much greater extent is it applicable to property which, although owned by private parties, has become clothed with a public interest, and when used in such a manner as to make it of public concern, and affect the community at large. As was said by Mr. Chief Justice Waite,⁷ "When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in the use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by dis-

² For the appropriation of water for sale, see Secs. 703, 1491, 1492.

³ For the legal status of companies organized for the purpose of furnishing water, see Secs. 1493-1498.

That individuals and corporations engaged in the carrying of water for compensation are held to be common carriers or *quasi* common carriers, or *quasi* public companies, see, also, *Wheeler v. Northern Colo. Irr. Co.*, 10 Colo. 582, 17 Pac. Rep. 487; *Salt River Valley C. Co. v. Nelssen*, 10 Ariz. 9, 85 Pac. Rep. 117, 12 L. R. A., N. S., 711; *Gould v. Maricopa Canal Co.*, 8 Ariz. 429, 76 Pac. Rep. 598; *Slosser v. Salt River Val. C. Co.*, 7

Ariz. 376, 65 Pac. Rep. 332; *Merrill v. Southside Irr. Co.*, 112 Cal. 433, 44 Pac. Rep. 720; *Western Irr. Co. v. Chapman*, 8 Kan. App. 778, 59 Pac. Rep. 1098; *Wilterding v. Green*, 4 Idaho 773, 45 Pac. Rep. 134; *Northern Light & Pr. Co. v. Stacher*, 13 Cal. App. 404, 109 Pac. Rep. 896.

⁴ Mr. Chief Justice Waite in *Munn v. People of Illinois*, 94 U. S. 113, 24 L. Ed. 77.

⁵ Mr. Chief Justice Tawney in the *License Cases*, 5 How. 46 U. S. 573, 12 L. Ed. 287.

⁶ See Secs. 1495, 1496.

⁷ *Munn v. People of Illinois*, *supra*.

continuing the use, but so long as he maintains the use he must submit to the control." This is the general power under which a State fixes maximum water rates which may be charged consumers by public service corporations.⁸ But the exercise of the police powers of a State is not confined to the fixing of water rates, and is not the outgrowth of the Arid Region Doctrine of appropriation, but is exercised in the fixing of rates of other articles of sale and of services rendered by these public service corporations. Under these general powers Congress in 1820 conferred upon the City of Washington the power to regulate the right of wharfage at private wharves, the sweeping of chimneys, and to fix the rates of fees therefor, and the weight and quality of bread.⁹ Under these general powers the various States of the Union have enacted laws regulating rates which might be charged by these corporations for the furnish-

⁸ *Wheeler v. Northern Colo. Irr. Co.*, 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603, where the Court held that even under the common law a corporation of this nature "exists largely for the benefit of others, being engaged in the business of transporting for hire, water owned by the public, to the people owning the rights to its use. It is permitted to acquire certain rights as against those subsequently diverting water from the same natural stream. It may exercise the power of eminent domain. Its business is affirmatively sanctioned, and its profits and emoluments are fairly guaranteed. But in consideration of this express recognition, together with the privileges and protection thus given, it is, for the public good, charged with certain duties, and subjected to a reasonable control."

See, also, *Spring Valley W. Co. v. Schottler*, 110 U. S. 347, 28 L. Ed. 173, 4 Sup. Ct. Rep. 48, where the Court held that it was within the power of the State or municipality to regulate the prices at which water

shall be sold by one who enjoys a virtual monopoly of the sale; *County of San Francisco v. Spring Valley W. Co.*, 48 Cal. 493; *Spring Valley W. Co. v. City of San Francisco*, 82 Cal. 286, 22 Pac. Rep. 910, 1046, 6 L. R. A. 756, 16 Am. St. Rep. 116; *San Diego etc. Co. v. Jasper*, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. Rep. 571; affirming *Id.*, 110 Fed. Rep. 703, 89 Fed. Rep. 274; *San Diego etc. Co. v. City of National City*, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. Rep. 804; affirming *Id.*, 74 Fed. Rep. 79; *Salt River Valley C. Co. v. Nelssen*, 10 Ariz. 9, 85 Pac. Rep. 117, 12 L. R. A., N. S., 711; *City of Indianapolis v. Navin*, 151 Ind. 139, 47 N. E. Rep. 525; *Freeport W. Co. v. City of Freeport*, 186 Ill. 179, 57 N. E. Rep. 862, 180 U. S. 587, 45 L. Ed. 679, 21 Sup. Ct. Rep. 493; *Santa Ana W. Co. v. Town of Buena Ventura*, 65 Fed. Rep. 323; *City of Danville v. Danville W. Co.*, 178 Ill. 299, 53 N. E. Rep. 118; *Id.*, 69 Am. St. Rep. 304.

⁹ 3 Stat. L. 587, Sec. 7.

ing of gas,¹⁰ telephone services,¹¹ transportation services by railroads,¹² and what is a reasonable toll to be charged by a turnpike company.¹³

§ 1371. **The history of the regulation of water rates—States have full control.**—The history of the regulation of water rates throughout the Western States is as follows: First, the settlers unaided and alone fought the matter of excessive charges with their respective companies furnishing the water and making such charges, and, as far as the results were concerned, the odds were very much in favor of the companies; second, the courts began to take notice of these excessive rates, which resulted in some jurisdictions in judicial regulation of water rates which might be charged by irrigation companies in the absence of statutory provisions;¹ third, constitutional provisions providing for the regulation of water rates by the legislature, and legislative enactments in States whether there were constitutional provisions or not, either in and of themselves regulating the rates which might be charged consumers by companies, or the granting of the power to some public officer, or board, or to the Court, to make such regulations according to the facts in each particular case.²

As far as the United States is concerned the right is left to each State to regulate the charges for water from reservoirs or other works occupying rights of way over the public lands under the Act of March 3, 1891,³ in the following language: "Provided, that the

¹⁰ *People v. Chicago Gas Trust*, 130 Ill. 268, 22 N. E. Rep. 798; *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 32 L. Ed. 979, 9 Sup. Ct. Rep. 553.

¹¹ *City of St. Louis v. Bell Telephone Co.*, 96 Mo. 623, 10 S. W. Rep. 197; *State v. Citizens' Telephone Co.*, 61 So. Car. 83, 39 S. E. Rep. 254, 85 Am. St. Rep. 870.

¹² *Chicago, Milwaukee & St. Paul R. Co. v. Tompkins*, 176 U. S. 167, 44 L. Ed. 417, 20 Sup. Ct. Rep. 336; *Lake Shore & Mich. So. R. Co. v. Smith*, 173 U. S. 684, 43 L. Ed. 858, 19 Sup. Ct. Rep. 565, where it is held that a State by legislation may pro-

vide for maximum rates of charges for railroad companies, provided they are such as will admit of the carrier earning a compensation just to it and the public; *Smyth v. Ames*, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. Rep. 418.

¹³ *Covington & L. Turnp. Road Co. v. Sanford*, 164 U. S. 578, 41 L. Ed. 560, 17 Sup. Ct. Rep. 198.

See, also, Freund on Police Power, Secs. 372 *et seq.*

¹ See Sec. 1312.

² See Secs. 1373-1375.

³ For the Act of March 3, 1891, see Secs. 937-949.

charges for water coming in whole or part from reservoir sites used or occupied under the provisions of this Act shall always be subject to the control and regulation of the respective States and Territories in which such reservoirs are in whole or part situate."⁴

The necessity for regulation of rates of water, and, in fact, all public service corporations, is becoming greater and greater. As was said by the Supreme Court of the United States:⁵ "Regulation of public service corporations, which perform their duties under conditions of necessary monopoly, will occur with greater and greater frequency as time goes on."

§ 1372. The judicial regulation of rates in the absence of constitutional or statutory provisions.—In the absence of either constitutional or statutory provisions, it is within the power of the courts to inquire whether the rates charged and collected for water furnished consumers are reasonable or unreasonable in actions properly brought where the question of rates is involved.¹ Again, in the absence of such provisions the courts will enjoin the collection

⁴ Act of Feb. 26, 1897, 7 Fed. Stat. Ann., 1905, p. 1098; 2 Comp. Stat. 1901, p. 1556; 29 Stat. L. 599.

⁵ *Knoxville v. Knoxville W. Co.*, 212 U. S. 1, 53 L. Ed. 371, 29 Sup. Ct. Rep. 148.

¹ That the general right to fix rates comes within the police powers of a State at common law, see Sec. 1370.

Whether rates which have been charged for its services by a public corporation are unreasonable is a proper subject for judicial inquiry. *Salt River Valley C. Co. v. Nelssen*, 10 Ariz. 9, 85 Pac. Rep. 117, 12 L. R. A., N. S., 711.

"Where the constitution and statute are absolutely silent as to the amount of the charge for transportation, and the time and manner of its collection, there would be strong legal ground for the position that the demands in these respects must be reasonable. The carrier voluntarily engages in the enterprise. It has in most instances,

from the nature of things, a monopoly of the business along the line of its canal. Its vocation, together with the use of its property, are closely allied to the public interest. Its conduct in connection therewith materially affects the community at large. It is, I think, charged with what the decisions term a 'public duty or trust.' In the absence of legislation on the subject, it would, for these reasons, be held, at common law, to have submitted itself to a reasonable judicial control, invoked and exercised for the common good, in the matter of regulations and charges; and an attempt to use its monopoly for the purpose of coercing compliance with unreasonable, and extortionate demands would lay the foundation for judicial interference." Mr. Justice Helm in *Wheeler v. Northern Colo. Irr. Co.*, 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603.

See, also, *San Diego etc. Co. v. San*

of charges made which are unreasonable and excessive,² or enjoin the company from preventing the water from flowing through the consumer's ditch, where a reasonable rate is tendered,³ or by a writ of mandate compel the company to deliver the water to the consumer upon his tendering a reasonable rate therefor.⁴ But the Court has no power to make a general rule prescribing the rates which may be charged in the future, either as applied to a particular company or in general to companies operating within its jurisdiction. This is a matter for the legislature. By analogy the same rule in this respect applies to the courts as is applied to the Interstate Commerce Commission. Under the Interstate Commerce Act the commission has no power to prescribe the tariff of rates which shall control railroads in the future. As was said by Mr. Justice Brewer, "It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but entirely a different thing to prescribe rates which shall be prescribed in the future—that is a legislative act."⁵ And as held in a later case by the same Court, in a water case directly in point, the Court will not fix the amount of water rates, even on holding that the rates formerly charged are unreasonable, but resort must first be had to the body designated by law to fix the proper rates, which, in California, is the Board of County Supervisors.⁶

Diego, 118 Cal. 556, 50 Pac. Rep. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261.

In an action by an irrigation company for water rents, whether the contract with the consumer was or was not a reasonable one is held to be a question for the jury. *Colorado C. Co. v. McFarland*, 50 Tex. Civ. App. 92, 94 S. W. Rep. 400, 109 S. W. Rep. 435.

² *Wheeler v. Northern Colo. Irr. Co.*, 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603.

³ *Salt River Valley C. Co. v. Nelssen*, 10 Ariz. 9, 85 Pac. Rep. 117, 12 L. R. A., N. S., 711.

⁴ *Wheeler v. Northern Colo. Irr. Co.*, *supra*; *Northern Colo. Irr. Co. v. Poup-rit*, 47 Colo. 490, 108 Pac. Rep. 23;

Slosser v. Salt River Valley C. Co., 7 Ariz. 376, 65 Pac. Rep. 332; *Gould v. Maricopa C. Co.*, 8 Ariz. 429, 76 Pac. Rep. 598; *Salt River Valley C. Co. v. Nelssen*, 10 Ariz. 9, 85 Pac. Rep. 117, 12 L. R. A., N. S., 711.

⁵ *Interstate Com. Commission v. Cincinnati etc. Co.*, 167 U. S. 497, 42 L. Ed. 243, 17 Sup. Ct. Rep. 896; see, also, cases cited.

See, also, *Salt River Valley C. Co. v. Nelssen*, 10 Ariz. 9, 85 Pac. Rep. 117, 12 L. R. A., N. S., 711, where the action was to recover an excessive rate paid, and the Court held that a recovery might be had.

⁶ *Osborne v. San Diego etc. Co.*, 178 U. S. 22, 44 L. Ed. 961, 20 Sup. Ct. Rep. 860; affirming *Id.*, 76 Fed. Rep. 319.

§ 1373. **Constitutional provisions relative to water rates.**—In a number of the Western States the tendency of water companies to make excessive charges for furnishing water to consumers was recognized, and at an early day in the formation of their constitutions provisions were therein inserted to the effect that the respective legislatures shall provide by law in the manner in which water rates shall be established.¹ In none of the constitutions, however, are the definite maximum rates therein fixed; they only provide that the legislature shall determine how they shall be fixed.

The Constitution of the State of Colorado provides that the legislature shall provide by law that the board of county commissioners in their respective counties shall have power, when application is made to them by either party interested, to establish reasonable maximum rates *to be charged for the use of water*, whether furnished by individuals or corporations.²

In the original constitution of California there were no provisions upon this subject, but in the amended constitution adopted in 1879, and which went into effect on January 1, 1880, it was provided to the effect that: "The use of all water now appropriated, or hereafter to be appropriated, for sale, rental, or distribution, is hereby declared to be a public use and subject to the regulation and control of the State in the manner to be prescribed by law."³ And the section further provides that the rates of compensation to be collected where the water was supplied "to any city or county, or city or town, or the inhabitants thereof," shall be fixed annually by the board of supervisors of the county, or by the governing board of the city or town, such rates to continue in force for one year and no longer. This latter provision applies exclusively to cases where the water is supplied to incorporated cities or towns.⁴ And in Section 2 of the same article it is provided that the right to collect rates supplied to such cities or towns is a franchise, and can

¹ For these constitutional provisions, see Part XIV.

² Colo. Const., Art. 16, Sec. 5.

See *Wheeler v. Northern Colo. Irr. Co.*, 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603, construing the phrase, "to be charged for the use of water," as meaning a charge for the carriage of water, and that "the
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ownership of the water should remain in the public, with a perpetual right to its use, free of charge, in the people."

³ Cal. Const., Art. 14, Sec. 1.

⁴ *San Diego etc. Co. v. City of National City*, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. Rep. 804; affirming *Id.*, 74 Fed. Rep. 79; *People v. Stephens*, 62 Cal. 209.

not be exercised except by the authority of and in the manner prescribed by law.⁵ The first part of the section quoted above gives no authority for the fixing of rates where the water is furnished exclusively to stockholders of a corporation and not sold, rented, or distributed to the public generally.⁶ These provisions of the constitution were evidently aimed at water monopolies, and, therefore, they were adopted in the fundamental law of the State as a safeguard also against future legislative action. As was held in an action decided in 1882,⁷ "If the framers of the instrument had intended to leave the entire matter where it previously rested—in the hands of the legislature—they would have said so in appropriate language. But it is perfectly evident that there were some things that they were unwilling to trust to the legislature. It is not with the view of 'liberating the great public uses of water and gas from legislative control and making them independent of the State' that the changes were made, but, on the contrary, it was intended, in certain enumerated respects, to lay a stronger hand upon them than that of the legislature—to wit, the hand of the constitution itself."⁸

⁵ See *People v. Stephens*, 62 Cal. 209; *Fresno Canal Co. v. Park*, 129 Cal. 437, 62 Pac. Rep. 87; *San Joaquin etc. Co. v. Merced County*, 2 Cal. App. 593, 84 Pac. Rep. 285; *Stanislaus W. Co. v. Bachman*, 152 Cal. 716, 93 Pac. Rep. 858, 15 L. R. A., N. S., 359.

⁶ *McFadden v. Board of Supervisors of Los Angeles County*, 74 Cal. 571, 16 Pac. Rep. 397.

⁷ *People v. Stephens*, 62 Cal. 209.

⁸ Const., Art. 14, Sec. 1, providing for the regulation and control by the State of all water "appropriated for sale, rental, or distribution," applies to all water set apart for, or devoted to such purposes, whether taken from public streams, or acquired from other sources. *Merrill v. South Side Irr. Co.*, 112 Cal. 426, 44 Pac. Rep. 720, and where it is said: "The evident purpose of the framers of our constitution was to strike a blow at the monopolies which had grown up out

of the sale, rental, and distribution of water."

For the further construction of the California constitution, see *Spring Valley Water Works v. Schottler*, 110 U. S. 347, 28 L. Ed. 173, 4 Sup. Ct. Rep. 48; *Fresno C. Co. v. Park*, 129 Cal. 437, 62 Pac. Rep. 87, where it is said that where the maximum water rates were not fixed as by law provided, a contract whereby a water company undertook to furnish water was not forbidden by the provisions of Article 14, Section 1, of the constitution, and could be enforced.

See, also, *San Diego Flume Co. v. Souther*, 104 Fed. Rep. 706, 44 C. O. A. 143; *Id.*, 90 Fed. Rep. 164, 32 C. O. A. 548; *Lanning v. Osborne*, 76 Fed. Rep. 319.

See, also, *San Joaquin etc. Co. v. Merced County*, 2 Cal. App. 593, 84 Pac. Rep. 285; *Stanislaus W. Co. v. Bachman*, 152 Cal. 716, 93 Pac. Rep. 858, 15 L. R. A., N. S., 359.

The constitution of the State of Idaho provides that "the right to collect rates or compensation for the use of any water supplied to any county, city or town, or water district, or the inhabitants thereof, is a franchise and can not be exercised except by authority of and in the manner prescribed by law."

"The legislature shall provide by law the manner in which reasonable maximum rates may be established to be charged for the use of water sold, rented, or distributed for any useful or beneficial purpose."⁹ The Court has construed this section to mean that it commands the legislature to provide, by law, the manner in which these rates may be established, and by necessary implication prohibits the legislature from fixing such rates, and that an Act of the legislature attempting to fix an absolute maximum rate which might be charged is unconstitutional and void.¹⁰ This was upon the theory that some canal companies can furnish water for much less than others, and still make a reasonable profit on their investment; but, that a rate which would make a reasonable profit on the investment of one canal would be confiscation for another, and that no State can deprive a person of his property without due process of law.

In some States by constitutional provisions, the power to fix water rates is conferred upon some public service commission. In California by the new constitutional provision adopted by the people of the State, October 10, 1911, it was provided by the amendment to Article 12, Section 23, that every private corporation and every individual or association of individuals owning, operating, managing, or controlling any canal, or pipe line plant for the production, generation, transmission, delivery, or furnishing of heat, light, water, or power was thereby declared to be a public utility subject to such control and regulation by the railroad commission, as may be provided by the legislature, "and the right of the legislature to confer powers upon the railroad commission respecting public utilities is hereby declared to be plenary, and to be unlimited by any provision of this constitution."

The new Arizona constitution, Article 15, Section 1, provides for the creation of a "Corporation Commission," and Sections 2 and 3 of the same article provide as follows: "Section 2. All corporations other than municipal engaged in carrying persons or

⁹ Idaho Const., Art. 15, Secs. 2, 6.

¹⁰ *Wilson v. Perrault*, 6 Idaho 178, 54 Pac. Rep. 617.

property for hire; or in furnishing gas, oil, or electricity for light, fuel, or power; or in furnishing water for irrigation, fire protection, or other public purposes; or in furnishing, for profit, hot or cold air or steam for heating or cooling purposes; or in transmitting messages, or furnishing public telegraph or telephone service, and all corporations other than municipal, operating as common carriers, shall be deemed public service corporations.

"Section 3. The corporation commission shall have full power to, and shall, prescribe just and reasonable classifications to be used, and just and reasonable rates and charges to be made and collected, by public service corporations within the State for service rendered therein," etc.

These provisions of the constitutions are declared by the courts to be merely declaratory of the common law principles discussed in previous sections of this chapter,¹¹ concerning the regulation by a State of the conduct of companies in the business of furnishing water to consumers, in the absence of constitutional or statutory provisions.¹²

§ 1374. Power of the legislature to provide for the regulation of water rates—Constitutional limitations.—The legislature of a State has the power, under the general police powers granted to a sovereignty, to enact statutory laws providing for the regulation of water rates, and to determine how the maximum rate, which may be lawfully charged by those in the business of furnishing water to others, may be fixed; and that, too, regardless of the fact as to whether or not there are provisions in the constitutions of the respective States authorizing the enactment of such laws. These statutory provisions are but the recognition of the common law principle that the persons, or corporations, who undertake to perform a public or quasi-public duty, must do so in a reasonable manner, and must charge only a reasonable amount for the services performed. These Acts are, therefore, held to be constitutional.¹

¹¹ See Secs. 1370-1372.

¹² *Wheeler v. Northern Colo. Irr. Co.*, 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; *People v. Stephens*, 62 Cal. 209; *Price v. Riverside etc. Co.*, 56 Cal. 431, 433; *Fresno etc. Co. v. Park*, 129 Cal. 437, 62 Pac.

Rep. 87; *Munn v. People of Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Chicago & N. W. E. Co. v. People*, 56 Ill. 365, 8 Am. St. Rep. 690; *Vincent v. Chicago & Alton R. Co.*, 49 Ill. 33.

¹ *Munn v. People of Illinois*, 94 U. S. 113, 24 L. Ed. 77.

Therefore, no constitutional provision is necessary for either the legislature, or the courts, to protect the consumer of water against the extortionate charges which may be made by individuals, or companies, who are in the business of furnishing water for use by others.² And, upon the other hand, it requires no constitutional provision for either the legislature, or the courts, to protect the companies or individuals furnishing the water in their right to make such a charge for the water furnished as will give a reasonable return on their investment. Therefore, the legislatures of all these States have provided by law just how water rates may be fixed in order that they may be reasonable and just, both as regards the rights of the parties furnishing the water, and the rights of the parties consuming it.³

The only limitations imposed upon a State legislature in the matter of the regulation of water rates are those imposed by the Constitution of the United States and of the State where the regulation is sought to be made. An Act can not be passed which attempts to fix the rates so low that the individuals or companies can not realize a reasonable profit upon their investment, or which will amount to a confiscation of the property acquired by the ditch company.

See, also, for right to regulate under the common laws, Sec. 1372.

"To regulate or establish rates for which water will be supplied is, in its nature, the execution of one of the powers of the State, and the right of the State so to do should not be regarded as parted with any sooner than the right of taxation should be so regarded." *County of Stanislaus v. San Joaquin etc. Co.*, 192 U. S. 201, 48 L. Ed. 406, 24 Sup. Ct. Rep. 241.

The legislature, in the exercise of its police power, may regulate the rate to be charged by a corporation doing business affected with a public interest. *Northern Light & Pr. Co. v. Stacher*, 13 Cal. App. 404, 109 Pac. Rep. 896; *San Francisco v. Spring Valley W. Co.*, 48 Cal. 493; *Spring Valley Water Works v. San Francisco*, 61 Cal. 3; *Id.*, 52 Cal. 111; *Spring*

Valley Water Works Co. v. San Francisco, 82 Cal. 286, 22 Pac. Rep. 910, 1046, 6 L. R. A. 756, 16 Am. St. Rep. 116; *San Diego W. Co. v. City of San Diego*, 118 Cal. 556, 50 Pac. Rep. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261; *Santa Ana W. Co. v. Town of Buena Ventura*, 65 Fed. Rep. 323; *Boise etc. Co. v. Boise City*, 123 Fed. Rep. 232, 59 C. C. A. 236; *Denver v. Denver Union W. Co.*, 41 Colo. 77, 91 Pac. Rep. 918; *Spring Valley Water Co. v. San Francisco*, 165 Fed. Rep. 676.

² *Wheeler v. Northern Colo. Irr. Co.*, 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603.

³ For the abstract of these Acts, see Sec. 1375.

See, also, for the laws of the various States fixing rates, Part XIV.

Such an Act would be the taking of private property without due process of law, and without just compensation, and contrary to the provisions of the constitutions.⁴ However, as held by the Supreme Court of the United States, judicial interference should never occur with the collection of rates established under legislative sanction, unless the case presents clearly, and beyond all doubt, such a flagrant attack upon the rights of property, under the guise of regulations, as to compel the Court to say that the rates prescribed will necessarily have the effect to deny compensation for private property taken for a private use.⁵

Another limitation imposed by the constitution is that the legisla-

⁴ *Wilson v. Perrault*, 6 Idaho 178, 54 Pac. Rep. 617, where it is said: "The State can not compel canal owners to furnish water to consumers without some reward; neither can it do that which in law amounts to the taking of private property for public use without just compensation or without due process of law."

See, also, *San Diego etc. Co. v. Jasper*, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. Rep. 571; affirming *Id.*, 110 Fed. Rep. 703; see, also, *Id.*, 89 Fed. Rep. 274; *San Diego etc. Co. v. City of National City*, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. Rep. 804; affirming *Id.*, 74 Fed. Rep. 79; *Spring Valley Water Works v. Schottler*, 110 U. S. 347, 28 L. Ed. 173, 4 Sup. Ct. Rep. 48; *County of Stanislaus v. San Joaquin etc. Co.*, 192 U. S. 201, 48 L. Ed. 406, 24 Sup. Ct. Rep. 241; reversing *Id.*, 113 Fed. Rep. 930, where the Court said: "It is not confiscation, nor a taking of property without due process of law, nor a denial of equal protection of the laws, to fix water rates so as to give an income of 6 per cent upon the then value of the property actually used for the purpose of supplying water as provided by law, even though the company had, prior thereto, been allowed

to fix rates that would secure to it 1½ per cent per month income upon the capital invested."

See, also, *Wheeler v. Northern Colo. Irr. Co.*, 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; *Santa Ana W. Co. v. San Buena Ventura*, 65 Fed. Rep. 323; *City of Denver v. Denver Union W. Co.*, 41 Colo. 77, 91 Pac. Rep. 918; *Boise City etc. Co. v. Clark*, 131 Fed. Rep. 415, 65 C. C. A. 399; *Boise City etc. Co. v. Boise City*, 123 Fed. Rep. 232, 59 C. C. A. 236; *City of Detroit v. Detroit Citizens' St. R. Co.*, 184 U. S. 368, 46 L. Ed. 592, and note, 22 Sup. Ct. Rep. 410; *Winchester etc. Rd. Co. v. Croxton*, 98 Ky. 739, 34 S. W. Rep. 518, 33 L. R. A. 177, and note upon the general power of a legislature to fix rates.

⁵ *San Diego etc. Co. v. City of National City*, *supra*.

The Court will not fix the amount of water rates on holding that the rates charged are unreasonable; but, under the California Act of 1885, resort must first be had to the body designated by law to fix the proper rates, which is the board of supervisors. *Osborne v. San Diego etc. Co.*, 178 U. S. 22, 44 L. Ed. 961, 20 Sup. Ct. Rep. 860; affirming *Id.*, 76 Fed. Rep. 319.

ture can not pass an Act which will tend to interfere with the validity of contracts by the company furnishing the water either with the consumers or with the State itself. We will discuss this subject in another section.⁶

§ 1375. Statutes providing how rates shall be fixed.—Pursuant to the powers granted either by the constitution of the State,¹ or under its general police powers at common law,² the legislatures of some of the Western States have provided by law how the rates, which may be charged by individuals, or corporations, for the water furnished consumers, may be fixed.³ In general the power to actually fix the rates is delegated to some board designated by the Statute.⁴

In California it is provided that, whenever a petition of not less than twenty-five inhabitants who are taxpayers of any county of the State shall, in writing, petition the board of supervisors thereof to regulate and control the rates and compensation to be collected by any person, company, association, or corporation, for the sale, rental, or distribution of any appropriated water to any inhabitants of such county, the clerk of such board shall immediately cause such petition, together with the notice of the time and place of hearing, to be published and posted as therein provided. At the hearing of such petition the board shall estimate, as near as may be, the value of all the works, and all other property, actually used in the furnishing of the water of such company; and shall also estimate the annual and reasonable expenses connected therewith. The board must then fix the rates which may be charged by any company for any use, which rates shall not be less than six, nor more than eighteen per cent of the value of the works and other property actually used; such rates shall be equal, reasonable, and just, both to the companies and to the consumers. The said rates, when so fixed, shall be binding and conclusive for not less than one year next after their establishment, and until established anew or abrogated by such board of supervisors. A similar method is then provided for

⁶ See Sec. 1382.

¹ For the provisions in the State constitutions, see Sec. 1373.

For the constitutions of the various States, see Part XIV.

² See Secs. 1370-1372.

³ For these laws, see Part XIV.

⁴ For the powers and duties of these boards, see Sec. 1376.

the changing of any rate theretofore fixed. The water must be furnished at the rates fixed to all persons by such a company, to the extent of the actual supply of its appropriated waters, and the penalty is fixed for excessive charges, by providing that the company shall be liable in an action by any person so aggrieved, to a recovery of the whole rate so collected, together with the actual damages sustained by such person.⁵

In Colorado, by the Acts of 1879 and 1887, it is provided that the board of county commissioners shall, at their January meeting, hear and consider all applications for the fixing of rates, which may be made by any party, or parties, interested in procuring water for irrigation from any company furnishing or selling water, and the board must fix a time when they will hear the testimony of the parties. The board is given full power to subpoena witnesses, and to compel their attendance, and also to require the production of books and papers required for evidence. In fixing the rates it must examine the value of the property of the company furnishing the water, and the cost of maintaining and operating the same, and fix a rate at which the water shall be furnished; which rate shall not be changed oftener than once in two years.⁶

⁵ Act of March 12, 1885, as amended. See Gen. Laws of Cal., Henning, p. 601; Stats. and Amdts., 1885, p. 95; 2 Deering's Code, p. 272.

"It is believed that the foregoing Act fully supersedes Stat., 1880, 16, Chap. 21. *McFadden v. Los Angeles County*, 74 Cal. 571, 573, 16 Pac. Rep. 397; *Crow v. San Joaquin etc. Irr. Co.*, 130 Cal. 309, 313, 62 Pac. Rep. 562, 1058; *Fresno Canal etc. Co. v. Park*, 129 Cal. 437, 446, 62 Pac. Rep. 87; *Hildreth v. Montecito Creek W. Co.*, 139 Cal. 22, 28, 72 Pac. Rep. 395." Note from General Laws of California, Henning, 1905, p. 406.

⁶ 3 Colo. Stat. Ann., Morr. Ed., 1911, Secs. 3262-3275; Revised Stat. of Colo., 1908, Secs. 3262-3275.

This Act was held constitutional in *Golden Canal Co. v. Bright*, 8 Colo. 144, 6 Pac. Rep. 142; *Wheeler v.*

Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487.

It is not necessary that all the consumers using or seeking water from a particular ditch should join in an application to the county commissioners to fix the maximum price for which water will be furnished, nor is it necessary that the applicant or petitioner be a person who has theretofore used water from such canal, ditch, or reservoir, if the company has any surplus water. *South Boulder etc. Co. v. Marfell*, 15 Colo. 302, 25 Pac. Rep. 504.

Where defendant irrigation company was a party to a statutory proceeding before the county commissioners in which the rate for water was fixed, the adjudication of the board can not be collaterally attacked by it in *mandamus*, the decision of the commis-

By the Act of 1889, the State of Idaho adopted practically the Colorado law relative to the procedure for the fixing of water rates.⁷ Prior to the enactment of this law, the District Court was authorized by statute to determine, under all circumstances, what was a reasonable compensation, and reasonable terms, for the use of water, either annually, or for a term of years.⁸ Subsequent to this Act, however, and prior to the last Act mentioned above, the legislature, by the Act of 1897, attempted itself to absolutely fix the rates which might be charged for water. This Act was declared to be unconstitutional upon the ground that the constitution granted the power to the legislature to determine how such rates might be fixed, but not itself to absolutely fix them.⁹

In Kansas, by statute, the power to fix water rates is conferred upon the "Board of Railroad Commissioners."¹⁰ In Nebraska the power is conferred upon the "State Railroad Commission,"¹¹ so, too, in Nevada,¹² and Oregon.¹³ In Washington, by statute, the power to fix rates is conferred upon the "Public Service Commission."¹⁴

§ 1376. Powers and duties of boards to fix rates.—As was seen in the preceding section,¹ the legislatures delegated the authority to fix the maximum rates which might be charged for the water furnished, or services rendered, by a company in furnishing water to consumers, to the board of county commissioners, or county supervisors, or to some public service board. The exercise of this power of the board was called in question, shortly after the passage of the California Act, and it was there held that the board can not fix such rates arbitrarily without any exercise of judgment, or discretion, but that when fixed after a full and fair investigation

sioners being conclusive until judicially overturned on direct attack. *Northern Colo. Irr. Co. v. Poupprit*, 44 Colo. 490, 108 Pac. Rep. 23.

⁷ See Idaho Code, 1901, Secs. 2599 *et seq.*; *Boise City etc. Co. v. Clark*, 131 Fed. Rep. 415, 65 C. C. A. 399; *Jackson v. Indian Cr. etc. Co.*, 16 Idaho 430, 101 Pac. Rep. 814.

⁸ *Wilterding v. Green*, 4 Idaho 773, 45 Pac. Rep. 134.

⁹ *Wilson v. Perrault*, 6 Idaho 178, 54 Pac. Rep. 617.

¹⁰ Gen. Stat. of Kan., 1909, Secs. 4477, 4478; amended by Laws, 1911, Chap. 238, p. 417.

¹¹ Compiled Stat. Neb., 1911, Sec. 6475c.

¹² Laws, 1911, Chap. 162.

¹³ Laws, 1911, Chap. 279, p. 483.

¹⁴ Laws, 1911, p. 538.

¹ See Sec. 1375.

the reasonableness of the water rates can not be reviewed by the courts, unless there was actual fraud in fixing them, or they are so palpably and grossly unreasonable as to amount to the same thing. On this point, however, it is also held that the board of supervisors is not so far a part of the legislative department of the State as to be entirely independent of judicial control in the exercise of its constitutional duty to fix water rates.²

In Idaho the constitution provides that the legislature must provide for local boards to fix water rates. It is held that this does not confer the right of the legislature to fix such rates.³ It is held by the Utah Supreme Court that a city could not authorize a water company to fix its own rates for water,⁴ the Court saying: "The courts have frequently held that, as the fixing and regulating of rates is a governmental function which may not be delegated nor surrendered by an agency of the sovereign without express authority, no contractual rights can be granted or obtained with respect thereto." And it may be considered as the settled law that the courts may take into consideration the value of the plant and determine the reasonableness of the water rates fixed by the board.⁵ But the Court will not fix the amount of water rates on holding that the rates charged are unreasonable, but resort must first be had to the body designated by the law to fix the proper rates, which is the board.⁶

As to the constitutionality of these laws delegating the power to boards to fix water rates, to this extent, they have been uniformly held to be constitutional.⁷

² *Spring Valley Waterworks v. San Francisco*, 82 Cal. 286, 22 Pac. Rep. 910, 1046, 6 L. R. A. 756, 16 Am. St. Rep. 116.

See, also, *San Diego W. Co. v. San Diego*, 118 Cal. 556, 50 Pac. Rep. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261; *San Diego etc. Co. v. National City*, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. Rep. 804; affirming *Id.*, 74 Fed. Rep. 79; *County of Stanislaus v. San Joaquin etc. Co.*, 192 U. S. 201, 48 L. Ed. 406, 24 Sup. Ct. Rep. 241; reversing *Id.*, 90 Fed. Rep. 516; *San Diego etc. Co. v. Jasper*,

189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. Rep. 571; affirming *Id.*, 110 Fed. Rep. 703, 89 Fed. Rep. 274.

³ *Wilson v. Perrault*, 6 Idaho 178, 54 Pac. Rep. 617.

⁴ *Brummitt v. Ogden Waterworks Co.*, 33 Utah 289, 93 Pac. Rep. 828.

⁵ *San Diego etc. Co. v. Jasper*, *supra*.

⁶ *Osborne v. San Diego etc. Co.*, 178 U. S. 22, 44 L. Ed. 961, 20 Sup. Ct. Rep. 860; affirming *Id.*, 76 Fed. Rep. 319.

⁷ See cases cited *supra*.

See, also, *Spring Valley Waterworks*

§ 1377. Proceedings must be had before the board before the courts will interfere.—Where the power to fix rates is conferred upon boards the general rule is that the courts will not interfere upon the complaint of the company furnishing water at too low a rate until it has made its showing before the board, and exhausted its remedies before the same. As was well said in a California case:¹ “It was the very purpose of Section 6 to permit a re-examination, or change, of previously established rates, to give any person, or corporation, against whom such established rates operated, an opportunity to obtain the very relief which plaintiff seeks to obtain in this action; and we think that, as the statute afforded it a remedy and redress by appeal to the board of supervisors at the time when this action was brought, and for many years previously, it should have exhausted this remedy before it was entitled to appeal to a court of equity to annul the order of the board. It is the general rule that a party must exhaust all his legal remedies before he is entitled to redress in a court of equity.”²

§ 1378. Values upon what compensation may be based for a “fair return” to the company.—It is the well-settled law upon the subject that the compensation or fair return to the company furnishing the water is based upon the present valuation of its plant. Therefore, in order to determine the present value of the property, which is made by law the basis of rate which may be fixed, any evidence which tends to prove that value may be considered either by the board, or by the court in reviewing the action of the board. In other words, this valuation of the company’s property is a question of fact to be proven, as are other questions of fact.

The present value of the property of the company actually used in furnishing the water may be proven by the books of the company,¹ the price the plant brought on a foreclosure sale, the value

v. Schottler, 110 U. S. 347, 28 L. Ed. 173, 4 Sup. Ct. Rep. 48; Santa Ana W. Co. v. Town of San Buena Ventura, 65 Fed. Rep. 323; Boise City etc. Co. v. Clark, 131 Fed. Rep. 415, 65 C. C. A. 399.

¹ San Joaquin etc. Co. v. County of Stanislaus, 155 Cal. 21, 99 Pac. Rep. 365.

² See, also, San Diego etc. Co. v. Jasper, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. Rep. 571; San Diego etc. Co. v. National City, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. Rep. 804.

¹ Testimony of expert witnesses as to the value of the property of a company is not admissible, at least in favor of the company, as against the

of the plant as fixed by the sworn statement of the officers of the company for the purpose of taxation, the depreciation of the value of the plant, due to the diminution of the water supply from long continued drought,² and also any other facts which are admissible under the rules of evidence tending to prove the actual present value of the plant.

The amount of taxes paid, also the interest on the bonded, or other indebtedness, "so far as that indebtedness represents money properly expended in or upon its property," the amount of dividends paid by the company, and the annual depreciation of the value of the plant, are held to be proper subjects for consideration by the board or court.³

The franchise of a company to collect water rates is property, and its value as a going concern may be considered in determining the value of the property of the company for rate-fixing purposes, but the burden of proving the value of such franchise rests upon the company; also the market value of the company's outstanding stocks and bonds may be properly considered.⁴ The risk of the business in the particular locality at the current rates in similar enterprises may also be considered.⁵

The amount of depreciation in the future may also be taken into consideration.⁶ The annual expenses of maintenance, taxes, re-

better evidence of its books. *San Diego Water Co. v. City of San Diego*, 118 Cal. 556, 50 Pac. Rep. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261.

² *San Diego etc. Co. v. Jasper*, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. Rep. 571; affirming *Id.*, 110 Fed. Rep. 702.

³ *Contra Costa Water Co. v. City of Oakland*, 165 Fed. Rep. 518.

⁴ *Spring Valley W. Co. v. City of San Francisco*, 165 Fed. Rep. 667.

⁵ *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 52, 53 L. Ed. 382, 29 Sup. Ct. Rep. 192. But where the Court also held that the assessed value of the franchise of a gas company furnishes no criterion by which to ascertain the value of the plant when test-

ing the reasonableness of gas rates as fixed by the statute.

⁶ *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 53 L. Ed. 371, 29 Sup. Ct. Rep. 148, in which it is said: "The company is not bound to see its property gradually waste without making provisions out of its earnings for replacement."

See, also, *Spring Valley W. Co. v. San Francisco*, 165 Fed. Rep. 667; *San Joaquin etc. Co. v. County of Stanislaus*, 163 Fed. Rep. 567; *San Diego etc. Co. v. Jasper*, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. Rep. 571; *San Diego etc. Co. v. National City*, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. Rep. 804; affirming *Id.*, 74 Fed. Rep. 79.

pairs, managing, and operating may be considered.⁷ A deduction for the depreciation of the value of the property from age and use must be made from the estimated cost of reproducing a water works plant when determining the present value of the tangible property for the purpose of testing the reasonableness of the rate fixed for water.⁸

There is a tendency upon the part of promoters and the managers of some of these corporations to inflate by "improper charges," and "by injudicious expenditures" the account for the construction of the works. Therefore, while the cost of the entire project may be considered, and will have more or less weight, according to the circumstances, they are by no means conclusive in investigations for the determination of the amount of rates which may be charged, either by the investigating board or the courts. Therefore, it is held by the Supreme Court of the United States, that the reasonable present value of the property, rather than its original cost, is to be taken as the basis of calculation in determining whether certain rates constitute a fair compensation for the water furnished, so that the owners of the project are not deprived of their property without due process of law.⁹

The question of the actual services rendered to the consumers must also be considered by the board or Court. The question

⁷ *San Diego etc. Co. v. National City, supra*; *San Diego etc. Co. v. Jasper, supra*; *Contra Costa etc. Co. v. City of Oakland*, 159 Cal. 323, 113 Pac. Rep. 668; *Id.*, 165 Fed. Rep. 518; *County of Stanislaus v. San Joaquin*, 192 U. S. 201, 48 L. Ed. 406, 24 Sup. Ct. Rep. 241.

⁸ *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 53 L. Ed. 371, 29 Sup. Ct. Rep. 148.

In ascertaining the value of large irrigation plants for the purpose of determining as to what are reasonable water rates, as fair a rule as can be formulated is to find the cost of reproduction as of the date of the use in question, and deduct therefrom the depreciation that has resulted from age and use. *San Joaquin etc. Co. v.*

Stanislaus County, 163 Fed. Rep. 567.

⁹ *San Diego etc. Co. v. City of National City, supra*; *San Diego etc. Co. v. Jasper, supra*.

"The original cost may have been too great; mistakes of construction, even though honest, may have been made, which necessarily enhanced the cost; more property may have been acquired than necessary or needful for the purpose intended." *County of Stanislaus v. San Joaquin etc. Co.*, 192 U. S. 201, 48 L. Ed. 406, 24 Sup. Ct. Rep. 241; reversing *Id.*, 113 Fed. Rep. 930.

See, also, the same case on reversal, 163 Fed. Rep. 567, where it is held that the distance of each county from the head of the canal, and the consequent loss of water from seepage and

whether or not more property had been acquired by the company furnishing the water than necessary or needful for the purpose intended may be considered.¹⁰ So, also, the question as to whether or not the plant is furnishing water up to its full capacity, which question includes the quantity of land under the plant which may be and which is actually furnished with the water.¹¹

If a company was permitted to charge a small proportion of the lands for which it was constructed to irrigate, with the whole amount which it would be entitled to charge; if it furnished water to all of the lands to its full capacity, carried to an extreme conclusion, for the sake of illustration, the company would be permitted to charge the whole amount for the furnishing one small farm with the water. Therefore, in other words, the value of the services rendered by the company to the consumers must also be considered in any proceeding for the determination of what rates may be charged.¹²

evaporation should be taken into account, and as between the respective counties the higher charge should be authorized by the one having the longest flow.

See, also, *Contra Costa W. Co. v. City of Oakland*, 159 Cal. 323, 113 Pac. Rep. 668; *Spring Valley W. Co. v. San Francisco*, 165 Fed. Rep. 698; *Boise City etc. Co. v. Clark*, 131 Fed. Rep. 415, 65 C. C. A. 399; *Knoxville v. Knoxville W. Co.*, 212 U. S. 1, 53 L. Ed. 371, 29 Sup. Ct. Rep. 148; *San Joaquin etc. Co. v. County of Stanislaus*, 163 Fed. Rep. 567, where it was held that the right of the water company to divert water from the river is undoubtedly of value, but it may not be a value upon which ultimately the plaintiff may be given a right under the law, and is, therefore, property for the purpose of application for a preliminary injunction, but is reserved for future consideration.

In a late California case, it was also held that such a corporation having a

monopoly is not entitled to an allowance for good will in determining the value of the property used in the business on which it is entitled to a return. *Contra Costa W. Co. v. City of Oakland*, 159 Cal. 323, 113 Pac. Rep. 668.

¹⁰ *Stanislaus County v. San Joaquin etc. Co.*, *supra*.

¹¹ "If a plant is built, as probably this was, for a larger area than it finds itself able to supply, or, apart from that, if it does not, as yet, have the customers contemplated, neither justice nor the constitution requires that, say, two-thirds of the contemplated number should pay a full return." *San Diego etc. Co. v. Jasper*, *supra*.

See, also, *Boise City etc. Co. v. Clark*, 131 Fed. Rep. 415, 65 C. C. A. 399.

¹² *Salt River Valley C. Co. v. Nelson*, 10 Ariz. 9, 85 Pac. Rep. 117, 12 L. R. A., N. S., 711.

§ 1379. The determination as to what are reasonable rates.—

The question now resolves itself into the inquiry as to what are reasonable rates for the furnishing of water to consumers by companies organized for that purpose, and how the rates charged, or to be charged in the future, are to be determined as reasonable or unreasonable.

A public corporation does not enjoy its franchise solely for the profit of its promoters or stockholders. While it uses the franchise there rests upon it a duty to render to the public, at a reasonable rate, or charge, the services for which it was created.¹ Therefore, in the determination as to what is a reasonable rate which may be charged for its services by a public service corporation of this nature, an examination must be made not only from the point of view of the corporation, but it must also be made from the standpoint of those who are served by it. A reasonable rate is, therefore, one which is as fair as possible to all whose interests are involved. And the effect of the rate upon the persons to whom services are rendered is as important a matter for consideration as is the effect upon stockholders, or bondholders.² And what a company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it furnishes the water for which the charges are made,³ taking into

¹ *Munn v. People of Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Salt River Valley C. Co. v. Nelssen*, 10 Ariz. 9, 85 Pac. Rep. 117.

² "The public can not properly be subjected to unreasonable rates in order simply that stockholders may earn dividends." *Covington etc. Co. v. Sandford*, 164 U. S. 578, 41 L. Ed. 560, 17 Sup. Ct. Rep. 198; *Smyth v. Ames*, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. Rep. 418; *San Joaquin etc. Co. v. Stanislaus County*, 163 Fed. Rep. 567.

What is a reasonable charge for irrigation within the New Mexico laws of 1897, Chapter 49, regulating the use and distribution of water for irrigation and providing that the charges therefor shall be reasonable, "must depend largely upon the cost

of constructing and operating the irrigation works." *Young & Norton v. Hinderlider*, 15 N. M. 666, 110 Pac. Rep. 104.

See, also, *Cleveland v. Malden etc. Co.*, — Wash. —, 125 Pac. Rep. 769.

³ *San Diego etc. Co. v. Jasper*, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. Rep. 571; affirming *Id.*, 110 Fed. Rep. 702; *San Diego etc. Co. v. City of National City*, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. Rep. 804; affirming *Id.*, 74 Fed. Rep. 79.

See, also, as to what is a fair return or a reasonable rate, *San Joaquin etc. Co. v. County of Stanislaus*, 163 Fed. Rep. 567; *Contra Costa W. Co. v. City of Oakland*, 159 Cal. 323, 113 Pac. Rep. 668; *Stanislaus County v. San Joaquin etc. Co.*, 192 U. S. 201,

consideration also the value of the services rendered to the consumers.⁴

As was said by the Federal Court upon this subject in a well considered case,⁵ the company "has the right to receive from water rates an income which will enable it to pay its actual operating expenses, its taxes, its interest on its bonded or other indebtedness, so far as that indebtedness represents money properly expended in or upon its property, and to pay a reasonable dividend on its stock, so far as the stock represents money actually received, and so invested, and in addition thereto to receive a sum sufficient to cover the annual depreciation of its plant." It was also held in the same case that the fact that interest rates generally had advanced does not give a company the right to charge a higher rate without the valuation of the property being readjusted.

It is held in Arizona,⁶ that "what is a reasonable price is in such a suit a fact to be proven as other facts are proven."

§ 1380. **The nature and effect of decisions by boards fixing rates—Judicial interference.**—The nature of the right of a State to establish reasonable compensation for service rendered by a company or corporation is a legislative function, and that, too, regardless of the fact whether the power is exercised directly by the legislature, or by a subordinate, or administrative body.¹ As was held by the Supreme Court of the United States in a late case:² "It happens that in this particular case it is not an Act of the legislature that is attacked, but an ordinance of a municipality. Nevertheless, the function of rate-making is purely legislative in its character, and this is true, whether it is exercised directly by the

48 L. Ed. 406, 24 Sup. Ct. Rep. 241; *Spring Valley Water Co. v. San Francisco*, 165 Fed. Rep. 667; *Id.*, 164 Fed. Rep. 657; *Spring Valley Waterworks v. San Francisco*, 124 Fed. Rep. 574; *San Joaquin etc. Co. v. County of Stanislaus*, 155 Cal. 21, 99 Pac. Rep. 365; *Niday v. Barker*, 16 Idaho 703, 101 Pac. Rep. 254.

⁴ "In using the expression, 'value of the services rendered,' we must understand that the word 'value' means value to the person to whom the serv-

ice is rendered." *Salt River Valley C. Co. v. Nelszen*, 10 Ariz. 9, 85 Pac. Rep. 117.

⁵ *Contra Costa W. Co. v. City of Oakland*, 165 Fed. Rep. 518.

⁶ *Salt River Valley etc. Co. v. Nelszen*, 10 Ariz. 9, 85 Pac. Rep. 117.

¹ *Contra Costa W. Co. v. City of Oakland*, 159 Cal. 323, 113 Pac. Rep. 668.

² *Knoxville v. Knoxville W. Co.*, 212 U. S. 1, 53 L. Ed. 371, 29 Sup. Ct. Rep. 148.

legislature itself, or by some subordinate or administrative body, to whom the power of fixing rates in detail has been delegated. The completed act derives its authority from the legislature and must be regarded as an exercise of the legislative power. . . . It is a delicate and dangerous function, and ought to be exercised with a keen sense of justice on the part of the regulating body, met by a frank disclosure on the part of the company to be regulated. The courts ought not to bear the whole burden of saving property from confiscation, though they will not be found wanting where the proof is clear. The legislatures and subordinate bodies, to whom the legislative power has been delegated, ought to do their part."³

The effect of a decision fixing water rates by a board duly authorized by law to fix the same is to raise the presumption that the act of the board is valid, as is presumed as to any other legislative Act, until the contrary is clearly shown.⁴ It is, therefore, held that the reasonableness of water rates fixed by a board of supervisors, after full and fair investigation, can not be reviewed by the courts unless there was actual fraud in fixing the rates, or they were so palpably and grossly unreasonable as to amount to the same thing, and to amount to the taking of private property without just compensation, or due process of law.⁵ As was said by

³ See, also, *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 28 L. Ed. 173, 4 Sup. Ct. Rep. 48; *Munn v. Illinois*, 94 U. S. 113, 126, 24 L. Ed. 77; *San Diego W. Co. v. San Diego*, 118 Cal. 556, 50 Pac. Rep. 333, 38 L. R. A. 460, 62 Am. St. Rep. 261; *Contra Costa W. Co. v. City of Oakland*, 159 Cal. 323, 113 Pac. Rep. 668; *Spring Valley W. Co. v. San Francisco*, 82 Cal. 286, 22 Pac. Rep. 910, 1046, 6 L. R. A. 756, 16 Am. St. Rep. 116; *San Diego etc. Co. v. National City*, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. Rep. 804; affirming *Id.*, 74 Fed. Rep. 79; *San Diego etc. Co. v. Jasper*, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. Rep. 571; *Id.*, 110 Fed. Rep. 703.

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⁴ *Munn v. Illinois*, 94 U. S. 113, 126, 24 L. Ed. 77.

⁵ The reasonableness of water rates fixed by the board of supervisors after a full and fair investigation can not be reviewed by the courts unless there is actual fraud in fixing the rates or that they are so palpably and grossly unreasonable as to amount to the same thing. *Spring Valley Waterworks v. San Francisco*, 82 Cal. 286, 22 Pac. Rep. 910, 1046, 6 L. R. A. 756, 16 Am. St. Rep. 116. "To which conclusion we adhere." *San Diego Water Co. v. San Diego*, 118 Cal. 556, 50 Pac. Rep. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261.

See, also, *Spring Valley Waterworks v. Bryant*, 52 Cal. 132; *Spring Valley Waterworks v. San Francisco*, 52 Cal.

the Supreme Court of the United States,⁶ "It should also be remembered that the judiciary ought not to interfere with the collection of rates established under legislative sanction, unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as, under all the circumstances, is just both to the owner and to the public; that is, judicial interference should never occur unless the case presents clearly, beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the Court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use."

But upon the other hand, in cases of actual fraud, or in cases where the rates fixed are confiscatory, a Court of equity will interfere.⁷ As was said by Mr. Justice Moody in rendering the opinion of the Supreme Court of the United States, in a late case:⁸ "The courts, in clear cases, ought not to hesitate to arrest the operation of a confiscatory law, but they ought to refrain from interfering in cases of any other kind."

In an action of this nature the simple question before the Court is whether or not the rate is so low as to deprive the company of a fair compensation or rate upon the present value of its property,⁹ and thus, in effect, to take the property of the company without due process of law, or just compensation. As was said in a late California decision:¹⁰ "The ultimate question in any

111; *Spring Valley Waterworks v. Bartlett*, 63 Cal. 245; *Santa Ana W. Co. v. San Buena Ventura*, 65 Fed. Rep. 323; *Contra Costa W. Co. v. City of Oakland*, 159 Cal. 323, 113 Pac. Rep. 668.

⁶ *San Diego etc. Co. v. National City*, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. Rep. 804.

⁷ Where the effect of a city ordinance fixing rates for water furnished by a corporation supplying the city is to deprive the corporation of a fair return on the valuation of its property, the ordinance is in violation of the State and Federal constitutional guarantees that no one shall be deprived

of his property without just compensation, and the courts will hold the ordinance void, and this is the full extent of the power of the courts in such matter. *Contra Costa Water Co. v. City of Oakland*, 159 Cal. 323, 113 Pac. Rep. 668.

⁸ *Knoxville v. Knoxville W. Co.*, 212 U. S. 1, 53 L. Ed. 371, 29 Sup. Ct. Rep. 148.

⁹ As to the present value of such property, see Sec. 1378.

What is a fair return, see Secs. 1378, 1379.

¹⁰ *Contra Costa W. Co. v. City of Oakland*, 159 Cal. 323, 113 Pac. Rep. 668.

judicial proceeding of this character is whether the rates fixed are confiscatory." This, as we have seen in previous sections, depends upon the question of the actual present value of the property of the company, and the rate allowed by the board. Where the rate fixed by the county commissioners was such that the water company could make no profit, the enforcement of such rate was properly enjoined.¹¹

The burden of proof to prove that certain rates fixed are confiscatory, and, therefore, in violation of the constitutional provisions, is upon the company. And the company must show that such rates are confiscatory beyond any reasonable or fair doubt.¹²

§ 1381. Right of companies to contract where rates are not fixed by law.—In those States which have no statutory provisions for fixing the maximum water rates, and also in those States which have such provisions, but where the rates have not been actually fixed in accordance with the law, the corporation furnishing the water and the consumers receiving it are left free to make such contracts as they may see fit, and such contracts will be sustained by the courts, provided that the rates fixed are reasonable and not extortionate and excessive.¹ The question now arises as to whether

¹¹ Board of Commissioners of Montezuma County v. Montezuma County, 39 Colo. 166, 89 Pac. Rep. 794.

See, also, Covington etc. Co. v. Sanford, 164 U. S. 578, 41 L. Ed. 560, 17 Sup. Ct. Rep. 198; Contra Costa W. Co. v. City of Oakland, 165 Fed. Rep. 518; San Joaquin etc. Co. v. County of Stanislaus, 163 Fed. Rep. 567.

See, also, cases cited *supra*.

¹² Contra Costa Water Co. v. City of Oakland, 159 Cal. 323, 113 Pac. Rep. 668; Wilcox v. Consolidated Gas Co., 212 U. S. 19, 53 L. Ed. 382, 29 Sup. Ct. Rep. 192; Knoxville v. Knoxville W. Co., 212 U. S. 1, 53 L. Ed. 371, 29 Sup. Ct. Rep. 148; Contra Costa Water Co. v. City of Oakland, 165 Fed. Rep. 518; Board of Commissioners of Montezuma County v.

Montezuma County, 39 Colo. 167, 89 Pac. Rep. 794.

¹ For the power of the courts to regulate water rates, see Secs. 1370-1372; Fresno Canal Co. v. Park, 129 Cal. 437, 62 Pac. Rep. 87; Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. Rep. 859, 15 L. R. A., N. S., 359; Osborne v. San Diego etc. Co., 178 U. S. 22, 44 L. Ed. 961, 20 Sup. Ct. Rep. 860; affirming 76 Fed. Rep. 319.

In Idaho such a contract was held valid, where the company, as a ground for the refusal to furnish the water under it, made the defense that the rate had not been fixed in the manner prescribed by the statute. Bothwell v. Consumers' Co., 13 Idaho 568, 92 Pac. Rep. 533, 24 L. R. A., N. S., 425; Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. Rep. 404, 29 L. R. A.,

or not, after such contracts are made and during their life, in States where there are provisions for the regulation of such rates, the board may regulate the water rates as between the contracting parties. The great weight of authority seems to hold to the effect that where a valid contract has been made as to the rates or charges which shall be paid by the consumers to the parties furnishing the water, that the rates so fixed in the contracts can not afterwards be regulated by the board during the life of such contracts. As was said in a recent California case: "Under the present statute the contract rights prevail in all cases, the boards of supervisors being powerless to affect or interfere with them."²

N. S., 213; *Boise etc. Co. v. Turner*, 176 Fed. Rep. 373; *Spring Valley W. Co. v. San Francisco*, 165 Fed. Rep. 667; *San Diego etc. Co. v. Souther*, 104 Fed. Rep. 706, 44 C. C. A. 143; *Fresno Canal Co. v. Rowell*, 80 Cal. 114, 22 Pac. Rep. 53, 13 Am. St. Rep. 112; *Fresno Canal Co. v. Dunbar*, 80 Cal. 530, 34 Pac. Rep. 275; *Fresno Canal Co. v. Hart*, 152 Cal. 450, 92 Pac. Rep. 1010; *Clague v. Tri-State etc. Co.*, 84 Neb. 499, 121 N. W. Rep. 570, 133 Am. St. Rep. 637; *Barstow Irr. Co. v. Cleghon*, 41 Tex. Civ. App. 531, 93 S. W. Rep. 1020; *Sammons v. Kearney etc. Co.*, 77 Neb. 580, 110 N. W. Rep. 308, 8 L. R. A., N. S. 404.

² *Stanislaus W. Co. v. Bachman*, 152 Cal. 716, 93 Pac. Rep. 858, 15 L. R. A., N. S. 359; *Fresno Canal Co. v. Park*, 129 Cal. 437, 62 Pac. Rep. 87.

"Until such rates are fixed in pursuance of law, the corporation furnishing the water, and the consumer receiving it, are left free to make such contracts as they may see fit to make, and their agreement will be sustained by the courts." *San Diego etc. Co. v. Souther*, 90 Fed. Rep. 164, 32 C. C. A. 548; reaffirming same on rehearing, *Id.*, 104 Fed. Rep. 706, 44 C. C. A. 143.

See, also, *San Diego etc. Co. v. Jasper*, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. Rep. 571; affirming *Id.*, 110 Fed. Rep. 703, 89 Fed. Rep. 274; *Souther v. San Diego etc. Co.*, 112 Fed. Rep. 228; *Boise Irr. Co. v. Clark*, 131 Fed. Rep. 415, 65 C. C. A. 399; *Boise etc. Co. v. Turner*, 176 Fed. Rep. 373; *Fresno Canal Co. v. Park*, 129 Cal. 437, 62 Pac. Rep. 87.

Where defendant agreed to pay a "reasonable rent" for water to be furnished him each year for irrigation purposes, there is no such ambiguity as to permit parol testimony that "reasonable rent" meant one-fifth of the crop. *Old River Rice Irr. Co. v. Stubbs*, — Tex. Civ. App. —, 137 S. W. Rep. 154.

See, however, *Jack v. Village of Grangeville*, 9 Idaho 291, 74 Pac. Rep. 969, where it was held that a contract may be made to continue for 30 years, except that rates may be established from time to time as the legislature may by law provide.

In *Jackson v. Indian Cr. etc. Co.*, 16 Idaho 430, 101 Pac. Rep. 814, it was held that, under the statute parties had the right to contract as to water rates, but the Court said: "Whether that rate can afterward be abrogated by the fixing of such rates

However, where the charges of the company are excessive and unreasonable, water companies can not by contract evade their duties to the public. As was said in a recent Texas case: "Irrigation companies authorized to exercise the power of eminent domain are quasi-public corporations, and can not limit their liability to the public by contract."³ And also held by the Supreme Court of the United States, the annual rates as first fixed are not made irrevocable by a contract for the sale of water rights, providing, in addition to the payment of the annual rates, for a fixed sum, to be fixed by the water company.⁴

Where valid contracts for rates have once been fixed and the irrigation or water plant has changed ownership, through a sale or foreclosure of the mortgage, it is held that the new owner has no authority to raise the rates to the detriment of the prior contracting consumers during the term of such contracts. As was said by the Federal Court for Idaho:⁵ "Certainly it may be argued, as it has been, that the enforcement of these contracts is a hardship to the company, as well as to the other water users who may have to pay a higher rate, to make good to the company its losses on them. It is, however, presumed that when these contracts were made the predecessor in interest of this company received some consideration for making them, which is presumed to inure to the benefit of this company. At any rate, it bought with knowledge of them. If it made an improvident contract, it can hardly ask

under the statute by the board of county commissioners, we are not called upon to decide in this case, for the reason that it does not appear that such rates have ever been established by the board of county commissioners or in accordance with such statute." See *Id.*, 18 Idaho 513, 110 Pac. Rep. 251.

³ Colorado etc. Co. v. McFarland, — Tex. Civ. App. —, 94 S. W. Rep. 400; *Id.*, 50 Tex. Civ. App. 92, 109 S. W. Rep. 435; Salt River Valley C. Co. v. Nelsen, 10 Ariz. 9, 85 Pac. Rep. 117.

⁴ Osborne v. San Diego etc. Co., 178

U. S. 22, 44 L. Ed. 961, 20 Sup. Ct. Rep. 860; affirming *Id.*, 76 Fed. Rep. 319.

A contract concerning governmental functions, such as one which affects a city to regulate rates of a water company, must be strictly construed; and such functions can not be held to have been stipulated away by doubtful or ambiguous provisions. Rogers Park W. Co. v. Fergus, 180 U. S. 624, 45 L. Ed. 702, 21 Sup. Ct. Rep. 490; affirming *Id.*, 178 Ill. 571, 53 N. E. Rep. 363.

⁵ Boise etc. Co. v. Turner, 176 Fed. Rep. 373.

the Court to correct that misfortune, which is not alleged to be the result of either fraud or mistake." ⁶

§ 1382. **Power of legislature to regulate water rates—Impairment of contracts.**—As we have seen in other sections, a contract between a water company and the consumers for water rates, reasonable in all of its terms as to the rights of both parties, is binding upon the parties and valid,¹ and, in this connection, we will say that the courts have been called upon many times to decide the constitutionality of certain Acts of legislatures, and ordinances of municipalities, which seemingly tend to impair the obligation of contracts made prior to the enactment of such laws or ordinances. The rule may be stated that, where a contract provides for the unreasonable, exorbitant, and excessive charges for the furnishing of the water or the services performed, it is illegal and invalid as to those charges under any law; and that, too, whether the law, or ordinance, was enacted before, or after, the contract was entered into. And, therefore, such contracts do not come within the prohibition of the Federal Constitution against any State enacting laws impairing the validity of contracts,² but the rates and charges of the company furnishing the water are subject to the regulation by legislative enactment, or by ordinance of a municipality, or by the courts, and that, too, where they were enacted subsequent to the making of the contract.³ As was well said by the Idaho Court

⁶ See, also, *Cline v. Benicia W. Co.*, 100 Cal. 310, 34 Pac. Rep. 714; *Sammons v. Kerney etc. Co.*, 77 Neb. 580, 110 N. W. Rep. 308, 8 L. R. A., N. S., 404; *Leavitt v. Lassen Irr. Co.*, 157 Cal. 82, 106 Pac. Rep. 404, 29 L. R. A., N. S., 213; *Hunt v. Jones*, 149 Cal. 297, 86 Pac. Rep. 868; *Nampa Irr. Dist. v. Gess*, 17 Idaho 552, 106 Pac. Rep. 993; *Stanislaus W. Co. v. Bachman*, 152 Cal. 716, 93 Pac. Rep. 858, 15 L. R. A., N. S., 359; *Knowles v. New Sweden Irr. Dist.*, 16 Idaho 217, 101 Pac. Rep. 81; *Niday v. Barker*, 16 Idaho 703, 101 Pac. Rep. 254; *Idaho Fruit Co. v. Great Western etc. Co.*, 17 Idaho 273, 105 Pac. Rep. 562; *Clague v. Tri-State etc. Co.*, 84

Neb. 499, 121 N. W. Rep. 570, 133 Am. St. Rep. 637; *Almeria etc. Co. v. Tzschuck Canal Co.*, 67 Neb. 290, 93 N. W. Rep. 174.

¹ See Sec. 1381.

For ordinances fixing water rates affecting existing contracts, see Sec. 1446.

² See Fed. Const., Art. 1, Sec. 10.

³ "In our judgment the language of the Act of 1862 did not amount to a contract that the rates for the use of water should never be lowered below the amount provided for in that Act. . . . We think that a mere reduction of rates, while still leaving reasonable, fair, or just compensation for the use of the property, is not pro-

in a case decided in 1912:⁴ "He has no vested right to charge an unreasonable, or an unconscionable rate while exercising a franchise to serve a public use. To deprive a person engaged in such a public service of the power to charge and collect an unreasonable, extortionate, or unconscionable rate, deprives him of no right, natural or acquired, and can not be the impairment of a contract within the purview and meaning of Section 10, Article 1, of the Federal Constitution, nor is it depriving him of property without due process of law, in violation of the Fourteenth Amendment."⁵

hibited, and we are quite clear that, even assuming there was a contract, the legislature nevertheless had the power to so alter and amend the Act of 1862, as provided for the fixing of rates as set forth in the Act of 1885." Mr. Justice Peckham, construing the California Act of 1885 fixing water rates at not less than 6 nor more than 18 per cent upon the value of the property, in *County of Stanislaus v. San Joaquin etc. Co.*, 192 U. S. 201, 48 L. Ed. 406, 24 Sup. Ct. Rep. 241; reversing *Id.*, 113 Fed. Rep. 930; *Id.*, 90 Fed. Rep. 516.

A change in the mode of fixing rates by a subsequent constitutional provision is not an interference with any of the vested rights of the company, or the impairment of its contract within the prohibition of the Federal Constitution. *Spring Valley Waterworks v. San Francisco*, 61 Cal. 3; *Id.*, 52 Cal. 111.

See, also, *Souther v. San Diego etc. Co.*, 112 Fed. Rep. 228; *Id.*, 90 Fed. Rep. 164, 32 C. C. A. 548; *Boise City Artesian etc. Co. v. Boise City*, 123 Fed. Rep. 232, 59 C. C. A. 236; *Boise City etc. Co. v. Clark*, 131 Fed. Rep. 415, 65 C. C. A. 399; *Osborne v. San Diego etc. Co.*, 178 U. S. 22, 44 L. Ed. 961, 20 Sup. Ct. Rep. 860; affirming *Id.*, 76 Fed. Rep. 319; *Brummitt v. Ogden Waterworks Co.*, 33 Utah 289, 93 Pac. Rep. 828.

Where plaintiffs brought mandamus to compel defendant water company to furnish water at rates fixed by the county commissioners, defendants can not set up a contract with the plaintiff for a higher rate in defense of the proceeding, mandamus not being the proper remedy for the determination of contract rights. *Northern Colo. Irr. Co. v. Pouppirt*, 44 Colo. 490, 108 Pac. Rep. 23.

A charter specification of rates which shall be lawful for a turnpike company to charge, subject to certain increase or decrease if necessary to keep the company's dividends within certain limits, does not constitute an irrevocable contract between the State and the corporation, but is merely an indication that such rates are supposed to be reasonable, without precluding the subsequent exercise of the power to change the rates. *Winchester etc. Co. v. Croxton*, 98 Ky. 739, 34 S. W. Rep. 518, 33 L. R. A. 177 and note; *South Boulder etc. Co. v. Marfell*, 15 Colo. 302, 25 Pac. Rep. 504; *McFadden v. Los Angeles County*, 74 Cal. 571, 16 Pac. Rep. 397; *Lanning v. Osborne*, 76 Fed. Rep. 319; *Id.*, 82 Fed. Rep. 575.

⁴ *City of Pocatello v. Murray*, — Idaho —, 120 Pac. Rep. 812.

⁵ See, also, *Tampa Waterworks Co. v. Tampa*, 199 U. S. 241, 50 L. Ed.

However, that a State, in matters of proprietary rights, may, by valid and reasonable contracts, exclude itself from the right to make regulations altering the terms of the same, or authorize municipal corporations to do so, has been too frequently declared to admit of doubt. Therefore, a contract with a water company for a limited period of time, fixing maximum rates to private consumers, in the absence of a showing of a charge of unreasonable rates so gross as to strongly suggest fraud, or corruption, is binding, and, as such, is protected against impairment by the contract clause of the Federal Constitution.⁶

By the Federal Court for Idaho⁷ it was held that private contracts between an Idaho irrigation company and land owners renting water rights at fixed prices, made in good faith prior to the Act of the Idaho legislature of March 7, 1895,⁸ were valid when made, and not affected by such Act, or subsequent legislation, and remain valid and enforceable, and the Court said upon the subject: "The only pretext the Court can adopt to annul these contracts would be that a change of facts and circumstances has rendered

170, 26 Sup. Ct. Rep. 23; *aff'g Id.*, 45 Fla. 600, 34 S. W. Rep. 631.

⁶ A contract authorized by the existing State constitution as then construed by the highest court of the State can not be affected by subsequent change in the decisions of that court, or by the adoption of a new constitution. *City of Los Angeles v. Los Angeles etc. Co.*, 177 U. S. 558, 44 L. Ed. 886, 20 Sup. Ct. Rep. 736; *aff'g Id.*, 88 Fed. Rep. 720; *Walla Walla v. Walla Walla W. Co.*, 172 U. S. 1, 43 L. Ed. 331, 19 Sup. Ct. Rep. 77; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. Ed. 525, 6 Sup. Ct. Rep. 273; *Freeport W. Co. v. Freeport*, 180 U. S. 587, 45 L. Ed. 679, 21 L. Ed. 686, 21 Sup. Ct. Rep. 493; *Vicksburg v. Vicksburg Waterworks Co.*, 206 U. S. 496, 51 L. Ed. 1155, 27 Sup. Ct. Rep. 762; *Detroit v. Detroit Citizens St. R. Co.*, 184 U. S. 368, 46 L. Ed. 592, 22 Sup. Ct. Rep. 410; *City of Denver v. Denver*

Union W. Co., 41 Colo. 77, 91 Pac. Rep. 918; *Danville W. Co. v. Danville*, 180 U. S. 619, 45 L. Ed. 696, 21 Sup. Ct. Rep. 505; *aff'g Id.*, 186 Ill. 326, 57 N. E. Rep. 1129.

The obligation of contracts between a water company and private consumers by which the latter were to pay for the water in accordance with the rates "now or hereafter in force" is not impaired by a municipal ordinance reducing such rates, enacted in the exercise of the power of the municipality to regulate water rates. *Knoxville W. Co. v. Knoxville*, 189 U. S. 434, 47 L. Ed. 887, 148 Sup. Ct. Rep. 29; *aff'g Id.*, 107 Tenn. 647, 64 S. W. Rep. 1075.

See, also, for the right to make contracts for water rates, where they have not been fixed under the statute, Sec. 1381.

⁷ *Boise etc. Co. v. Turner*, 176 Fed. Rep. 373.

⁸ *Laws of Idaho*, 1895, p. 174.

unconscionable what was once fair and reasonable. I would not feel justified in so doing."⁹

§ 1383. **Contracts for discriminatory rates.**—Under the laws of State control, a water company organized for the conveying, selling, or renting water to consumers, has no right to make discriminatory rates to its customers. But the rates which may be charged are fixed, as provided by law, and the water must be furnished to all consumers, in the order of their respective priorities, at the same charge, as long as the company has water left for disposal. In case of an additional charge, severe penalties are prescribed by the statutes, even to the extent of a forfeiture of the company's franchise and water works.¹ As to the charging of a less rate than that fixed, in accordance with law, to certain favored consumers, the supplying of any portion of the land under the system at anything less than the regularly established rate adds to the burden of the other land, which is thereby called upon to make good the "just compensation" for the use of the property.² Therefore, it was held by the Court of Appeals that, under the law of Idaho, a company has no right to make a distinction between the consumers which it furnishes with water, while supplying some with water at a low rate under a private agreement, and at the same time attack the validity of the maximum rates fixed by the county commissioners upon the ground that the rates so fixed will not give a reasonable return on the value of the property of the company, and therefore amounts to the taking of property without just compensation.³

Again, in States where there are no statutory laws for the fixing of maximum rates, upon principle, the rates charged should be

⁹ See, also, *City of Pocatello v. Murray*, 173 Fed. Rep. 382; *Leavitt v. Lassen Irr. Co.*, 157 Cal. 82, 106 Pac. Rep. 404; *Stanislaus W. Co. v. Bachman*, 152 Cal. 516, 93 Pac. Rep. 858, 15 L. R. A., N. S., 359.

¹ Cal. Stat. 1901, p. 331.

² *Boise City Irr. Co. v. Clark*, 131 Fed. Rep. 415, 65 C. C. A. 399.

³ *Boise City Irr. Co. v. Clark*, 131 Fed. Rep. 415, 65 C. C. A. 399, the Court saying: "Where any distinc-

tion made between consumers of the waters in question is authorized to be made, we are unable to understand."

See, also, *Nampa etc. Co. v. Gess*, 17 Idaho 552, 106 Pac. Rep. 993; *Boise City etc. Co. v. Turner*, 176 Fed. Rep. 373.

Again, if upon this basis the rates charged both classes of consumers did actually yield just compensation, it is proof that the rates fixed by the commissioners were too high.

uniform to all consumers, and the company should not be permitted to charge favored customers with a less rate than the maximum water rates charged to other consumers. That the water of a State is a public utility can not be questioned. That these corporations, organized for the express purpose of utilizing this public utility, and furnishing the water to actual consumers, are in law quasi-public in their nature is also unquestioned.⁴ A public utility is so subject to the public use that it should have neither the power, nor the temptation, to create any difference in rates charged the consumers, whereby one could, in the field of competition, possibly obtain any advantage over another. The public owe a duty to the public utility, or to the corporation making the same available, not to pass such legislation by way of regulation which will be confiscatory. The public utility, or the quasi-public corporation, owes a duty to each and every constituent of the public, that no one shall derive, from the franchise it enjoys, an opportunity to take advantage of another. The same rule is applied to public carriers, or to companies furnishing gas, or electricity, or anything which is supplied by a public utility. So the rule should be applied to an irrigation company, where all users of water should be placed upon an absolute equality.⁵ This was, in effect, the ruling of the California Court in a recent case, where it said: "All are equally entitled to share in the use of the water who pay, or offer to pay, the legal rate, and to abide by the reasonable rules of the company." ⁶

⁴ See Secs. 1493, 1494.

See, also, *McCrary v. Beaudry*, 67 Cal. 120, 121 Pac. Rep. 264; *San Diego etc. Co. v. National City*, 74 Fed. Rep. 79; *aff'd* 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. Rep. 571; *Lanning v. Osborne*, 76 Fed. Rep. 319; *Price v. Riverside etc. Co.*, 67 Cal. 120, 7 Pac. Rep. 264; *Hildreth v. Montecito Cr. W. Co.*, 139 Cal. 22, 72 Pac. Rep. 395; *McFadden v. County of Los Angeles*, 74 Cal. 571, 16 Pac. Rep. 397.

See, also, *Cleveland v. Malden etc. Co.*, — Wash. —, 125 Pac. Rep. 769.

⁵ See *Slosser v. Salt River Canal Co.*,

7 Ariz. 376, 65 Pac. Rep. 332; *Gould v. Maricopa C. Co.*, 8 Ariz. 429, 76 Pac. Rep. 598; *Salt River Valley Co. v. Nelssen*, 10 Ariz. 9, 85 Pac. Rep. 117.

But see *State ex rel. Ferguson v. Birmingham W. Co.*, 164 Ala. 586, 51 So. Rep. 354, where the Court said: "But we do not see our way clear to a holding that whenever a water company makes a concession to a consumer it thereby fixes a new schedule of rates for all its consumers."

⁶ *Leavitt v. Lassen Irr. Co.*, 157 Cal. 82, 106 Pac. Rep. 404, where it was held that a water company having

§ 1384. Charges of "royalty" or "bonus" not permitted.—In those States where the laws provide for the regulation of water rates which may be charged consumers, there are also found provisions that, where the rates have been fixed, in accordance with the provisions of the statutes, no additional charge must be made for the furnishing of the water than the maximum rates so fixed. Severe penalties are prescribed for the violation of these provisions.¹ In the State of Colorado the "Anti-Royalty Act" of 1887,² makes it unlawful for any person owning, or controlling, any ditch, canal, or reservoir, to demand, accept, or receive, any royalty, bonus, or premium, as a prerequisite or condition precedent to the right or privilege of applying or bargaining for, or procuring water. The statute also provides that any violation of these provisions is punishable by fine and imprisonment, and that the corporate rights and privileges of any corporation violating the provisions of the Act may be forfeited upon *quo warranto* proceedings.³

In California it was also held that, as a condition precedent to the furnishing of water to consumers, a company could not make an additional charge as a bonus, even if a consumer had signed and agreed to a regulation of the company, "that no land will be supplied with water unless all dues and claims for previous supply on that land shall have been paid." The Court held that it was the duty of the company to furnish a consumer with water upon the tender of the established rate, and the regulation of the conditions on the consumer's right was void, and for the refusal of the company to furnish the water an action for damages would lie.⁴

water appropriated under the Constitution of 1879 for sale, rental, or distribution, the use of which is thereby declared to be a public use, can not confer any preferential right on one consumer over another to the use of any part of its water.

¹ See for the statutes, Part XIV.

² 3 Colo. Stat. Ann. Morr. Edition, 1911, Secs. 3271-3275; Revised Stat. of Colo. 1908, Secs. 3271-3275.

³ In the case of *Wheeler v. Northern Colo. Irr. Co.*, 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603, where, by contract, the company had required

the consumer to "buy in advance the right to receive and use the water," and to pay therefor the sum of \$10.00 per acre, and also that he pay annually, in the way of carriage rate, not less than \$1.50 or more than \$4.00 per acre, "as may be established from year to year" by the company, it was held that the contract was in violation of the Anti-Royalty Act.

See, also, *Northern Colo. Irr. Co. v. Richards*, 22 Colo. 450, 45 Pac. Rep. 423.

⁴ *Crow v. San Joaquin etc. Co.*, 130 Cal. 309, 62 Pac. Rep. 562, 1058.

Upon principle, we will add that there should be but one charge made by a company for furnishing water for use by consumers, and this charge should include all fees for furnishing the water, annual maintenance, and repairs. This charge should be reasonable, both as regards the rights of the company and those of the consumer. The system of making separate charges for different items of service should be abolished by statute. It has been too often used as a subterfuge for a charge of higher rates.

§ 1385. **Terms of payment.**—Where water rates have been once fixed, either by law or contract, the company furnishing the water may lawfully require the consumer to either pay the rates in advance, or may require security for such payment, as a condition precedent to the furnishing of the water,¹ but if any canal or ditch company fails to require such payment or security therefor, and does furnish the consumers with the water, and the consumer fails to pay for the same, the remedy is by a suit at law to enforce such payment, and the company can not, by rule, or regulation, refuse to furnish such consumer with water until such arrearages are paid. In cases of this nature it is held that the right of the company to declare a forfeiture is waived.²

See, also, *San Diego etc. Co. v. National City*, 74 Fed. Rep. 79; *aff'd* 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. Rep. 804; *Lanning v. Osborne*, 76 Fed. Rep. 319; *Boise City Irr. Co. v. Clark*, 131 Fed. Rep. 415, 65 C. C. A. 399; *Osborne v. San Diego etc. Co.*, 178 U. S. 22, 44 L. Ed. 961, 20 Sup. Ct. Rep. 860; *aff'g Id.*, 76 Fed. Rep. 319.

¹ *Shelby v. Farmers' etc. Co.*, 10 Idaho 723, 80 Pac. Rep. 222.

² *Kimball v. Northern Colo. Irr. Co.*, 42 Colo. 412, 94 Pac. Rep. 333; *Shelby*

v. Farmers' etc. Co., 10 Idaho 723, 80 Pac. Rep. 222; *Crow v. San Joaquin etc. Co.*, 130 Cal. 309, 62 Pac. Rep. 562, 1058; *South Boulder etc. Co. v. Marfell*, 15 Colo. 302, 25 Pac. Rep. 504; *Cooper v. Shannon*, 36 Colo. 98, 85 Pac. Rep. 175; *Lassen Irr. Co. v. Long*, 157 Cal. 94, 106 Pac. Rep. 409; *Leavitt v. Lassen Irr. Co.*, 157 Cal. 82, 106 Pac. Rep. 404, 29 L. R. A., N. S., 213.

For the duty to furnish water, see Secs. 1498-1502.

CHAPTER 70.

STATE IRRIGATION DISTRICT LAWS.

- § 1386. Scope of chapter.
- § 1387. The purpose and object of district laws.
- § 1388. The general results of district laws.
- § 1389. Some beneficial features of district laws.
- § 1390. History of district laws—States adopting—California.
- § 1391. History of district laws—Colorado.
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- § 1401. History of district laws—Utah.
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- § 1404. Irrigation districts—Definition and corporate nature.
- § 1405. Constitutionality of irrigation district Acts.
- § 1406. Constitutionality of Acts—Points upon which held constitutional.
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- § 1408. Organization of district can not be collaterally attacked.
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- § 1410. Proceedings under the laws—The petition for organization.
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- § 1415. District may sue and be sued.
- § 1416. Proceedings—Power of board—The acquisition of property.
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- § 1421. Proceedings for confirmation—Effect of judgment.
- § 1422. Proceedings—General annual assessments.
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- § 1424. Proceedings—Construction of works.
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- § 1426. Proceedings—Construction of works across the property of others.
- § 1427. Proceedings—Compensation of officers—Board not to be interested in contracts.
- § 1428. Proceedings—Limit of indebtedness.
- § 1429. Proceedings—Governing the use of water.
- § 1430. Proceedings—Change of boundaries—Inclusion of lands.
- § 1431. Proceedings—Change of boundaries—Exclusion of lands.
- § 1432. Proceedings—Dissolution of districts.

§ 1386. **Scope of chapter.**—This chapter will contain a full description of the subject of State irrigation district laws, the organization of the irrigation district under the authority of these laws, and their powers and duties. These districts must be distinguished from irrigation or water districts, as described in some of the statutes of the laws of State control, and meaning simply water divisions.¹

§ 1387. **The purpose and object of district laws.**—Primarily, it is designed by the laws providing for the organization of irrigation districts, to place both the management and the ownership of rights to the use of water in the hands of those most interested in its intelligent and economical use; and, secondly, to provide a method for acquiring the financial means for constructing systems of works necessary for the appropriation and use of water of considerable or great magnitude, and which are beyond the ability of the individual owner of lands to be irrigated, as well as beyond the ability of the average corporation. Incidentally, it may also be said, that the purpose was to get from under the necessity of private corporations, which are organized for the purpose of profit, and do not always work in harmony with the consumers of water, the land owners within such districts being enabled to obtain water at first cost, and through the means of their own district organization.¹ It must be remembered that, at the time the "Wright

¹ For the laws of State control, see Chap. 68, Secs. 1337-1367.

¹ "The whole object of the legislation authorizing the organization of irrigation districts is to enable the owners of lands susceptible of irrigation from a common source and by the same system of works, to form a dis-

trict composed of such lands, which district when formed is a public corporation for the sole purpose of obtaining and distributing such water as may be necessary for the irrigation thereof, thus enabling each one to have for his land in the district the benefit of a common system of irrigation, and

Law" was passed by the California legislature in 1887, which law was the pioneer law upon the subject, and upon which the laws of all the other States are modeled,² that the time had long since passed, when a single farmer, or one with the aid of his neighbors, in the thickly settled communities of that State, could make an individual appropriation, and by a simple dam and ditch, divert water from a natural stream and conduct it to his farm. The country had become thickly settled; and, correspondingly, the demand for water became greater and greater. The use of the waters of the surface streams had practically reached its maximum limit from the systems then in vogue; and, without the development of an additional supply, or the conservation of the waters of the flood periods, the amount of lands which might be irrigated and reclaimed had also reached the limit. To construct great works for the conservation of this water required a great amount of capital, which even the private corporations at this period were loth to furnish. And, if private corporations undertook to furnish the capital, and construct the works necessary, it was with the sole idea of making a profit upon the investment, all of which had to be paid by the consumer. So the idea originated with the framers of the bill to place the ownership, management, and control of the water with the consumers themselves; and, at the same time, to enable any irrigation district organized under the provisions of the Act, as a public corporation, to borrow money to construct these works, to issue bonds for the security of the amounts borrowed, and, by a system of taxation upon all of the lands within the district, raise the money for the annual expenses of the district, and for the payment of the bonds and their accrued interest. Therefore, the purpose of the Act, as well set forth in the title of the original "Wright Law," as introduced by Mr. Wright himself, in the California legislature, was: "An Act to provide for

bringing about the reclamation of the land of the district from aridity to a condition of suitability for cultivation. It was recognized that without such a common system the individual land owners might be unable to obtain water for the irrigation of their lands, and that a work which would be for the public benefit and general welfare,

viz., the reclamation from aridity of large portions of the lands of the State, might never be accomplished if left to individual enterprise." *Jenison v. Redfield*, 149 Cal. 500, 87 Pac. Rep. 62.

² See, however, the early law of Utah, Sec. 1401.

the organization and government of irrigation districts, and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes." ³

§ 1388. The general results of district laws.—Taking into consideration that twenty-five years have elapsed since the passage of the original "Wright Law," and shortly after its passage in California similar laws were passed by the legislatures of other States, the net results of the operation of these laws have not been wholly to the good. The beneficial results of the operations of private corporations throughout these States, including where they were made in connection with the Carey Act,¹ have far exceeded those under the irrigation district Acts.² Although, in some of the districts where there was an ample water supply for the irrigable lands therein, and where every effort was made to preserve the district organizations, the results have been pre-eminently successful. This statement is true of the Turlock irrigation district, which has an area of 176,210 acres, and is the largest district in the State of California, and the Modesto irrigation district, having an area of 82,000 acres, both districts being organized in 1887, the same year that the "Wright Law" was enacted.

The reason that better results have not been obtained under the irrigation district laws is not so much the fault of the laws themselves as it is on account of the obstructions which have been placed in the way of their operation. In the first place, there were about fifteen years of litigation before the law could be considered settled in all its phases. It was nearly ten years after the law was enacted, in California, before its constitutionality was finally settled by the Supreme Court of the United States.³ In fact, the early history of the operation of the law in California is a record of liti-

³ Act of March 7, 1887, Cal. Stat. 1887, page 29; 5 Deering's Code, pp. 235-294.

¹ For the Carey Act. see Secs. 1312-1336.

² According to the 13th census for 1910, the area under actual irrigation in 1909 under irrigation districts was 533,142 acres. Under the Carey Act, the area is given as 288,553 acres; un-

der co-operative enterprises, 4,646,039 acres; under commercial enterprises, 1,444,806 acres; under individual and partnership enterprises, 6,258,401 acres.

³ Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; rev'g *Id.*, 68 Fed. Rep. 948; Tregea v. Modesto Irr. Dist., 88 Cal. 334, 26 Pac. Rep. 237, 164 U. S. 179, 41 L. Ed. 395, 17 Sup. Ct. Rep. 52.

gation and financial loss. This litigation, which was the retarding influence upon the irrigation development under the law, was originated within, and not from without, the districts. The litigants, upon the one hand, were the districts seeking to enforce their powers under the law, or the holders of district obligations seeking to enforce their claims; and upon the other hand were the protesting land owners, especially those owning large tracts of uncultivated land or town lots within the districts. This was due to the provision of the law that the owners of all the land within the districts must pay an annual tax for their maintenance, and, whether such owners used the water or not, they are compelled, under the law, to pay their annual assessment.

And, in the meantime, during this period of litigation, many of the districts which had organized under the law in California, had disincorporated under the later Act of 1893.⁴ The consumers of the water furnished through the district organizations got tired waiting for a final and decisive ruling as to the validity of their water rights, and so took advantage of the disincorporation Act to disorganize the districts and obtain their water through some other medium. Again, during this period of what seemed almost interminable litigation the bondholders of these districts, which had borrowed money to acquire the rights to the water and to construct the necessary works, became frightened and refused, not only to purchase the bonds of these district, but also took steps to collect the amounts that had been advanced in their purchase. And, therefore, there was a period of time when irrigation bonds were a drug upon the market. This was especially true shortly after the decision of Judge Ross of the United States Circuit Court, in the Fallbrook case, holding that the Wright Act was unconstitutional upon a number of grounds, and before his decision was reversed by the Supreme Court of the United States.⁵ Not being able to raise money upon their bonds, of course, the operations under these district organizations ceased.

Again, another retarding influence upon the operations of the law may be attributed to a defect of the original Act itself. The original Act did not sufficiently provide for the safeguards, after-

⁴ See Cal. Stat. 1893, p. 520.

⁵ Fallbrook v. Bradley, *supra*.

For disincorporation Acts, see, also,
Sec. 1432.

158—Kin. on Irr.

ward provided by some of the States,⁶ for the examination and approval of projects by some competent State official, where districts were taking steps for organization. Every State adopting an irrigation district law should have a competent State administration to determine the feasibility of all district projects attempted to be organized. Some of the laws have this provision, notably Idaho and Wyoming.⁷

After the law in California was first enacted there was a great rush in the organization of these districts, and, unfortunately, the wild-cat operators got in their work. Districts were organized where the project was not feasible, in some cases where there was not an available supply of water for the irrigation of the lands included therein; other districts were organized without there being sufficient irrigable land. Under the statute, bonds were issued by these districts and sold, and the money realized therefrom expended in various ways. The first few interest installments were probably paid. Then matters ran along until the interest became delinquent, and, when the bondholders attempted to assert their rights, they found that they had very little security for their money. All this had the influence, for the time being, of placing irrigation district securities upon the black list, thus hindering and retarding the growth of legitimate enterprises of this nature.⁸

Since the decision by the Supreme Court of the United States, holding that irrigation district law based upon the "Wright Law" of California, was constitutional, there has been a revival in the

⁶ See Sec. 1411.

⁷ For the organization of irrigation districts, see Secs. 1410-1414.

⁸ See the case of *Cullen v. Glendora W. Co.*, 113 Cal. 503, 39 Pac. Rep. 769, 45 Pac. Rep. 822, 1047, where no estimate of the amount of the money necessary to be raised for the construction of the works was made as required by law, and in an appeal from a judgment confirming the bonds, the lower court was reversed, the Court saying: "It must be conceded, I think, that the provisions of both the Wright Act and the confirmation Act generally facilitate the organization of irrigation

districts and the issuance and confirmation of bonds, and thus afford some excuse, if not justification, for the practical construction which seems to have been given them by the promoters of the Glendora district, and, perhaps, by other irrigation districts, to the effect that the principal object of those Acts is the issuance and confirmation of a liberal supply of bonds, and that a sufficient supply of water for irrigation is chiefly incidental."

See, also, *Ahern v. Board of Directors of Highline Irr. Dist.*, 39 Colo. 409, 89 Pac. Rep. 963.

interest taken in these laws, and the operations thereunder. Quite a number of the States have passed laws similar to that of California upon the subject.⁹ These States have all profited by the success and failures in California, and especially by the litigation which has arisen and been decided relative to these districts in that State. Something has been said about the failure of the district law in Utah, and its subsequent repeal, as indicating that the law was a failure in that State.¹⁰ The fact of the matter is, that, as early as 1865, the legislature of the then Territory of Utah passed an Act providing for the organization of irrigation districts, which had some of the features of the Act afterwards passed in 1887 by the legislature of California, and known as the "Wright Law." The Utah Act was afterward repealed by reason of the fact that the law was crude, and, therefore, ineffectual.¹¹ It is for this reason that nothing was accomplished under it. But that no point can be made by reason of the fact of the repeal of this law, as indicating that Utah does not favor irrigation district laws, is the fact that the legislature of that State, in 1909, enacted a complete irrigation district law, and largely followed the provisions of the California Act.¹²

Our conclusions upon this subject as to why greater results have not been shown under the irrigation district laws, therefore are, that it is not so much the fault of the laws themselves, as it is of the obstructions placed against the operations under those laws. The laws themselves are constitutional and sound in principle, eminently practical, and where actually put to use, are of the most beneficial of irrigation laws, for the reason that they provide the machinery for the construction and operation of irrigation systems by the men who use them, and that, too, at practically first cost. With the legal questions settled as to their validity, we may look for better general results in the future.

§ 1389. **Some beneficial features of district laws.**—There are many beneficial features of the operations under the irrigation

⁹ See Secs. 1391-1403.

¹⁰ "The Act was repealed, having accomplished no results." Wiel, *Water Rights in the Western States*, p. 652. See, also, p. 653.

Bulletin 124, U. S. Dept. of Agriculture, p. 31.

¹¹ For the Utah law of 1865, see *Comp. Laws of Utah*, 1876, p. 219.

¹² See *Utah Laws*, 1909, Chap. 74, p. 144.

- ✓ district laws, some of which we will mention here. In the first place, it is a decided advantage to have all of the rights in waters from a common source of supply, under one management and control, and that by one public corporation, whose officers are
- ✓ elected by the votes of the electors residing within the district. These officers are then directly responsible for their official acts to the people of the district, and any errors committed can usually be
- ✓ rectified at the polls. This increases the civic responsibility of the citizens of the district, and causes great interest to be taken in the management of the affairs of the district. By a very close analogy the public school districts are similar in many respects to the irrigation districts. The people of this country take great interest in the election of the officers of their respective school districts, in order that their children may be properly educated, and that the affairs of the district may be properly attended to. So, the citizens of these irrigation districts take great interest in the election of officers, for the reason that whatever tends toward the careful and prudent management of the district, tends toward the welfare of the whole community within the district.¹

1 Upon this subject we will quote from Mr. L. L. Dennett, attorney for the Modesto Irrigation District of California, writing in regard to the success of that district. "Another effect of the law has been to increase the feeling of civic responsibility. Ordinarily the functions of government are so far apart from individual activity that the average man misses the connection between his own political activity and the wise administration of public affairs. Here he comes into contact every day, in a matter vitally concerning his livelihood, with the necessity for a wise administration of the affairs of the district, and, it becoming necessary for him to consult frequently with other assessment payers in the district and with the officials thereof relative to the management of its affairs, he recognizes that he is an essential and effective part of the machinery

of the district government. Intensive farming under any irrigation system makes for greater intelligence, but when there is added the necessity, which here exists, for aggressive participation in public affairs, a condition arises where all that is best in civic activity in large centers of population goes hand in hand with the cleaner and purer outdoor life, and it does not require any great degree of imagination to foresee the time when these communities will show the highest type of Anglo-Saxon civilization, combining the maximum degree of self government with the greatest freedom from domination of political demagogues. The law is the natural outgrowth of Anglo-Saxon institutions, and bids fair to be their most successful product." The Great West, Sacramento, Cal., Vol. 8, No. 9, pp. 20, 21.

Again, as all the property within a school district is taxed for the support of the district, whether the owner has any children attending school or not, so, also, in some jurisdictions, all of the lands within an irrigation district are assessed for its support, and that, too, whether the water furnished by the district is used upon the land or not. The land owner may then use the water, and it is free, the same as the tuition in the district schools is free for his children, should he have any. The tendency of this feature of the law is to cause every man to cultivate his land as far as possible, for the reason that he has to pay for the water in any event. And where a man pays for a thing, he is most apt to use it, so as to get its benefits. If he has more land than he can himself cultivate and care for, as was the case in many instances, when these districts were first organized, the tendency is that he will sell a portion of his holdings, or lease them to men who will cultivate them. This system, therefore, materially increases the rapidity with which land is brought under intensive cultivation. It does not pay to hold large tracts of unimproved land under this system. It is a fundamental principle, beginning to be recognized in this country, that no man should be permitted to own more land than he will cultivate and improve. This was recognized in the National Reclamation Act, and the more recent laws upon the subject by Congress. The irrigation district laws are a practical recognition of that principle; and, rather than pay annually the assessment upon unimproved and uncultivated land, the owner is bound, sooner or later, to dispose of portions of it to those who will. Thus additional homes are provided for.

Again, the increased value of the lands within the district must be considered. Lands, which before the organization of the district, would hardly sell for from \$20.00 to \$25.00 per acre, after the organization of the district found a ready sale at from \$100.00 to \$150.00 per acre. From that time to the present it has steadily increased in value. So, instead of it being a hardship upon the poor man, who had only one thousand acres within one of these districts, to be compelled to sell a portion of his holdings because he could not afford to pay the annual assessment on the uncultivated part, it has proven an actual benefit to him, for the reason that he could sell at advanced prices. So, also, instead of depriving owners of their land, or causing any laws, as claimed when the constitu-

tionality of the law was called into question by the large land owners, the law made many of them actually wealthy, both by raising the price, and creating a market for the land. Town lots in the town within a district are also assessed for the support of the district. This, however, is more than compensated for by the increase in actual value of the lots, caused by the growth of the towns and the general prosperity of the community.

The last, and by no means least, subject which we will touch upon, is the actual cost of these propositions to the actual consumers of the water, or the irrigators themselves. A portion of the cost and expense being borne by others, which is more than compensated for as set forth above, the cost to the actual consumer is thereby lessened. Again, there is no profit to any one under this system, and the works are constructed and maintained at actual cost, plus the interest on the outstanding bonds, should there be any. Some districts have no bonded indebtedness. But where there is, a sinking fund is provided for, with which to pay off the bonded indebtedness, after which the property of the district will then belong to the land owners thereof, free and clear of all incumbrances, and the only expense will be for the maintenance and management of the works and district affairs. In contradistinction to this, had the project been undertaken by a private corporation, in addition to all the costs and expenses incurred by the irrigation district, the company would expect and usually receive a large continuing profit upon the investment.

We have discussed this phase of the law from the premises that the affairs of the district were wisely and economically managed, and that all the physical conditions of the district were favorable to the project. Where the conditions of the district are all favorable, and the affairs of the district are wisely, economically, and carefully administered, in thickly settled communities, we consider the irrigation district laws, based upon those of the State of California, in theory, the acme of perfection of irrigation laws in this country.

§ 1390. **History of district laws—States adopting—California.**
—To the legislature of the then Territory of Utah, by the Act approved January 20, 1865, belongs the credit of enacting the first

irrigation district law.¹ The next law to be enacted upon the subject was the now famous irrigation district law of California, familiarly known as the "Wright Law," enacted in 1887.² Mr. Wright, the author of the bill, was the Assemblyman from Stanislaus County, California, the county where, also, the most successful Modesto irrigation district was afterward organized. He was sent to the legislature for the express purpose of having such a law enacted. The original Wright Law was amended by the legislature at every session thereof, after the same was enacted, until the session of the legislature in 1897.³ The Act of 1889,⁴ relating to the confirmation of these organizations, and commonly designated as the "Confirmation Act," although entirely an Act supplemental to the original Wright Act, in law, forms no part of the original Act. It was an Act creating a special proceeding for the determination of the validity of the acts authorized by the statute to be performed.⁵ In 1897 the original Act, and its amendments, were repealed, and a new and complete similar Act, sometimes called the "Bridgford Act," or the "Wright-Bridgford Act," substituted in its place.⁶ The Act of 1897 has also been amended in some minor details,⁷ and, with these amendments, constitute the law upon the subject in California.⁸

¹ For the history of these laws in Utah, see Sec. 1401.

For cause of the repeal of early Utah law, see Sec. 1401.

The last law to be enacted upon this subject was enacted by the special session of the legislature of Arizona in 1912, and after the adoption of the constitution of that State. The Act largely follows the California law.

² For the original Wright Law, see Stats. Cal., 1887, p. 29.

See, also, Vol. 5, Deering's Code, pp. 285-294.

³ The original Wright Act was amended as follows: Stats. and Amdts. Cal., 1889, pp. 15, 18, 21, 212; *Id.*, 1891, pp. 142, 147, 244; *Id.*, 1893, pp. 175, 276, 516, 520; *Id.*, 1895, p. 127.

⁴ Stats. and. Amdts. Cal. 1889, p. 212.

⁵ *In re* Central Irr. Dist., 117 Cal. 382, 49 Pac. Rep. 345.

⁶ Stats. and Amdts. Cal. 1897, p. 254; see, also, Gen. Laws, Cal., 1899, pp. 436-548.

See, also, Western Union Tel. Co. v. Modesto Irr. Dist., 149 Cal. 662, 87 Pac. Rep. 190, 9 Ann. Cas. 1190.

⁷ See Stats. and Amdts. Cal., 1909, pp. 12, 46, 139, 415, 429, 461, 569, 998, 1062, 1075.

⁸ For complete statutes upon the subject, see Gen. Laws., Cal., 1905, pp. 559-601. And for the recent amendments see Stats. 1909, cited *supra*. See, also, Kerr's Biennial Supp., 1906-1909, pp. 1647-1655. See, also, Kerr's Biennial Supp., 1911, pp. 1124-1133.

For the complete abstract of the California irrigation district law, see Part XIV, under California.

Prior to the time that the original Wright Law was enacted, relating to irrigation districts, the legislature of California had passed a somewhat similar law relating to the reclamation of swamp lands. This law had been repeatedly held constitutional by the Supreme Court of the State, and afterward by the Supreme Court of the United States.⁹ And afterwards, when the constitutionality of the Wright Law was attacked, this decision was one of the principal cases relied upon by those who contended that the law was constitutional.¹⁰ The California irrigation district law has been held constitutional many times by the Supreme Court of the State, and also by the Supreme Court of the United States.¹¹

Since the irrigation district law of California was enacted, it has been largely copied by the great majority of the other Western States, including the State of Wyoming, where it was originally contended that the law of State control was the only proper law for the regulation and control of waters.¹² We will make a short statement of the history of the laws of these States in their alphabetical order.

§ 1391. History of district laws—Colorado.—In Colorado "An Act to provide for the organization and government of irrigation districts" was first enacted in 1901.¹ The Act was afterward amended in 1903.² The law was again amended in 1907 and 1909.³

The constitutionality of the law has been upheld by the Supreme Court of the State.⁴

⁹ Hager v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. Ed. 569, 4 Sup. Ct. Rep. 663; *Id.*, 66 Cal. 54, 4 Pac. Rep. 945.

¹⁰ For the constitutionality of irrigation district laws, see Secs. 1405-1407.

¹¹ See, also, Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; *rev'g Id.*, 68 Fed. Rep. 948, which held that the Act was unconstitutional.

¹² For the laws of State control, see Chap. 69, Secs. 1368-1385.

¹ Laws Colo. 1901, p. 198, Chap. 87.

² Laws Colo. 1903, p. 267; see, also,

Mill's Ann. Stat., 1905, Secs. 2309a *et seq.*

³ Laws Colo. 1907, p. 448.

For the complete statutes upon the subject, see Mill's Ann. Stat., 1905, Secs. 2309a-2309i2, as amended, Laws Colo. 1907, pp. 488-491, and Laws 1909, pp. 422-425, pp. 426-428, pp. 429-431.

For an abstract of the present law, see Part XIV, under Colorado.

See, also, 3 Colo. Stats. Ann., Morr. Ed., 1911, Secs. 3440-3494; Rev. Stats. Colo., 1908, Secs. 3440-3494.

⁴ Anderson v. Grand Valley Irr. Dist., 35 Colo. 525, 85 Pac. Rep. 313; Ahern v. Board of Directors of High-

§ 1392. **History of district laws—Idaho.**—The law upon the subject of irrigation districts was first enacted in the State of Idaho in 1895.¹ This Act was superseded by the Act of 1897,² which later Act was amended and re-enacted as amended by the Act of 1899;³ the law was again repealed by the Act of 1903, and again re-enacted,⁴ and the later law was amended in 1907.⁵ The law was again amended in 1911.⁶

The Idaho law has also been repeatedly held by the Supreme Court of the State to be constitutional.⁷ In general, the law follows that of California, and the Court in construing it follows the decisions of the Supreme Court of that State.

§ 1393. **History of district laws—Kansas.**—The legislature of the State of Kansas first provided for an irrigation district law in 1891.¹ The board of county commissioners were authorized to form into convenient districts such tracts of contiguous territory as might be conveniently irrigated from any given source of water supply. The general features of the law follow the law of California, as amended at that date. In 1901, the law was amended in several minor respects; so, too, in 1905.²

§ 1394. **History of district laws—Montana.**—The first irrigation district law in the State of Montana was enacted in 1907. This law is based largely upon the provisions of the California law as amended, but in some instances changed to conform to local conditions.¹ The law was repealed in 1909, and a new statute upon the

line Irr. Dist., 39 Colo. 409, 89 Pac. Rep. 963.

¹ Laws Idaho, 1895, p. 183.

² Laws, 1897, p. 146.

³ Laws Idaho, 1899, p. 408.

⁴ Laws Idaho, 1903, p. 150.

⁵ Laws Idaho, 1907, p. 484.

For complete statute upon the subject, see Idaho Rev. Laws, 1908, Secs. 2372-2442. For an abstract of the law, see Part XIV, Idaho.

⁶ See Laws 1911, Chap. 46, p. 102.

⁷ Nampa & M. Irr. Dist. v. Brose, 11 Idaho 474, 83 Pac. Rep. 499; Settlers' Irr. Dist. v. Settlers' Canal Co., 14 Idaho 504, 94 Pac. Rep. 829; Pioneer

Irr. Dist. v. Bradbury, 8 Idaho 310, 68 Pac. Rep. 295, 101 Am. St. Rep. 201; Knowles v. New Sweden Irr. Dist., 16 Idaho 217, 101 Pac. Rep. 81; Oregon Short Line R. Co. v. Pioneer Irr. Dist., 16 Idaho 578, 102 Pac. Rep. 904.

¹ Laws Kansas, 1891, p. 243.

² See Laws 1905, Chap. 277, Secs. 1 *et seq.*

For the complete statute upon the subject, see Gen. Stat. Kan. 1909, Secs. 4479-4505.

¹ See Laws Mont. 1907., p. 135.

See, also, Rev. Code of Mont., 1907, Secs. 2309-2402.

subject enacted.² In the repealing clause, it was, however, provided that, where any irrigation district was then in the process of organization, under the provisions of the first Act, said organization might be completed under said provisions, but after such organization was completed, the district should be governed by the provisions of the later Act.

The Act has been declared constitutional in a very late case.³

§ 1395. History of district laws—Nebraska.—In this State provisions for irrigation districts were first enacted in 1895, known as the "Irrigation District Law."¹ The law was taken almost entirely from the California law, as it existed at that time, but changed to meet local conditions. The law has also been amended several times, especially in 1905.² The law has been repeatedly held constitutional by the State Supreme Court; and, in one of the first decisions upon the subject, it was remarked that, "the Act in question is, in all essential features, copied from the district irrigation law of California, in which State it had, by decisions hereafter cited, received a settled construction long before its adoption by us, and its enactment in this State must be construed as a legislative approval of the interpretation there given it."³

² See *Laws Mont.*, 1909, pp. 254-289.

For an abstract of this law, see Part XIV, under Montana.

³ *O'Neill v. Yellowstone Irr. Dist.*, 44 Mont. 492, 121 Pac. Rep. 283.

See, also, *Billings Sugar Co. v. Fish*, 40 Mont. 256, 106 Pac. Rep. 565, 26 L. R. A., N. S., 973, where it was held that a similar law relative to the organization of districts for drainage was constitutional.

¹ *Laws Neb.* 1895, p. 269.

² See *Laws Neb.* 1905, p. 694.

For the complete laws upon the subject, see *Comp. Stats. of Neb.*, 1911, Secs. 6476-6542a.

For an abstract of the present law, see Part XIV, under Nebraska.

³ *Board of Directors of Alfalfa Irr. Dist. v. Collins*, 46 Neb. 411, 64 N. W. Rep. 1086.

See, also, *Baltes v. Farmers Irr. Dist.*, 60 Neb. 310, 83 N. W. Rep. 83; *Andrews v. Lillian Irr. Dist.*, 66 Neb. 458, 92 N. W. Rep. 612, 97 N. W. Rep. 336; *Lincoln & Dawson Co. Irr. Dist. v. McNeal*, 60 Neb. 613, 83 N. W. Rep. 847; *State v. Several Parcels of Land*, 81 Neb. 770, 114 N. W. Rep. 282; *Wyman v. Searle*, — Neb. —, 128 N. W. Rep. 801; *Sowerwine v. Central Irr. Dist.*, 85 Neb. 687, 124 N. W. Rep. 118; *Farmers Irr. Dist. v. Frank*, 72 Neb. 136, 100 N. W. Rep. 286.

§ 1396. **History of district laws—Nevada.**—The first law enacted in Nevada providing for irrigation districts, was that approved on March 23, 1891.¹ The Act was almost entirely copied from the California law, as originally passed, and included the amendments thereto of 1889.² Section 12 of the Act, as originally passed, however, after providing for the condemnation of lands for rights of way, had the following: "Provided, that nothing contained in this section shall authorize any interference with, or condemnation of, any canal, or water right, the right to which has vested prior to the organization of any district under the provisions of this Act."

By the Act approved March 20, 1911,³ an entire new law was provided. In the last section of the Act, it was provided: "None of the provisions of this Act shall be construed as repealing, or in any wise modifying, the provisions of any other Act relating to the subject of irrigation, or water distribution."⁴

§ 1397. **History of district laws—New Mexico.**—Under the Acts approved March 18, 1909, a complete law for the organization of irrigation districts was provided for New Mexico,¹ and as yet has not been construed by the courts of New Mexico.

§ 1398. **History of district laws—Oregon.**—In Oregon the first Act upon the subject of irrigation districts was enacted in 1895.¹ The law is, in substance, a copy of the Wright Act of California, together with its amendments, which form the basis of the irrigation district laws of the most of the Western States.² The law has been held constitutional by the Supreme Court of the State.³ The law was amended in 1909,⁴ and again in 1911.⁵

¹ Laws Nev. 1891, p. 106.

² For the Cal. Amendments of 1889, see Laws Cal. 1889, p. 21 and p. 212.

³ See Laws 1911, Chap. 134, p. 248.

⁴ See, also, for the complete law as it exists today, Revised Laws Nevada, 1912, Secs. 4723-4790.

For an abstract of the irrigation district law of Nevada, see Chap. 93.

¹ See Laws 1909, Chap. 109, p. 295; see, also, *Id.*, Chap. 140, p. 383.

² See Laws Ore. 1895, p. 13.

² See Bellinger and Cotton's Codes, 1902, Secs. 4700 *et seq.*

³ Little Walla Walla Irr. Dist. v. Preston, 46 Ore. 5, 78 Pac. Rep. 982.

See, also, Hall v. Hood River Irr. Dist., 57 Ore. 69, 110 Pac. Rep. 405.

⁴ Laws 1909, pp. 144-215, 364-369.

⁵ Laws 1911, Chap. 223, p. 378.

For complete laws upon the subject, see Lord's Oregon Laws, Secs. 6167-6217, as amended by the above Acts of 1911.

§ 1399. **History of district laws—South Dakota.**—As early as 1891, in South Dakota, there was enacted a law providing for the organization of irrigation districts, to conform with any township of the State. The purpose of the law, as described in the title, was: "An Act authorizing civil townships to sink artesian wells for public purposes, and to issue bonds therefor."¹ The law was afterward amended, in 1895.² The law has a few features of the California law, and, as it related to the development and use of subterranean waters alone, it is in a class by itself.³

§ 1400. **History of district laws—Texas.**—The legislature of Texas enacted an irrigation district law in 1905.¹ The law closely follows the California provisions, as they existed at that time, adapted to local conditions.

§ 1401. **History of district laws—Utah.**—To the legislature of the Territory of Utah, in the early year of 1865, belongs the credit of enacting the first irrigation district law.¹ This law, as amended from time to time, remained in full force and effect for about nineteen years, when it was repealed. In 1884 a new law was also enacted upon the subject,² and this later law remained in force until 1897, when it also was repealed.³ It was provided, however, in the repealing Act, that the repeal should not affect existing districts.⁴ Although a number of small districts were organized under this Act, and continued in operation as such, very little was accomplished under the law; the most of the districts were discontinued. The failure of this law to accomplish better results

For an abstract of the Oregon district laws, see Chap. 97.

¹ See Laws S. D. 1891, p. 196.

² Laws S. D. 1895, p. 118.

See, also, Rev. Codes of S. D. 1903, Secs. 2680-2731.

³ In 1903 a similar law was enacted providing for districts to conform to counties.

Laws S. D. 1893, Chap. 109.

See, also, Rev. Code of S. D. 1903, Secs. 2648-2679.

¹ Gen. Laws, Texas, 1905, p. 235.

See, also, Sayles' Civ. Stat. Texas, Supp. 1906, p. 269.

See, also, Rev. Civ. Stat., 1911, Arts. 5012-5107.

¹ See Act approved Jan. 20, 1865, Comp. Laws of Utah, 1876, pp. 219-225.

² See Comp. Stat. of Utah, 1888, Secs. 2408-2427.

³ Laws, Utah, 1897, p. 225; see, also, Rev. Stat. of Utah, 1888, Sec. 1287.

⁴ Harris v. Tarbet, 19 Utah 325, 57 Pac. Rep. 33.

was due more to the crude provisions of the law itself than to the theory of irrigation district law. However, upon examination it will be seen that some of the principles of this law were adopted later by the California legislature in the district law enacted by it.

After the repeal of the early district law in 1887, as above stated, Utah had no irrigation district law until the Act approved March 22, 1909.⁵ This law followed the California law, and included the most important amendments, which had, from experience, been found necessary in that State. The revenue laws of the State, for the assessments, levying and collecting of taxes on real estate for county purposes, except as modified in the Act itself, were made applicable for the purposes of the Act. Therefore, after the board of directors of the irrigation district has determined the amount of money necessary for the ensuing year, it is made the duty of the county assessor to assess all real estate, exclusive of improvements, lying within the district, in whole, or in part, in such county. The tax levy for the use of the district is then made by the county commissioners, and the county treasurer makes the collection of the amount assessed. The general revenue laws are also made applicable for the enforcement of penalties and forfeiture for delinquent assessments. This is one of the most complete irrigation district laws in existence. The Act is undoubtedly constitutional, and it has been so decided by the court. The law was amended in certain particulars in 1911.⁶

The law has been declared constitutional by the Supreme Court of the State.⁷

§ 1402. History of district laws—Washington.—In the State of Washington, on March 20, 1890, there was approved "An Act providing for the organization and government of irrigation districts and the sale of bonds arising therefrom."¹ In general, the Act is nearly identical with the California district law of 1887, including the amendatory and supplemental Acts of 1889, with, of course, the necessary changes being substituted to conform to local conditions.

⁵ Laws, Utah, 1909, pp. 144-168.

⁶ See Laws 1911, Chap. 53, p. 70.

For complete laws upon the subject, see Compiled Laws of Utah, 1907, as amended as above set forth.

For an abstract of the Utah district laws, see Chap. 102.

⁷ Lundberg v. Green River Irr. Dist., — Utah —, 119 Pac. Rep. 1039.

¹ Laws Wash. 1889-90, p. 671.

The Act has been amended a number of times in its minor details, especially in 1895.²

The law has been held constitutional a number of times by the Supreme Court.³

§ 1403. History of district laws—Wyoming.—In Wyoming, by the Act enacted in 1907, the irrigation district law was adopted in that State. The law was amended in 1911.¹ This Act also followed, in the main, the California law, with the most important amendments as they existed at that time. The Act provides that its provisions shall not in any way apply to, or affect, lands, or the owners thereof, which might theretofore be segregated by the State under the provisions of the Act of Congress, known as the "Carey Act," and the statutes of the State relative thereto, nor to lands, and the owners thereof, situated under, and susceptible of, irrigation, for which water right permits have been granted, or shall hereafter be granted, by the State Engineer; and every irrigation district organized under the provisions of the Act shall be subject to the provisions of the statutes of the State relative to the acquisition, appropriation, and distribution of water, and all rights thereto. These provisions make the law a combination of the irrigation district laws, and the laws of State control, a combination, the results of which are anxiously awaited. But in theory, a district law, subject to a strict State control, ought to place sufficient safeguards around irrigation projects that would be satisfactory to every one interested.²

§ 1404. Irrigation districts—Definition and corporate nature.—"Irrigation Districts," as the same are understood and discussed

² See Laws Wash. 1895, p. 432.

For the complete laws upon the subject, see Rem. & Bal. Ann. Codes, 1910, Secs. 6416-6512; Pierce's Codes, 1905, Secs. 5736, 5881 *et seq.* See, also, Laws Wash. 1905, p. 353.

³ Board of Directors of Middle Kit-titas Irr. Dist. v. Peterson, 4 Wash. 147, 29 Pac. Rep. 995; State *ex rel.* Witherop v. Brown, 19 Wash. 383, 53 Pac. Rep. 548; Kinkade v. Witherop, 29 Wash. 10, 69 Pac. Rep. 399; Roth-

child Bros. v. Rollinger, 32 Wash. 307, 73 Pac. Rep. 367; Purdin v. Washington etc. Assn., 41 Wash. 394, 83 Pac. Rep. 773; Board of Directors v. Peterson, 4 Wash. 147, 29 Pac. Rep. 995.

¹ See Laws 1911, Chap. 31, p. 44; *Id.*, Chap. 99, p. 139; Laws Wyo. 1907, p. 103.

See, also, Rev. Stats. Wyo. 1910, Secs. 829-873.

² For the laws of State control, see Secs. 1337-1367.

in this chapter, are those public corporations organized under the authority of the statute of a State, for the purpose of appropriating, regulating, controlling, and distributing water for irrigation, by the owners of the lands to be irrigated.¹ It is now well settled that such an irrigation district is a public corporation, organized under the general law of the State, enacted by the legislature for the purpose of promoting the general welfare, and that its officers are public officials charged with the duty of carrying out the provisions of the law.² "It is created for a public purpose, and it rests in the discretion of the legislature when to create it, and with what powers to endow it."³ These irrigation districts, especially

¹ It must be noted here that these irrigation districts are not the same as the water districts provided for under the laws of State control in some of the States, as discussed in a previous chapter. See Secs. 1344, 1345.

² "The formation of one of these districts amounts to the creation of a public corporation, and their officers are public officers." *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; *rev'g Id.*, 69 Fed. Rep. 948.

"The defendant is a public corporation, organized under the general law of the State enacted by the legislature for the purpose of promoting the general welfare." *People v. Selma Irr. Dist.*, 98 Cal. 206, 32 Pac. Rep. 1047; holding that such a district can not be dissolved at the suit of the people for the misuse or nonuser of its corporate rights and franchises in the absence of a legislative provision therefor.

For the disorganization and abandonment of irrigation districts, see Sec. 1432.

Turlock Irr. Dist. v. Williams, 76 Cal. 360, 18 Pac. Rep. 379; *Central Irr. Dist. v. De Lappe*, 79 Cal. 351, 21 Pac. Rep. 825; *Crall v. Poso Irr. Dist.*, 87 Cal. 140, 26 Pac. Rep. 797; *Madera*

Irr. Dist., Bonds of, In re, 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106; *Herring v. Modesto Irr. Dist. (Cal.)*, 95 Fed. Rep. 705; *Lincoln and Dawson Co. Irr. Dist. v. McNeal*, 60 Neb. 613, 83 N. W. Rep. 847; *Quint v. Hoffman*, 103 Cal. 506, 37 Pac. Rep. 514; *People v. Linda Vista Irr. Dist.*, 128 Cal. 477, 61 Pac. Rep. 86; *Jenison v. Redfield*, 149 Cal. 500, 87 Pac. Rep. 62; *Perry v. Otay Irr. Dist.*, 127 Cal. 565, 60 Pac. Rep. 40; *Stimpson v. Alessandro Irr. Dist.*, 135 Cal. 389, 67 Pac. Rep. 496, 1034; *Tulare Irr. Dist. v. Collins*, 154 Cal. 440, 97 Pac. Rep. 1124.

An indictment charging defendant with having offered a bribe "to one G., a member of the board of directors of a corporation, to-wit, 'Alta Irrigation District,' " etc., and failing to allege that such a corporation is a public corporation, is fatally defective, as the section applies only to public and *quasi* public corporations. *People v. Turnbull*, 93 Cal. 630, 29 Pac. Rep. 224, and where it is said in the opinion: "An irrigation district organized under the 'Wright Act' is a public corporation."

³ *Fallbrook Irr. Dist. v. Bradley, supra.*

before their status was defined in the Fallbrook case,⁴ have often been termed, by the courts and others, "municipal corporations," as being practically synonymous with the term, "public corporations."⁵ Strictly speaking, this is incorrect, for the reason that in the usual and ordinary sense, the word "public" is a broader term than the word "municipal," and includes, not only municipal corporations, but others of a public character, which are not, in the ordinary sense, "municipal."⁶

As was well said in a late Idaho case:⁷ "Here are found the essential elements of a public corporation, none of which pertain to a private corporation. The property held by the corporation is in trust for the public, and subject to the control of the State. Its officers are public officers, chosen by the electors of the district, and invested with public duties. Its object is for the good of the public, and to promote the prosperity and welfare of the public."⁸

But it was not until the powers of these districts to incur bonded indebtedness was attacked that the proper distinction was made. And, in these cases, it was held that an irrigation district, although it is a public corporation, is not a municipal corporation within the meaning of the provisions of the constitution prohibiting the

⁴ Fallbrook Irr. Dist. v. Bradley, *supra*.

⁵ See Herring v. Modesto Irr. Dist., 95 Fed. Rep. 705, 717; Madera Irr. Dist., Bonds of, *In re*, 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106.

⁶ Board of Directors of Middle Kittitas Irr. Dist. v. Peterson, 4 Wash. 147, 29 Pac. Rep. 995.

"A municipal corporation, in its strict and proper sense, is a body politic and corporate constituted by the incorporation of the inhabitants of a city or town for the purposes of local government thereof." Dillon's Municipal Corporations, 4th Ed., Sec. 19.

"All corporations intended as agencies in the administration of civil government are public, as distinguished from private corporations. Thus an incorporated school district, or county,

as well as city, is a public corporation; but the school district or county, properly speaking, is not, while the city is, a municipal corporation. All municipal corporations are public bodies, created for civil or political purposes; but all civil, political, or public corporations are not, in the proper use of the language, municipal corporations." Dillon's Municipal Corporations, 4th Ed., Sec. 22.

⁷ Pioneer Irr. Dist. v. Walker, 20 Idaho 605, 119 Pac. Rep. 304.

⁸ See, also, City of Nampa v. Nampa & Meridan Irr. Dist., 19 Idaho 779, 115 Pac. Rep. 979; Board of Directors of Middle Kittitas Irr. Dist. v. Peterson, 4 Wash. 147, 29 Pac. Rep. 995; Madera Irr. Dist., Bonds of, *In re*, 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106.

incurring of indebtedness beyond a certain limit by cities, towns, counties, and other municipal corporations. Again, under the laws of Nebraska irrigation districts are held to be public rather than municipal corporations, and their officers are public officers of the State; and, therefore, the statute giving county boards a share in their creation is not in violation of the Nebraska constitution,⁹ on the ground that it authorizes the creation of municipal corporations by county boards, and confers legislative authority on such boards.¹⁰

It can thus be seen that the authorities hold that an irrigation district organized under these Acts is a public corporation in the broad sense of the term, both as distinguished from private corporations; and, also, that an irrigation district is not confined to the strict and more narrow limits of a "municipal corporation."

§ 1405. Constitutionality of irrigation district Acts.—The State irrigation district Acts have been attacked from every possible point, but have been uniformly held to be constitutional, both by the Supreme Courts of the respective States adopting the law and also by the Supreme Court of the United States. As this law originated in the State of California, that State was also the battle ground upon the question of the constitutionality of the law. And, in general, it may be said that, in the other States afterward adopting the law, based as it was, largely upon the provisions of the California law, their courts simply fell in line with the courts of that State, and hold that the law was adopted together with the construction placed upon its constitutionality by the Supreme Court of California.¹

⁹ Art. 3, Sec. 1.

¹⁰ *Alfalfa Irr. Dist. v. Collins*, 46 Neb. 411, 64 N. W. Rep. 1086.

¹ "It should, as preliminary to an examination of the subject, be remarked that the Act in question is in all essential features copied from the district law of California, in which State it had, by decisions hereafter cited, received settled construction long before its adoption by us, and its enactment in this State must be construed as a legislative approval of the interpretation there given it." Board

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of Directors of Alfalfa Irr. Dist. v. Collins, 46 Neb. 411, 64 N. W. Rep. 1086.

In Colorado, after citing the California cases, the Court said: "It seems to us that all the objections urged upon this hearing under the head of 'due process of law,' so far, at least, as they affect the appellant, or are involved in, or bear upon, the issues raised in this special proceeding, have been met and sufficiently answered in the foregoing decisions, and to repeat the argument of the opinions would be

The original Wright Act was passed in California in 1887,² and as early as May 31, 1888, the Supreme Court of that State held that the provisions of the Act are in harmony with the constitution and State laws, and that the districts organized under the Act have all the constituents of public corporations formed to accomplish a public use and purpose.³ The Supreme Court of the United States, in

a work of supererogation." *Anderson v. Grand Valley Irr. Dist.*, 35 Colo. 525, 85 Pac. Rep. 313.

In Idaho: "In fact, the irrigation Act under consideration was adopted from California, and prior to its adoption by this State the supreme court of California had repeatedly held that law to be constitutional. The Wright law has been attacked from nearly every possible point of view, and the supreme court of that State has without deviation held it to be constitutional. See *Kinney on Irrigation*, Sec. 390. We hold that the district irrigation law of this State is not repugnant to any of the provisions of our State constitution." *Nampa & M. Irr. Dist. v. Brose*, 11 Idaho 474, 83 Pac. Rep. 499.

In Oregon: "It is, in substance, a copy of the Wright Act of California, which forms the basis of the irrigation laws of the arid States. The constitutionality of such legislation has been assailed on different grounds, but it has been upheld by both State and Federal courts." *Little-Walla Walla Irr. Dist. v. Preston*, 46 Ore. 5, 78 Pac. Rep. 982.

"The duty to determine the propriety of establishing irrigation districts, resting, as it does, upon public necessity, appertains exclusively to the law making body. So, also, the mode by which they may be organized must be determined by it. But the ascertainment of the necessity or utility of establishing a particular district, as well

as the solution of the question whether the conditions precedent have been complied with, involve judicial functions, the exercise of which is properly left to the courts." *O'Neill v. Yellowstone Irr. Dist.*, 44 Mont. 492, 121 Pac. Rep. 283.

² See *Hist. of Law in California*, Sec. 1390.

³ *Turlock Irr. Dist. v. Williams*, 76 Cal. 360, 18 Pac. Rep. 379.

For the construction of this statute, see, also, *Central Irr. Dist. v. De Lappe*, 79 Cal. 351, 21 Pac. Rep. 825; *Crall v. Poso Irr. Dist.*, 87 Cal. 140, 26 Pac. Rep. 797; *Modesto Irr. Dist. v. Tregoe*, 88 Cal. 334, 26 Pac. Rep. 237; dismissed, 164 U. S. 179, 41 L. Ed. 395, 17 Sup. Ct. Rep. 52; *In re Madera Irr. Dist.*, 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106; *Tregoe v. Owens*, 94 Cal. 317, 29 Pac. Rep. 643; *People v. Selma Irr. Dist.*, 98 Cal. 206, 32 Pac. Rep. 1047; *Woodward v. Fruitvale Irr. Dist.*, 99 Cal. 554, 34 Pac. Rep. 239; *Rialto Irr. Dist. v. Brandon*, 103 Cal. 384, 37 Pac. Rep. 484; *Fallbrook Irr. Dist. v. Abila*, 106 Cal. 355, 39 Pac. Rep. 793; *San Diego v. Linda Vista Irr. Dist.*, 108 Cal. 189, 41 Pac. Rep. 291, 35 L. R. A. 33; *Cooper v. Miller*, 113 Cal. 238, 45 Pac. Rep. 325; *Cullen v. Glendora W. Co.*, 113 Cal. 503, 39 Pac. Rep. 769, 45 Pac. Rep. 822, 1047; *Hughson v. Crane*, 115 Cal. 404, 47 Pac. Rep. 120; *Boehmer v. Big Rock Creek Irr. Dist.*, 117 Cal. 19, 48 Pac. Rep. 908; *In re Central Irr. Dist.*, 117

a case appealed from the judgment of the Circuit Court of the United States for the Southern District of California, Judge Ross presiding, also held that the Act was constitutional upon all points.⁴

The Acts of the legislature of California amendatory and supplemental to the original Wright Act have also, in the main, been held

Cal. 282, 49 Pac. Rep. 354; Mitchell v. Patterson, 120 Cal. 286, 52 Pac. Rep. 589; Perry v. Otay Irr. Dist., 127 Cal. 565, 60 Pac. Rep. 40; Sechrist v. Rialto Irr. Dist., 129 Cal. 640, 62 Pac. Rep. 261; Escondido H. S. Dist. v. Escondido Seminary, 130 Cal. 128, 62 Pac. Rep. 401; Stimson v. Alessandro Irr. Dist., 135 Cal. 389, 67 Pac. Rep. 496; Baxter v. Vineland Irr. Dist., 136 Cal. 185, 68 Pac. Rep. 601; Nevada Nat. Bank v. Poso Irr. Dist., 140 Cal. 344, 73 Pac. Rep. 1056; People v. Perris Irr. Dist., 142 Cal. 601, 76 Pac. Rep. 381; Merchants' Bank v. Escondido Irr. Dist., 144 Cal. 329, 77 Pac. Rep. 937; Boskowitz v. Thompson, 144 Cal. 724, 78 Pac. Rep. 290; Jenison v. Redfield, 149 Cal. 500, 87 Pac. Rep. 62; Western Union Tel. Co. v. Modesto Irr. Dist., 149 Cal. 662, 87 Pac. Rep. 190, 9 Am. & Eng. Ann. Cas. 1190; Best v. Wohlford, 153 Cal. 17, 94 Pac. Rep. 98; Fogg v. Perris Irr. Dist., 154 Cal. 209, 97 Pac. Rep. 316; Tulare Irr. Dist. v. Collins, 154 Cal. 440, 97 Pac. Rep. 1124; Commercial National Bank v. Schlitz, 6 Cal. App. 174, 91 Pac. Rep. 750; Stowell v. Rialto Irr. Dist., 155 Cal. 215, 100 Pac. Rep. 248; Tulare Irr. Dist. v. Collins, 154 Cal. 440, 97 Pac. Rep. 1124; Lindsay Irr. Dist. v. Mehrtens, 97 Cal. 676, 32 Pac. Rep. 802; Strong v. Baldwin, 154 Cal. 150, 97 Pac. Rep. 178, 129 Am. St. Rep. 141; Chinn v. Superior Court of San Joaquin County, 156 Cal. 478, 105 Pac. Rep. 580; Title etc. Co. v. Kerrigan, 150 Cal. 289, 88 Pac. Rep. 356, 8 L. R. A., N. S., 682, 119 Am. St. Rep. 199;

People v. Linda Vista Irr. Dist., 128 Cal. 477, 61 Pac. Rep. 86; Inglin v. Hoppin, 156 Cal. 483, 105 Pac. Rep. 582; Nevada Bank v. Board of Supervisors of Kern County, 5 Cal. App. 638, 91 Pac. Rep. 122; Hewell v. Hogin, 3 Cal. App. 248, 84 Pac. Rep. 1002; McPherson v. Alta Irr. Dist., 14 Cal. App. 353, 112 Pac. Rep. 193; Palmdale Irr. Dist. v. Ratke, 19 Cal. 358, 27 Pac. Rep. 783; Decker v. Perry (Cal.), 35 Pac. Rep. 1017; People *ex rel.* Stone v. Jefferds, 126 Cal. 296, 58 Pac. Rep. 704; Sechrist v. Rialto Irr. Dist., 129 Cal. 640, 62 Pac. Rep. 261; Miller v. Perris Irr. Dist., 85 Fed. Rep. 693; *Id.*, 92 Fed. Rep. 263; Thompson v. Perris Irr. Dist., 116 Fed. Rep. 769; Shepard v. Tulare Irr. Dist., 94 Fed. Rep. 1; People v. Brown Valley Dist., 119 Fed. Rep. 538; Wright v. East Riverside Irr. Dist., 138 Fed. Rep. 313, 70 C. C. A. 603; Mara v. San Jacinto Irr. Dist., 131 Fed. Rep. 780; Lunberg v. Green River Irr. Dist., — Utah —, 119 Pac. Rep. 1039; Board of Supervisors v. Thompson, 122 Fed. Rep. 860, 59 C. C. A. 70.

See, also, for the construction of the irrigation district statutes, under the various States, Secs. 1391-1403.

⁴ Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; reversing *Id.*, 68 Fed. Rep. 948.

It will be noticed in this connection that this case was argued by some of the most eminent counsel of the country, ex-President Benjamin Harrison, Joseph H. Choate, and John F. Dillon.

valid and constitutional.⁵ The first amendatory Act of 1889,⁶ relating to the "Bond Fund" and amending Section 22 of the original Act, was construed;⁷ so, too, with the second amendatory and supplemental Act of the same year,⁸ relating to the exclusion of lands from irrigation districts of which they form a part.⁹ The supplemental Act of 1889, known as the "Confirmation Act," has been repeatedly held as constitutional. But, owing to the importance of this branch of the subject, we will discuss it in a separate section.¹⁰

The amendatory Act of 1891,¹¹ relative to the eligibility of persons to sign a petition for the organization of a district, and changing the words "freeholders own lands" to "holders of title or evidence of title," and the lands to be included in such district, was construed in connection with the original Act.¹²

So, also, the further amendatory Act of 1891, amending Section 15 of the original Act, relative to the issuance of bonds of the district.¹³ And, again, the further amendatory Act of 1891, amending Section 18 relative to the assessments of property.¹⁴

The amendatory statute of 1893,¹⁵ amending Section 17 of the original Act, and attempting to empower the board of directors of an irrigation district to pledge by way of mortgage, trust deed, or otherwise, all property of the district as additional security for the payment of its bonds, was held to be unconstitutional and void, with-

⁵ For these amendatory and supplemental Acts, see Hist. Cal. Law, Sec. 1390.

⁶ Stats. and Amendts. Cal., 1889, p. 15.

⁷ *Mitchell v. Patterson*, 120 Cal. 286, 52 Pac. Rep. 589.

⁸ Stats. and Amdts. Cal., 1889, p. 21.

⁹ *Modesto Irr. Dist. v. Tregoe*, 88 Cal. 334, 26 Pac. Rep. 237; dismissed, 164 U. S. 179, 41 L. Ed. 395, 17 Sup. Ct. Rep. 52.

¹⁰ For the confirmation Act of California, see Stats. and Amdts., 1889, p. 212.

For discussion upon subject, see Secs. 1420, 1421.

¹¹ Stats. and Amdts. 1891, p. 142.

¹² *Fallbrook Irr. Dist. v. Abila*, 106 Cal. 355, 39 Pac. Rep. 793.

See, also, *Cullen v. Glendora W. Co.*, 113 Cal. 503, 39 Pac. Rep. 769, 45 Pac. Rep. 822, 1047; *In re Central Irr. Dist.* 117 Cal. 382, 49 Pac. Rep. 354; *People v. Perris Irr. Dist.*, 142 Cal. 601, 76 Pac. Rep. 381.

¹³ Stats. and Amdts., 1891, p. 147; *Fallbrook Irr. Dist. v. Abila*, 106 Cal. 355, 39 Pac. Rep. 793; *Cullen v. Glendora W. Co.*, 113 Cal. 503, 39 Pac. Rep. 769, 45 Pac. Rep. 822, 1047; *Mitchell v. Patterson*, 120 Cal. 286, 52 Pac. Rep. 587; *Boskowitz v. Thompson*, 144 Cal. 724, 78 Pac. Rep. 290.

¹⁴ *Best v. Wohlford*, 144 Cal. 733, 78 Pac. Rep. 293.

¹⁵ Stats. and Amdts., 1893, p. 175.

out affecting the original Section 17, or any other portion of the Act.¹⁶

The law, as we have stated, was re-enacted in 1897;¹⁷ the new law has also been construed by the court, and, in the main, held constitutional: Sections 37, 38, 39, 71, and 72, relative to the assessment of improvements and the powers of the board of equalization; ¹⁸ Section 48, relative to the essentials of a tax deed; ¹⁹ Section 53, relative to the construction of the works, and power to contract;²⁰ and Section 39, relative to the levy and collection of taxes.²¹

As will be seen from a consultation of the cases cited in our notes, the California law upon the subject, in the main, has been upheld by the courts; and that, too, both as regards the original Act and the amendments thereto. The same may be said relative to the irrigation district laws of the other States adopting the same.²²

In no State have the main features of the laws been declared unconstitutional. It is true that certain features of the laws have at times been declared unconstitutional; but these have usually been amended at subsequent sessions of the legislature. We will now take up the discussion of the grounds of attack upon the main features of the law.²³

§ 1406. Constitutionality of Acts—Points upon which held constitutional.—Having shown in the previous section that the main features of the irrigation district laws in all jurisdictions where

¹⁶ *Merchants' Bank v. Escondido Irr. Dist.*, 144 Cal. 329, 77 Pac. Rep. 937.

¹⁷ See *Hist. of Law in Cal.*, Sec. 1390.

¹⁸ *Lahman v. Hatch*, 124 Cal. 1, 56 Pac. Rep. 621; Sections 39 and 69, relative to suits to determine the validity of assessments, and what assessment shall be adopted as the basis of assessment for the district; *Western Union Tel. Co. v. Modesto Irr. Co.*, 149 Cal. 662, 87 Pac. Rep. 190, 9 Ann. Cas. 1190.

¹⁹ *Best v. Wohlford*, 153 Cal. 17, 94 Pac. Rep. 98; *Commercial Nat. Bank v. Schlitz*, 6 Cal. App. 174, 91 Pac. Rep. 750.

²⁰ *Healey v. Anglo Cal. Bank*, 5 Cal. App. 278, 90 Pac. Rep. 54.

²¹ *Nevada Nat. Bank v. Board of Supervisors of Kern Co.*, 5 Cal. App. 638, 91 Pac. Rep. 122.

For general propositions, see Sec. 1406.

See, also, *Hughson v. Crane*, 115 Cal. 404, 47 Pac. Rep. 120; *Arroyo D. & W. Co. v. Bequette*, 149 Cal. 543, 87 Pac. Rep. 10; *Tulare Irr. Dist. v. Collins*, 154 Cal. 440, 97 Pac. Rep. 1124.

²² For the constitutionality of the laws of the other States, see the sections upon the history of the laws, Nos. 1391-1403.

²³ See Sec. 1406.

their constitutionality has been tested have been upheld as valid and constitutional,¹ in this section we will briefly discuss some of the grounds of the attack upon these laws, whereby it was sought to have them declared unconstitutional. The principal source of attack was from the owners of large tracts of cultivated land, or the owners of town lots which could not be irrigated within the boundaries of a district, who sought to evade the payment of the assessments imposed by the law and levied upon their lands.

It was therefore contended that the statute, in violation of the Constitution of the United States and of the State, attempted to authorize the assessment and the taking of private property for a private use, and that a district formed under the Act was a private and not a public corporation. It has been repeatedly held by the courts that this contention was not well taken, and that: "The formation of one of these districts amounts to the creation of a public corporation, and their officers are public officers." It is therefore held by the courts that an irrigation district formed under these laws is a public corporation, and its object is the promotion of the general welfare, and the assessment of the property under the provisions of the law is not the "taking" of property for a private, but for a public, use.² It therefore also follows that property may be

¹ See Sec. 1405.

² The irrigation of lands under the California Act is a public purpose and the water thus used is put to a public use. *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; reversing *Id.*, 68 Fed. Rep. 948.

See, also, for the corporate nature of irrigation districts, Sec. 1404.

For the taking of private property by the power of eminent domain, see Secs. 1059-1098.

That the taking is for a public use, see *In re bonds Madera Dist.*, 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106; *Lincoln & Dawson County Irr. Dist. v. McNeal*, 60 Neb. 613, 83 N. W. Rep. 847; *Kinkade v. Witherop*, 29 Wash. 10, 69 Pac. Rep. 399; *Turlock Irr. Dist.*

v. Williams, 76 Cal. 360, 18 Pac. Rep. 379; *Central Irr. Dist. v. De Lappe*, 79 Cal. 351, 21 Pac. Rep. 825; *Crall v. Poso Irr. Dist.*, 87 Cal. 140, 26 Pac. Rep. 797; *People v. Turnbull*, 93 Cal. 630, 29 Pac. Rep. 224; *People v. Selma Irr. Dist.*, 98 Cal. 206, 32 Pac. Rep. 1047; *Lindsay Irr. Dist. v. Mehrtens*, 97 Cal. 676, 32 Pac. Rep. 802; *Alfalfa Irr. Dist. v. Collins*, 46 Neb. 411, 64 N. W. Rep. 1086; *Herring v. Modesto Irr. Dist.*, 95 Fed. Rep. 705; *Quint v. Hoffman*, 103 Cal. 506, 37 Pac. Rep. 514; *Nampa & M. Irr. Dist. v. Brose*, 11 Idaho 474, 83 Pac. Rep. 499, where it was held that the Act is not repugnant to any of the provisions of the State of Idaho; *Pioneer Irr. v. Bradley*, 8 Idaho 310, 68 Pac. Rep. 295, 101 Am. St. Rep. 201; *Tulare Irr. Dist. v. Shepard*, 185

taken by a district by virtue of the power of eminent domain.³ It is also held that the fact that the use of the water under the law is limited to the land owner, and is not given to every resident of the district, does not prevent the use being public; but that land which can be beneficially used without irrigation may be so much improved by the use of it upon other lands in the district, that such land may be properly within a district, and assessed for its benefit as a public improvement, and such use of the water is a public use.⁴

It was also contended that the law was unconstitutional because it authorized the taking of private property without due process of law. There were a number of phases of this branch of the question presented in the various cases, but the courts invariably held against them all, and held the law to be constitutional. It being held that, whenever a State law imposes a tax, assessment, servitude, or other burden upon property for a public use, either of the whole of the State or a limited portion thereof, and such law provides a mode of confirming or contesting such charge in the ordinary courts of justice, with due notice to the owner, the judgment in such proceedings does not deprive the owner of his property without due process of law.⁵ The adoption of a method of assessment according to the

U. S. 1, 46 L. Ed. 773, 22 Sup. Ct. Rep. 531; affirming *Id.*, 94 Fed. Rep. 1; Little Walla Walla Irr. Dist. v. Preston, 46 Ore. 5, 78 Pac. Rep. 982.

³ "The provisions of the Act relative to the condemnation of private property, land, water, etc., for the uses prescribed therein, are in harmony with the constitution and State laws, and in strict consonance with the views of the Supreme Court in the case of *Lux v. Haggin*." (69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.) *Turlock Irr. Co. v. Williams*, 76 Cal. 360, 18 Pac. Rep. 397.

See, also, *Rialto Irr. Dist. v. Brandon*, 103 Cal. 384, 37 Pac. Rep. 484; *Knowles v. New Sweden Irr. Dist.*, 16 Idaho 217, 101 Pac. Rep. 81; *Lindsay Irr. Dist. v. Mehrtens*, 97 Cal. 676, 32 Pac. Rep. 802.

⁴ *Fallbrook Irr. Dist. v. Bradley*,

supra, where the question involved was an assessment levied upon non-irrigated land.

⁵ *Fallbrook Irr. Dist. v. Bradley*, *supra*; *Tregea v. Modesto Irr. Dist.*, 164 U. S. 179, 41 L. Ed. 395, 17 Sup. Ct. Rep. 52; dismissing *Id.*, 88 Cal. 334, 26 Pac. Rep. 237.

See, also, cases cited in notes, *supra*.

"His property is not taken from him without due process of law, if he is allowed a hearing at any time before the lien of the assessment thereon becomes final." *Madera Irr. Dist., In re Bonds*, 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106.

See, also, *Anderson v. Grand Valley Irr. Dist.*, 35 Colo. 525, 85 Pac. Rep. 313; *Kinkade v. Witherop*, 29 Wash. 10, 69 Pac. Rep. 399.

value of all the real property within a district, or an *ad valorem* method, for the expenses of the improvements of the district, is not the taking of property without due process of law.⁶ Again, these district laws are not unconstitutional on the ground that the power thereby conferred upon districts to levy taxes is without limitation.⁷ And, again, the fact that the statute makes no provision for notice to the land owner that on a particular day the board of directors will assess benefits to the lands within the district will not render such statute unconstitutional, upon the ground of taking property without due process of law, where the statute does provide for notice to be given of the proceedings to organize such district, and notice for the hearing for the confirmation of the organization and the proceedings of such district, at which hearing the court is required to examine all proceedings for the organization of such district including the assessment of benefits.⁸

That the law was unconstitutional was also urged, upon the ground that it was a delegation to others of the legislative power to create a public corporation. But, as said in the Fallbrook case: "We do not think that there is any validity to the argument. The legislature delegates no power. It enacts conditions upon the performance of which the corporation shall be regarded as organized with the powers mentioned and described in the Act."⁹

In a recent California case,¹⁰ it was also contended that under the

⁶ Fallbrook Irr. Dist. v. Bradley, *supra*; *In re Madera Irr. Dist. Bonds*, 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106, where it is held that assessments according to the value of the land, and not according to the amount of benefits received by each parcel to pay for a public improvement in an irrigation district, are not unconstitutional, as such assessments are included in the inherent power of taxation, which is not limited to the benefits received.

See, also, *Alfalfa Irr. Dist. v. Collins*, 46 Neb. 411, 64 N. W. Rep. 1086; *Modesto Irr. Dist. v. Tregoe*, 88 Cal. 334, 26 Pac. Rep. 237; dismissed, 164 U. S. 179, 41 L. Ed. 395, 17 Sup. Ct. Rep. 52.

See, also, upon the subject of the

assessment and levying of taxes, *Tregoe v. Owens*, 94 Cal. 317, 29 Pac. Rep. 643; *Best v. Wohlford*, 153 Cal. 17, 94 Pac. Rep. 98; *Boskowitz v. Thompson*, 144 Cal. 724, 78 Pac. Rep. 290; *Hughson v. Crane*, 115 Cal. 404, 47 Pac. Rep. 120; *Baxter v. Vineland Irr. Dist.*, 136 Cal. 185, 68 Pac. Rep. 601.

⁷ *Alfalfa Irr. Dist. v. Collins*, *supra*.

⁸ *Oregon S. L. R. Co. v. Pioneer Irr. Dist.*, 16 Idaho 578, 102 Pac. Rep. 904; *Kinkade v. Witherop*, 29 Wash. 10, 69 Pac. Rep. 399.

⁹ Fallbrook Irr. Dist. v. Bradley, *supra*; *In re Madera Irr. Dist. Bonds*, *supra*.

¹⁰ *Imperial Water Co. No. 1 v. Board of Supervisors of Imperial County*, — Cal. —, 120 Pac. Rep. 780.

statute, as amended by the Act of 1911,¹¹ a lack of the signatures of all the petitioners to the petition vitiated the proceedings thereon upon the ground that it was in violation of the due process clause of the constitution. The Court, in deciding to the contrary, said: "We know of no authority to the effect that a signature to the published notice is a necessary part of such process, where the only notice given or required is a publication in a newspaper. The substantial thing is that such notice shall be given as, under the circumstances, would have a reasonable tendency to apprise the parties interested of the nature of the proceeding and the time and place of hearing. . . . The legislature is the sole judge of the propriety of the formation of such districts. The question of procedure is a matter of legislative policy. Conceding that a notice and hearing are required, under the authorities, it is nevertheless clear that the legislature may authorize the initiatory proposal to be made by such persons as it sees fit."

In a late case decided in Montana,¹² where the law provides that the petition shall be presented to the district court, and all proceedings for the organization of irrigation districts must be had by court, the law was attacked upon the ground that it conferred legislative and administrative duties on the court, beyond the power of the legislature to confer. The Court, however, upheld the constitutionality of the law and in the opinion said: "It is sufficient to sustain the law if the general power conferred is judicial, though it incidentally requires the performance of legislative and administrative duties."

The Acts have been attacked as being contrary to the constitution of a State requiring bills to contain but one subject, which shall be clearly expressed in the title. But the contention was held not good by the courts.¹³

It is also held in Colorado that the district law is not repugnant to the provisions of Article 16 of the State constitution, which declares the waters of natural streams to be the property of the public

¹¹ Stats. and Amdts., 1911, p. 509. Nampa & M. Irr. Dist. v. Brose, 11

¹² O'Neill v. Yellowstone Irr. Dist., Idaho 474, 83 Pac. Rep. 499; Pioneer

¹³ 44 Mont. 492, 121 Pac. Rep. 283. Irr. Dist. v. Bradley, 8 Idaho 310, 68

¹⁴ Anderson v. Grand Valley Irr. Pac. Rep. 295.

Dist., 35 Colo. 525, 85 Pac. Rep. 313;

and dedicates the same to the use of the people subject to appropriation.¹⁴

The Colorado law was also attacked upon the ground of non-compliance by the general assembly with Article 5, Section 22 of the Colorado Constitution, requiring the vote on the final passage of bills to be taken by ayes and noes, and the names of those voting to be entered on the journal of each house. It was held by the Court that one who questions the validity of a law upon this ground must present proper evidence showing the facts upon which he relies to show such non-compliance, and the Court will not consider the admissions of parties or stipulations of counsel as to the contents of legislative journals in impeachment of the validity of a law; and the judgment of the district court to the contrary was reversed, where it was based upon such a stipulation.¹⁵

The Act of the California legislature of 1889, known as the "Confirmation Act,"¹⁶ and the provisions of the statutes of the other States relative to the same subject have also been held to be constitutional.¹⁷

The burden of proof is upon the district to prove its validity and the validity of the issuance of its bonds.¹⁸

¹⁴ *Anderson v. Grand Valley Irr. Dist.*, *supra*.

¹⁵ *Anderson v. Grand Valley Irr. Dist.*, *supra*.

¹⁶ *Stats. and Amdts. Cal.*, 1889, p. 212.

¹⁷ *People v. Linda Vista Irr. Dist.*, 128 Cal. 477, 61 Pac. Rep. 86; *Crall v. Poso Irr. Dist.*, 87 Cal. 140, 26 Pac. Rep. 797; *In re Madera Irr. Dist. Bonds*, 92 Cal. 296, 28 Pac. Rep. 272, 14 L. B. A. 755, 27 Am. St. Rep. 106; *Modesto Irr. Dist. v. Tregea*, 88 Cal. 334, 26 Pac. Rep. 237; *dismissed*, 164 U. S. 179, 41 L. Ed. 395, 17 Sup. Ct. Rep. 52; *Cullen v. Glendora W. Co.*, 113 Cal. 503, 39 Pac. Rep. 769, 45 Pac. Rep. 822, 1047; *People v. Perris Irr. Dist.*, 132 Cal. 289, 64 Pac. Rep. 399; *Id.*, 142 Cal. 601, 76 Pac. Rep.

381; *Stimson v. Alessandro Irr. Dist.*, 135 Cal. 389, 67 Pac. Rep. 496, 1034; *Fogg v. Perris Irr. Dist.*, 154 Cal. 209, 97 Pac. Rep. 316; *Kinkade v. Witherop*, 29 Wash. 10, 69 Pac. Rep. 399; *Bd. of Directors Middle Kittitas Irr. Dist. v. Peterson*, 4 Wash. 147, 29 Pac. Rep. 995; *State v. Brown*, 19 Wash. 383, 53 Pac. Rep. 548; *Nampa & M. Irr. Dist. v. Brose*, 11 Idaho 474, 83 Pac. Rep. 499; *Anderson v. Grand Valley Irr. Dist.*, 35 Colo. 525, 85 Pac. Rep. 313.

See, also, for proceedings for confirmation, Secs. 1420, 1421.

¹⁸ *Fallbrook Irr. Dist. v. Abila*, 106 Cal. 355, 39 Pac. Rep. 793; *Cullen v. Glendora Water Co.*, 113 Cal. 503, 39 Pac. Rep. 769, 45 Pac. Rep. 822.

§ 1407. **Constitutionality of Acts—Jurisdiction—Federal questions.**—The State courts have, of course, jurisdiction to determine the constitutionality of the irrigation district Acts, and all provisions thereof. The taking of private property without due process of law, contrary to the provisions of the Constitution of the United States, is also a Federal question. It therefore follows that actions involving this question may be brought in the first instance in, or removed or appealed to, the Federal Courts.¹

Whether or not the taking of private property is for a public or a private use is not, strictly speaking, in and of itself, a Federal question, upon the ground that it is contrary to the Fifth Amendment of the Constitution of the United States, unless the taking is by the Federal Government.² The Fifth Amendment of the Constitution applies only to the taking by the Federal Government.³ However, it is held by the Supreme Court of the United States that where it is claimed that a citizen is deprived of his property without due process of law, even if the taking be by or under State authority for any other than a public use, either under the guise of taxation, or by the assumption of the right of eminent domain, in that way

¹ Where the defendant contended in the State Court that the operation of a State irrigation statute deprived him of property without due process of law, contrary to the Federal Constitution, and the Supreme Court of the State decided against such contention, a Federal question was presented. *Tregea v. Modesto Irr. Dist.*, 164 U. S. 179, 41 L. Ed. 395, 17 Sup. Ct. Rep. 52; dismissing the case upon other grounds. For the same case below, see 88 Cal. 334, 26 Pac. Rep. 237.

See, also, *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; *Tulare Irr. Dist. v. Shepard*, 185 U. S. 1, 46 L. Ed. 773, 22 Sup. Ct. Rep. 531; affirming *Id.*, 94 Fed. Rep. 1; *Herring v. Modesto Irr. Dist.*, 95 Fed. Rep. 705.

Quo warranto brought by a State against an irrigation district is not a

Federal question. *People ex rel. Brady v. Brown's Valley*, 119 Fed. Rep. 538.

² The 5th amendment to the United States Constitution operates exclusively in restriction of Federal power, and has no application to the States. *Thorington v. Montgomery*, 147 U. S. 490, 37 L. Ed. 252, 13 Sup. Ct. Rep. 394.

³ "There is no specific prohibition in the Federal Constitution which acts upon the States in regard to their taking private property for any but a public use. The 5th amendment, which provides, among other things, that such property shall not be taken for public use without just compensation, applies only to the Federal Government, as has been many times decided." *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56.

the question whether private property has been taken for any other than for a public use becomes material in the Federal Courts, as incidental to the main question of due process of law, even where the taking is under the authority of the State instead of the Federal Government.⁴ And in the consideration of these questions, the decisions of the highest courts of the State where the suit originated, and the declaration of the people of the State in their constitution and statutes, that the State does not deprive the land owner of his property without due process of law, and that the use of the water for irrigation under the Act is a public use, are to be treated with very great respect by the Supreme Court of the United States, but they are not absolutely binding upon it as to what is due process of law and, as an incident thereto, what is a public use.⁵

The jurisdiction of the Federal Courts involving questions under the irrigation district laws, provided that the jurisdictional facts exist, as to diversity of citizenship, amount, etc., is the same as it is in other cases.⁶

§ 1408. Organization of district can not be collaterally attacked.—Irrigation districts organized under the Acts in question being public corporations,¹ and the laws under which they are organized being universally held constitutional by the courts,² as such public corporations, the validity and regularity of their organization can not be questioned collaterally.³ it is held that *quo warranto* will

⁴ Fallbrook Irr. Dist. v. Bradley, *supra*.

⁵ Fallbrook Irr. Dist. v. Bradley, *supra*.

⁶ The fact that a plaintiff is given a different remedy in the State courts can not affect the jurisdiction of a Federal Court to entertain his action, where, by reason of his citizenship and amount involved, he has the right to sue in that court. Herring v. Modesto Irr. Dist., 95 Fed. Rep. 705.

¹ For corporate nature of districts, see Sec. 1404.

² For the constitutionality of district laws, see Secs. 1405-1407.

³ People v. Linda Vista Irr. Dist.,

128 Cal. 477, 61 Pac. Rep. 86; Quint v. Hoffman, 103 Cal. 506, 37 Pac. Rep. 514; Miller v. Perris Irr. Dist. (Cal.), 85 Fed. Rep. 693, 92 Fed. Rep. 263; Purdin v. Washington etc. Assn., 41 Wash. 394, 83 Pac. Rep. 773; Swamp Land Dist. v. Silver, 98 Cal. 51, 32 Pac. Rep. 866; Reclamation Dist. No. 542 v. Turner, 104 Cal. 334, 37 Pac. Rep. 1038; Hamilton v. San Diego County, 108 Cal. 273, 41 Pac. Rep. 305; People *ex rel.* Stone v. Jeffers, 126 Cal. 296, 58 Pac. Rep. 704; Oregon Short Line R. Co. v. Pioneer Irr. Dist., 16 Idaho 578, 102 Pac. Rep. 904.

not lie after the confirmatory decree has been rendered, to declare a district organization invalid, for the reason that it is a collateral attack upon the former judgment.⁴ The organization of an irrigation district can not be collaterally attacked in an action by land owners to enjoin the collection of an assessment by the officers of the district.⁵ Again, such an attack can not be made in an action to recover possession of land sold for the non-payment of irrigation taxes or assessments.⁶ Again, the sale of bonds can not be enjoined by a land owner who did not appear at the confirmation proceedings.⁷ It is therefore generally held that where a reputed irrigation district is acting under the forms of law, unchallenged by the State, the validity of its organization can not be attacked, either directly or collaterally by a private individual. And, furthermore, it is held that where proceedings were duly brought, under the confirmation Act, to which the State might have made itself a party, and, not having appeared, a judgment validating the proceedings was *res judicata* against it; and, therefore, even the State itself could not thereafter question the validity of the organization of such district in *quo warranto* proceedings brought in the name of the people of the State by the attorney general.⁸ This ruling we deem to be emi-

⁴ See cases in the last note.

See, also, *People v. Selma Irr. Dist.*, 98 Cal. 206, 42 Pac. Rep. 1047; *People v. Perris Irr. Dist.*, 132 Cal. 289, 64 Pac. Rep. 399; *Id.*, 142 Cal. 601, 76 Pac. Rep. 381; *People v. Linda Vista Irr. Dist.*, 128 Cal. 477, 61 Pac. Rep. 86.

⁵ *Quint v. Hoffman*, 103 Cal. 506, 37 Pac. Rep. 514; *Miller v. Perris Irr. Dist. (Cal.)*, 85 Fed. Rep. 693, 92 Fed. Rep. 263, where it is held that, where a reputed irrigation district is acting under forms of law, unchallenged by the State, the validity of its organization can not be attacked, either directly or collaterally, by a private individual.

⁶ *Purdin v. Washington etc. Assn.*, 41 Wash. 394, 83 Pac. Rep. 773.

⁷ *Crall v. Poso Irr. Dist.*, 87 Cal. 140, 26 Pac. Rep. 797.

⁸ *People v. Linda Vista Irr. Dist.*, 128 Cal. 477, 61 Pac. Rep. 86, where the Court said: "If a proceeding in *quo warranto* by the State must be resorted to in order to test the *de jure* character of these corporations, the confirmatory Act would serve no purpose on the statute books, if the State be not bound by the judgment rendered in the proceeding. Indeed, it would seem, in the light of the above decisions of this Court, that this statute was enacted for the very object of binding the State."

That *quo warranto* proceedings brought by a State against an irrigation district is not a Federal question, see *People ex rel. Brady v. Brown's Valley Irr. Dist.*, 119 Fed. Rep. 538.

nently correct. It would certainly be a strange condition of affairs, if, in the face of a judgment rendered by a duly authorized court confirming the proceedings for organization of one of these irrigation districts and validating its issued bonds, the State itself could maintain an action, in which a judgment might be rendered invalidating both the proceedings and the bonds issued.

§ 1409. A district can not plead illegality of its own organization.—As the validity of the proceedings for the organization of an irrigation district can not be collaterally attacked,¹ so, too, an irrigation district will not be permitted to plead the illegality of its own organization, and thus defeat the collection of its outstanding bonds or accrued interest thereon. As held by the Federal Court, such a defense can not be pleaded by the district itself for the purpose of defeating obligations which it incurred while acting as a *de facto* corporation.² As was said by Mr. Justice Peckham, in a case where a district had been duly organized under the law, and where the organization had been confirmed by the court, and bonds issued and also confirmed, and the bonds sold and the money realized therefrom had been used in the construction of the works, and in a suit for the collection of the accrued interest upon the bonds the district interposed the defense upon a technical point that the district was illegally organized: "In the case of *Douglass Co. v. Bolles*,³ a case involving facts somewhat similar, this Court said: 'Common honesty demands that a debt thus incurred should be paid.' That sentiment has lost no force by the lapse of time, and we think that it applies in its full strength to this case."⁴

§ 1410. Proceedings under the laws—The petition for organization.—The proceedings which must be taken for the organization of irrigation districts, the acquisition of property, issuance of bonds, and other subjects in the various States adopting these district laws are largely the same. We will therefore discuss these subjects together.¹ An irrigation district being a public corporation,

¹ See Sec. 1408.

² *Herring v. Modesto Irr. Dist.*, 95 Fed. Rep. 705, 717.

³ 94 U. S. 104, 24 L. Ed. 46.

⁴ *Tulare Irr. Dist. v. Shepard*, 185

U. S. 1, 46 L. Ed. 773, 22 Sup. Ct. Rep. 531; affirming *Id.*, 94 Fed. Rep. 1.

¹ For corporate nature of irrigation districts, see Sec. 1404.

its organization is instituted by the people owning lands within the boundaries of the proposed district. For the purpose of establishing such a district organization, a petition must be filed with the board of county commissioners, or county supervisors, as the case may be, of the county in which the lands, or the greatest portion thereof, are situated. The petition shall state that it is the purpose of the petitioners to organize an irrigation district, under the provisions of the law authorizing the same, a general description of the boundaries of such proposed district, the means proposed to supply water for the irrigation of the lands embraced therein, and praying that the said board define and establish the boundaries of said proposed district and submit the question of the final organization of the district to a vote of the land owners, or the qualified electors, as the case may be, within the proposed district. In Utah, which State has the most modern of these district laws and where the defects in the laws of the other States were sought to be corrected, the petition must be signed not only by a majority of the land owners within the proposed district, but also by those who are the owners in the aggregate of a majority of the whole number of acres belonging to the land owners within the proposed district.² But, to the original petition for organization, the most of the States do not require this majority to be the signers. The petition is but a preliminary matter and not prejudicial to the rights of any party.³

² Laws Utah, 1909, p. 144, Sec. 2.

³ In California, the petition must be signed by a majority in number of the holders of title, or evidence of title, to lands within such proposed district, and representing the majority in value of said lands, according to the equalized county assessment roll or rolls for the year last preceding. Gen. Laws Cal., Henning, 1908, p. 559, Secs. 1, 2, as Sec. 2 was amended in 1909; Laws, 1909, p. 12; Kerr's Supp., 1906, 1909, p. 1647.

In Colorado, the petition must be signed by a majority of the resident freeholders within said proposed district, and who shall also be the owners in the aggregate of a majority of the whole number of acres belonging to

the resident freeholders therein. Laws Colo., 1905, p. 246, Sec. 2.

In Idaho, it must be signed by 50 or a majority of the holders of title or evidences of title, to at least one-fourth part of the total area of land which will be assessable for the purposes of the district. Laws Idaho, 1903, p. 150, Secs. 1, 2.

See *Gem Irr. Dist. v. Johnson*, 18 Idaho 386, 109 Pac. Rep. 845, where it is held that "the holders of title or evidence of title," or entrymen "on lands under any law of the United States or of this State," are competent to sign the petition.

In Kansas, the petition must be signed by three-fifths of the resident land owners. See Laws Kan., 1891, p.

The petition in this respect must strictly comply with the statute of the State where the district is sought to be organized.⁴

In Montana the law provides that the proceedings for the organization of an irrigation district shall be initiated by filing with the clerk of the district court a petition signed by the requisite number of owners setting forth the general requisites of such petitions, as stated above. It also provides that the court or judge shall fix the time and place for the hearing of the petition and direct a notice to be given by the clerk for publication. Power is given the court to adjourn the hearing from time to time. At the hearing, the court is required to hear and determine whether all of the requirements of the statute have been complied with, and for that purpose shall hear all competent and relevant testimony. It must determine what lands shall be included and what lands excluded; the court making such changes in the boundary of the proposed district as may be necessary for that purpose. If it is found that the petition substantially complies with the requirements of the statute, an order must be made by the court (1) setting forth the findings and allowing the petition; (2) establishing the district; (3) giving accurate de-

243, Secs. 1, 2; Gen. Stat. of Kan., 1909, Sec. 4480.

In Nebraska, it must be signed by a majority of the resident freeholders who are qualified electors. Laws Neb., 1905, p. 694, Secs. 1, 2; Comp. Stat. of Neb., 1911, Sec. 6477.

In Nevada the petition must be signed by a majority of the tax payers within the proposed district. Laws Nev., 1891, p. 106, Secs. 1, 2; Revised Laws Nev., 1912, Secs. 7323, 7324.

In Washington, 50 or a majority of the land owners, whose property is susceptible of one mode of irrigation must sign the petition. Rem. & Bal. Ann. Codes, 1910, Sec. 6496.

See, also, *Rothchilds Bros. v. Rolinger*, 32 Wash. 307, 73 Pac. Rep. 367.

⁴ *Cullen v. Glendora W. Co.*, 113 Cal. 503, 39 Pac. Rep. 769, 45 Pac.

Rep. 822, 1047; *Fallbrook Irr. Dist. v. Abila*, 106 Cal. 365, 39 Pac. Rep. 794; *In re Central Irr. Dist.*, 117 Cal. 382, 49 Pac. Rep. 354, holding that owners of small lots in towns are not qualified signers of the petition.

As to the description of the lands in the petition, see *Central Irr. Dist. v. De Lappe*, 79 Cal. 351, 21 Pac. Rep. 825; *In re Madera Irr. Dist. Bonds*, 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106.

An attorney in fact, duly appointed in writing, has full power to sign such petition, and will bind the principal as fully and to all intents and purposes as if he had personally signed the same. *Black Canyon Irr. Dist. v. Marple*, 19 Idaho 176, 112 Pac. Rep. 766.

See, also, upon the general proposition, *O'Neill v. Yellowstone Irr. Dist.*, 44 Mont. 492, 121 Pac. Rep. 283.

scription of the lands included; (4) dividing the district into three divisions; and (5) appointing three competent persons as commissioners, one for each division, to conduct the affairs of the district. "This order is made conclusive upon all the owners of land in the district, and is 'final unless appealed from to the Supreme Court within sixty days from the date of the entry.'"⁵ It will be noticed that this statute is unique in this, that it requires no election of the land owners or electors of the proposed district, but that the order of the court establishing such district is final and conclusive. The law has been upheld by the Supreme Court of the State.⁶ Such petition must be published for the time and in the manner prescribed by the law, together with a notice signed by the petitioners, or a committee thereof, giving the time and the place of the presentation of the petition to the board of county commissioners.⁷ No personal notice to the parties interested is necessary of the presentation of the petition or the hearing thereon.⁸

§ 1411. Proceedings—Examination by State Engineer.—For the protection of all parties interested in the proposed district, some of the States provide that accompanying the petition there must be maps and plats of the lands to be included showing the source of the water proposed to be used, and plans and estimates of the proposed works. Before the hearing by the county board, the maps and plats must have been submitted to the State Engineer, who must make a report as to the feasibility and practicability of the proposed irrigation system. In Idaho it is required that the petition of the land owners, maps, and plats and other papers shall be filed

⁵ O'Neill v. Yellowstone Irr. Dist., 44 Mont. 492, 121 Pac. Rep. 283.

⁶ O'Neill v. Yellowstone Irr. Dist., *supra*.

⁷ The organization of district held valid where the names of the petitioners were not published with the notice, in an action to collect interest on bonds. Tulare Irr. Dist. v. Shepard, 185 U. S. 1, 46 L. R. A. 773, 22 Sup. Ct. Rep. 531; affirming *Id.*, 94 Fed. Rep. 1.

See, also, Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 160—Kin. on Irr.

369, 17 Sup. Ct. Rep. 56; reversing *Id.*, 68 Fed. Rep. 948; Ahern v. High Line Irr. Dist., 39 Colo. 409, 89 Pac. Rep. 963.

Upon the subject of notice, and that same need not be signed by all the petitioners, see Imperial Water Co. No. 1 v. Board of Supervisors of Imperial County, — Cal. —, 120 Pac. Rep. 780.

⁸ Crall v. Poso Irr. Dist., 87 Cal. 140, 26 Pac. Rep. 797.

See, also, cases cited *supra*.

in the office of the State Engineer at least four weeks before the date set for the hearing. It is then made the duty of the State Engineer to examine such petition, maps, and other papers and, if he deems it necessary, to further examine the proposed district, the waters proposed to be acquired, and the location and plans of the works to be constructed. The State Engineer must then make a report upon the matter in such form as he deems advisable, and submit the same to the county board, at the meeting set for the hearing of the petition. Whenever the State Engineer shall report to the board against the organization of such district, the board must refuse the petition, unless requested in writing by three-fourths of the land owners in the proposed district. The statute then provides for the amendments of the plans and a resubmission of the matter to the county board.¹

By these provisions there is a combination of the laws of State control² and the irrigation district laws. From the early experience in California, it has been found better that every State having the irrigation district law should also have a competent State administration as a protection not only to the bondholders but also to the farmers themselves.

§ 1412. Proceedings—Hearing on petition—Settlement of boundaries of district.—Upon the date fixed in the notice for the hearing on the petition, and it appearing that the petition and the notice of the hearing are regular and in accordance with the statute, the county commissioners must proceed with the hearing, which may be adjourned from time to time, not exceeding a time fixed by the statute.

No provision for a hearing of the land owners is necessary prior to the organization of an irrigation district which is a public corporation created by a vote of the electors at an election called by the

¹ See Idaho Codes, 1908, Sec. 2374. See, also, *Knowles v. New Sweden Irr. Dist.*, 16 Idaho 217, 101 Pac. Rep. 81.

In Wyoming, "said maps and plats must have first been submitted to the State Engineer for his examination,

and must be accompanied by his report as to the feasibility, practicability, and probable cost of the proposed irrigation system." Wyo. Comp. Stat., 1910, Sec. 831.

² For the law of State control, see Secs. 1337-1367.

board of supervisors on a petition of freeholders.¹ The definite boundaries of the district must be fixed; lands may be excluded from the district by the board, provided that the board shall not modify the proposed boundaries described in the petition so as to change the objects of said petition, or so as to exempt from the operation of the law any lands within the boundaries proposed susceptible of irrigation by the same system of water works applicable to other lands in such proposed district.² It is also provided that at such hearing contiguous lands not described in the petition, which are susceptible from the same source of supply and system of works, may, upon application of the owner or owners, be included in such district. And upon this subject it is held that upon the question of fact as to what lands will or will not be benefited, the judgment of the board is conclusive upon the courts.³ Therefore, the only way to overthrow such a decision is to show fraud or bad faith.⁴ The fact that public lands are included in the irrigation district will not invalidate the organization of the district.⁵ However, where lands belonging to the United States are included within the limits of a district, which lands were subsequently sold by the Government to third persons, neither the Government nor the pur-

¹ *In re Madera Irr. Dist. Bonds*, 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106.

See, also, *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; reversing *Id.*, 68 Fed. Rep. 948, where it is said: "The publication of the notice of the proposed presentation of the petition is sufficient notification to those interested in the question, and gives them an opportunity to be heard before the board."

² See *Central Irr. Dist. v. De Lappe*, 79 Cal. 351, 21 Pac. Rep. 825.

³ *Modesto Irr. Dist. v. Tregoe*, 88 Cal. 334, 26 Pac. Rep. 237; dismissed, 164 U. S. 179, 41 L. Ed. 395, 17 Sup. Ct. Rep. 52; *Cullen v. Glendora W. Co.*, 113 Cal. 503, 39 Pac. Rep. 769, 45 Pac. Rep. 822; *Central Irr. Dist. v. De Lappe*, 79 Cal. 351, 21 Pac.

Rep. 285; *In re Madera Irr. Dist. Bonds*, 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106.

⁴ *Herring v. Modesto Irr. Dist.*, 95 Fed. Rep. 705; *Cullen v. Glendora W. Co.*, 113 Cal. 503, 39 Pac. Rep. 769, 45 Pac. Rep. 822, 1047, where it is said: "What the board did in this respect was within its discretionary power, and the only available objection to it would be abuse of power, or fraud."

⁵ *Cullen v. Glendora W. Co.*, 113 Cal. 503, 39 Pac. Rep. 769, 45 Pac. Rep. 822; *In re Madera Irr. Dist. Bonds*, 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106; *Modesto Irr. Dist. v. Tregoe*, 88 Cal. 334, 26 Pac. Rep. 237; dismissed, 164 U. S. 179, 41 L. Ed. 395, 17 Sup. Ct. Rep. 52.

chaser having assented to the inclusion of the lands within the district, such lands are not only not liable under a judgment rendered against the district in an action on its bonds, but are also exempt from any assessment under the statute for the payment of the bonds.⁶ The fact that some of the property within a district will receive no direct benefit from the irrigation of the same, or that all the property which will be benefited is not included within the taking district, will not render the proceedings for the formation of the district invalid.⁷ Therefore an incorporated town may lawfully be included if the statute so provides, within the boundaries of an irrigation district and the town lots assessed for its benefit, upon the theory that although the town lots are incapable of irrigation they will be indirectly benefited and that they may therefore be assessed for a public improvement by the district.⁸

However, in those jurisdictions where the law excepts land, which, from some natural cause, can not be irrigated from the proposed system, the question is jurisdictional and is a question for the court to decide.⁹ Provisions are also made in some of the States to exclude from the operation of the district all lands within the boundaries of districts which have an ample independent water right.¹⁰

When the boundaries of any proposed district shall have been duly examined and defined, the board shall forthwith make an order allowing the prayer of the petition, and define and establish the boundaries of the said district. Also the said commissioners shall, by a further order, call an election to determine whether or not the district shall be permanently organized and to elect its board of

⁶ Nevada Nat. Bank v. Poso Irr. Dist., 140 Cal. 344, 73 Pac. Rep. 1056.

⁷ *In re Madera Irr. Dist. Bonds*, 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106; *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; reversing *Id.*, 68 Fed. Rep. 948; *Pioneer Irr. Dist. v. Bradbury*, 8 Idaho 310, 68 Pac. Rep. 295; *Turlock Irr. Dist. v. Williams*, 76 Cal. 360, 18 Pac. Rep. 379.

⁸ *In re Madera Irr. Dist. Bonds*, *supra*; *Modesto Irr. Dist. v. Tregoe*,

88 Cal. 334, 26 Pac. Rep. 237; dismissed, 164 U. S. 179, 41 L. Ed. 395, 17 Sup. Ct. Rep. 52; *Nampa etc. Dist. v. Brose*, 11 Idaho 474, 83 Pac. Rep. 499.

⁹ *Andrews v. Lillian Irr. Co.*, 66 Neb. 458, 92 N. W. Rep. 612, 97 N. W. Rep. 336; *Sowerwine v. Central Irr. Dist.*, 85 Neb. 687, 124 N. W. Rep. 118.

¹⁰ *State v. Several Parcels of Land*, 81 Neb. 770, 114 N. W. Rep. 282; *Knowles v. New Sweden Irr. Dist.*, 16 Idaho 217, 101 Pac. Rep. 81.

directors and the other officers provided by law. And for the purpose of such election the board must divide the district into divisions as provided by the law, which divisions shall constitute the election precincts. In the most of these Acts it is provided that, in the hearing of such petition, the board of county commissioners shall disregard any informality therein, and in case they deny or dismiss the same for any reason on account of the provisions of the Act not having been complied with, which are the only reasons upon which they shall have the right to refuse or dismiss the same, they shall state their reasons in detail, which shall be entered upon the records, and in case these reasons are not well founded, a writ of mandamus shall, upon proper application therefor, issue out of the district court of said county, compelling them to act in compliance with the law. In California, by Section 4 of the Act of 1897, the right of appeal from said order was attempted to be given to any party interested who is a party to the record. This provision, however, was held by the Supreme Court of the State to be "unconstitutional and void."¹¹

§ 1413. Proceedings — The election on organization. — The county board, after the orders have been made as set forth in the preceding section, shall cause a notice¹ embodying said orders in substance to be published as prescribed by the law giving public notice of the election for the organization of the district, the time and places thereof, and the matters to be submitted to vote. Such notice shall require the voters to cast ballots which shall contain the words: "Irrigation District—Yes," or "Irrigation District—No," or words equivalent thereto.²

At the date set, the election must be held which shall finally determine whether or not the district is to be permanently organized. The first officers of the district, if the result is favorable to its organization, are also elected at this election. And thereafter they shall be elected at the time and in the manner provided by the law.

¹¹ Chinn v. Superior Court, 156 Cal. 478, 105 Pac. Rep. 580.

See, also, Inglin v. Hoppin, 156 Cal. 483, 105 Pac. Rep. 582.

¹ See Sec. 1412.

² For the notice of election, see Central Irr. Co. v. De Lappe, 79 Cal. 351, 21 Pac. Rep. 825.

Such elections shall be conducted as nearly as practicable in accordance with the general election laws of the State.³

The qualifications of the voters upon the question of the organization of the district differs in the different States, depending upon the laws, and as they are restricted and limited by the constitutions of the respective States. Also the majority of the votes necessary for the organization of the district varies in the different States. Upon the question of the eligibility of persons to vote upon the organization of a district, in California all persons are entitled to vote who possess all of the qualifications required of electors under the general election laws of the State.⁴ But in those States whose constitutions permit a property qualification in order to vote upon this and similar subjects, the legislature may fix such a qualification. Therefore, in Utah it is provided that at all elections held under the provisions of the law all persons shall be entitled to vote who are owners of agricultural lands within said district and that, too, whether or not they are residents within the proposed district or not. Provided, that at all elections each elector shall be entitled to cast one vote for each acre of land or fraction thereof owned by such elector, and shall sign the ballot and indicate opposite his or her name the number of acres owned by the elector casting the ballot.⁵ In Colorado, at said election, and all elections held under the provisions of the law, all persons who are qualified electors within the proposed district and are resident freeholders and shall have paid a property tax in said proposed district during the year preceding such election shall be entitled to vote and none others.⁶

³ Central Irr. Co. v. De Lappe, 79 Cal. 351, 21 Pac. Rep. 825; People v. Perris Irr. Dist., 142 Cal. 601, 76 Pac. Rep. 381.

It is held in Idaho that in the elections the district is governed by the general election laws of the State, which provide for a secret ballot. Pioneer Irr. Dist. v. Walker, 20 Idaho 605, 119 Pac. Rep. 302.

⁴ Gen. Laws Cal., Hen., 1908, p. 561, Sec. 8.

The fact that those who have no interest in the lands affected may by

their votes make the necessary majority in favor of creating an irrigation district, or even that the owners of land may be non-residents, and have no voice in the matter, does not make the statute invalid. *In re Madera Irr. Dist. Bonds*, 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106.

⁵ Laws Utah, 1909, p. 146, Sec. 4.

⁶ Laws Colo., 1905, p. 249, Sec. 4; Colo. Stat. Ann., Morr. Ed., 1911, Sec. 3443.

The laws of some of the other States also require similar property qualifications.

The laws also provide that upon a date fixed the county board must canvass the votes cast at such election for organization. And upon the subject of the requisite majority necessary for that purpose the statutes of the various States differ. In Colorado, Nebraska, and Utah a majority is sufficient; but in California, Idaho, Nevada, and Washington, there must be at least two-thirds of all the votes cast in favor of organization, and in Kansas three-fifths, in order to declare the district duly organized. And the persons receiving the highest number of votes are duly elected as its officers. The said board is then required to make an order entered upon their minutes, declaring such territory duly organized as an irrigation district, under the name and style theretofore designated and shall declare the persons receiving respectively the highest number of votes for such several offices duly elected to such offices. The said board shall then cause a copy of such order, and in some cases a plat of said district, duly certified, to be immediately filed for record in the office named of each county in which any portion of the lands are situated, and no county board of any county, including any portion of such district, shall after the date of the organization of such district, allow another district to be formed including any of the land of such district. And from and after the date of such filing, the organization of such district shall be complete, and the officers thereof shall immediately enter upon the duties of their respective offices, upon qualifying according to law, and shall hold their offices, respectively, until their successors are elected and qualified.

The most of the laws provide that the validity of the election may be contested; but whether it is so provided in the statute or not they may be, but in all such contests the provisions of the law are to be liberally construed.⁷

The irrigation district now being formally organized, it is deemed in law a public corporation;⁸ its organization can not be collaterally

⁷ Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 Pac. Rep. 825; *In re Madera Irr. Dist. Bonds*, 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106; *In re Central Irr. Dist.*, 117 Cal. 382, 49 Pac. Rep. 354; *Hertle v. Ball*, 9 Idaho 193, 72 Pac. Rep. 953.

⁸ For corporate nature of irrigation districts, see Sec. 1404.

attacked;⁹ and the district itself can not plead the illegality of its own organization in suits against it.¹⁰ In most of the laws it is provided that judicial notice shall be taken in all actions, suits, and judicial proceedings in any court of the State where organized, of the organization and existence of any irrigation district of the State; and its due and lawful formation and organization shall not thereafter be questioned in any action, suit, or proceeding whether brought under the provisions of the Act or otherwise.¹¹

§ 1414. Proceedings—Duties and powers of boards of directors.

—The laws provide that the directors, having been elected and having qualified, shall organize as a board and elect their president and other officers. Some of the statutes also provide that the directors shall divide themselves into classes by lot; the terms of office of each class to expire at different times. By this means some of the old members are always on the board. Regular meetings of the board are also provided for. The board is also given the power, and it is made their duty, to adopt a seal, manage, and conduct the affairs and business of the district, make and execute all necessary contracts, employ such agents, attorneys, officers, and employees as may be required, and prescribe their duties, establish equitable rules and regulations for the distribution and use of the water among the owners of the land within the district, and generally to perform all such acts as shall be necessary to fully carry out the purposes of the law.¹ The diverting, storing, carrying, or other works of the district must also be constructed under the supervision of the board.

§ 1415. District may sue and be sued.—The laws also provide that the board of directors of a district is authorized and empowered to institute and maintain any and all actions and proceedings, suits at law or in equity necessary and proper to fully carry out the provisions of the law; or to enforce, maintain, protect, or preserve

⁹ See Sec. 1408.

¹⁰ See Sec. 1409.

¹¹ See Laws Utah, 1909, p. 153, Sec. 15.

¹ Under the old district law of Utah (see Hist. Law in Utah, Sec. 1401), it was held that it was the duty of the board to assume jurisdiction over

the whole district; that they can not assume the management of a part of the district and neglect another part; and that, where this is attempted, mandamus will lie to compel the board to perform its duty under the law. *Harris v. Tarbet*, 19 Utah 325, 57 Pac. Rep. 33.

any and all rights, privileges, and immunities created by the law or acquired in pursuance thereof. And in all courts, actions, suits, or proceedings the said board may sue, appear, and defend in person or by attorneys and in the name of such irrigation district.¹

An action will lie for damages against an irrigation district.² Irrigation districts in a proper cause may be enjoined from doing or performing certain acts.³ An action for mandamus will also lie against an irrigation district, compelling it to deliver water to the consumers thereunder;⁴ to enforce the district to pay its bonds;⁵ and also to compel a district to keep its works in repair.⁶ In fact, any action which will lie against any municipal or public corporation will lie against an irrigation district.

§ 1416. Proceedings—Power of board—The acquisition of property.—The board is also given the power to enter upon the lands to make surveys. They may locate the necessary diverting works and canals upon any lands deemed by them best for the purpose for conducting the water to the places of use. They are also given the power to acquire lands in order to carry out the purposes of the law by purchase or condemnation; and in some instances water rights may also be acquired by condemnation.¹ The title to all the property acquired under the provisions of the law immediately vests in such irrigation district, in its corporate name, and is held by

¹ *Boehmer v. Big Rock Creek Irr. Dist.*, 117 Cal. 19, 48 Pac. Rep. 908; *Hewitt v. San Jacinto etc. Irr. Dist.*, 124 Cal. 186, 56 Pac. Rep. 893, where it was held that a district was liable for failure to furnish water under a contract.

² *McPherson v. Alta Irr. Dist.*, 14 Cal. App. 353, 112 Pac. Rep. 193.

See, also, action for damages, Chap. 83.

³ *Teeter v. Nampa & Meridan Irr. Dist.*, 19 Idaho 355, 114 Pac. Rep. 8.

⁴ *Gerber v. Nampa & Meridan Irr. Dist.*, 16 Idaho 1, 116 Pac. Rep. 104.

⁵ *Hewel v. Hogin*, 3 Cal. App. 248, 84 Pac. Rep. 1002.

See, also, Sec. 1419.

See, also, for mandamus, Chap. 82.

⁶ *McPherson v. Alta Irr. Dist.*, 14 Cal. App. 303, 112 Pac. Rep. 193.

¹ For right to acquire lands by condemnation, see *Rialto Irr. Dist. v. Brandon*, 103 Cal. 384, 37 Pac. Rep. 484; *Knowles v. New Sweden Irr. Dist.*, 16 Idaho 217, 101 Pac. Rep. 81; *Andrews v. Lillian Irr. Co.*, 66 Neb. 458, 97 N. W. Rep. 336, 92 N. W. Rep. 612.

See, also, *Stimson v. Alessandro Irr. Dist.*, 135 Cal. 389, 67 Pac. Rep. 496, 1034; *Baxter v. Dickinson*, 136 Cal. 185, 68 Pac. Rep. 601; *Merchants' Bank v. Escondido Irr. Dist.*, 144 Cal. 329, 77 Pac. Rep. 937.

such district in trust for "the uses and purposes set forth in the Act."² Neither the irrigation district nor its board of directors has any power to transfer, sell, or otherwise dispose of the property of the district, within and under its jurisdiction.³

In the payment for the property acquired by the board, the majority of the statutes provide that it may be paid for in cash or by the bonds of such district at their par value without the previous offer of such bonds for sale.⁴ But the board has no powers in this respect except those which are expressly conferred by the statute or are implied as necessary to carry out the main purposes of the Act. Therefore bonds issued in payment for certain certificates of another company, entitling the holder to a certain amount of water, are held void.⁵ But for the direct purchase of water rights, as we view the law, they may be paid for either in cash or in bonds. Again, where the irrigation district has purchased the property of an irrigation company including its water right, it may, as a part consideration therefor, agree to deliver water to previous purchasers from the company, and an action will lie against the district for its failure to so deliver the water, even though the lands lie outside the district.⁶

As to whether or not a district, in the contract for purchase of water rights from the owners of the same where such water was used upon lands within the district, can agree that such lands shall be exempt from assessment as a part consideration of the purchase price and that the lands shall be furnished water by the district, we are of the opinion that such a contract would be *ultra vires* upon the part of the board of directors attempting to make such a contract. The statutes expressly provide how water rights may be acquired by a district and that they may be acquired by condemnation if it is necessary; and, again, the statutes also expressly provide how

² Laws Utah, 1909, p. 152, Sec. 13; *Jenison v. Redfield*, 149 Cal. 500, 87 Pac. Rep. 62.

³ *Thompson v. McFarland*, 29 Utah 455, 82 Pac. Rep. 478.

⁴ Laws Colo., 1905, p. 253, Sec. 11; Laws Utah, 1909, p. 150, Sec. 11.

The original Wright Law, Section 12, provides that, in case of a purchase of land, the directors may pay

for the same with the bonds of the district issued under the Act at their par value. *Hughson v. Crane*, 115 Cal. 404, 47 Pac. Rep. 120.

⁵ *Stimson v. Alessandro Irr. Dist.*, 135 Cal. 389, 67 Pac. Rep. 496, 1034; *Hughson v. Crane*, 115 Cal. 404, 47 Pac. Rep. 120.

⁶ *Hewitt v. San Jacinto etc. Irr. Dist.*, 124 Cal. 186, 56 Pac. Rep. 893.

assessments may be levied and collected upon the lands within the district. There are no provisions in any of the statutes for the exemption of any lands properly included within a district from the assessments levied by the district, or for any rebates for such assessments on any account. The board has no power to make any contracts except those which are expressly conferred by the statute, or are implied as necessary to carry out the main purposes of the Act. And such a contract as this would at least be unnecessary. However, there seem to be no cases adjudicating this express point.

In a late case in Idaho, however, it was held that where a grant conveyed to an irrigation district a free and unincumbered right and title in and to the waters of a canal, it carried with it an unqualified right to the extent of the water conveyed in the appropriation itself and the right to have the water flow through the canal, and the grantor perpetually abandoned the right to ever thereafter charge, collect, or realize any profit or rental for the use of the water conveyed.⁷

The board of directors is also given the power to construct all works necessary for the district. Under the terms of the Acts the payment of all contracts should be in cash and not in bonds. However, it is held that where an irrigation district in order to pay for the work of constructing a ditch issued bonds and a person contracted to purchase the issue at a certain sum, but being unable to carry out his agreement they were given to the contractor for the work, a contention that the bonds were issued without consideration was of no moment; and it was therefore held that no provision of the statute was violated and neither could the district complain.⁸

§ 1417. Proceedings—The issuance of bonds.—The Acts all provide in effect that for the purpose of constructing or purchasing or acquiring necessary reservoir sites, reservoirs, water rights, canals, ditches, and other works and otherwise carrying out the provisions of the Acts; and also whenever the construction fund has been exhausted by expenditures authorized under the provisions of the Acts and when it is necessary to raise additional money for said purposes, that the board of directors may estimate and determine the amount

⁷ *Nampa & Meridan Irr. Dist. v. Gess*, 17 Idaho 552, 106 Pac. Rep. 993. ⁸ *Kinkade v. Witherop*, 29 Wash. 10, 69 Pac. Rep. 399.

of money necessary to be raised for such purposes, and call a special election, at which election there shall be submitted to the land owners or electors, as the case may be, of the district whether or not the bonds of the said district shall be issued in the amount so determined. But prior to the calling of such an election, the directors must make an estimate of the probable amount of the money needed; and where the money to be realized is for the construction of works, an estimate must be made of their probable cost, based upon some definite plan.¹

In Idaho, before such special election can be called, all surveys, examinations, plans, maps, proper field notes, and estimates are required to be made under the direction of a competent irrigation engineer and must be certified to by him and filed with the board, and the board must submit the same to the State Engineer for examination and report. The State Engineer is then required to examine the same and make a written report on the whole subject to the board. Upon receiving such report the board of directors is then required to determine the amount of money necessary to be raised, and then may call the special election at which the question must be submitted to the electors of the district.²

1 Cullen v. Glendora W. Co., 113 Cal. 503, 39 Pac. Rep. 769, 45 Pac. Rep. 822, 1047; Willow Sprs. Irr. Dist. v. Wilson, 74 Neb. 269, 104 N. W. Rep. 165.

The action of the board is not invalid because taken at an adjourned session of a regular meeting of the board. Fallbrook Irr. Dist. v. Abila, 106 Cal. 355, 39 Pac. Rep. 793.

Under the California law, such bonds can only be issued to acquire property and for the construction of an irrigation system, and bonds issued in payment for certificates of another irrigation company entitling the holders to a certain amount of water are void. Stimson v. Alessandro Irr. Dist., 135 Cal. 389, 67 Pac. Rep. 496, 1034;

See, also, Hall v. Hood River Irr. Dist., 57 Ore. 69, 110 Pac. Rep. 405; Stowell v. Rialto Irr. Dist., 155 Cal. 215, 100 Pac. Rep. 248; Haese v.

Heitzeg, 159 Cal. 569, 114 Pac. Rep. 816; Russell v. Irish, 20 Idaho 194, 118 Pac. Rep. 501; Bissett v. Pioneer Irr. Dist., — Idaho —, 120 Pac. Rep. 461; O'Neill v. Yellowstone Irr. Dist., 44 Mont. 492, 121 Pac. Rep. 283.

See, also, *In re* Bonds of South San Joaquin Irr. Dist., — Cal. —, 119 Pac. Rep. 198.

² See Idaho Rev. Laws, 1909, Secs. 2396-2398, 2399, as amended by Laws, 1911, p. 199.

See, also, Knowles v. New Sweden Irr. Dist., 16 Idaho 217, 101 Pac. Rep. 81.

In Idaho it is held that under the provisions of Article 1, Section 20, of the constitution, the legislature has the power and authority to prescribe a proper qualification for any person to vote at an election creating an indebtedness; but the Court held that by the adoption of Section 2396 of the

The notices of such election must be given as prescribed by the respective statutes. Such notice shall specify the time of holding the election, the amount of the bonds proposed to be issued; and such election must be held and the result thereof determined and declared as provided by the respective Acts; and in many of the statutes it is provided that it shall be held as nearly as practicable in conformity with the provisions of the Acts governing the election of officers; provided, that no informalities in conducting such election shall invalidate the same, if the election shall have been otherwise fairly conducted.³ At such election the ballots shall contain the words "Bonds—Yes," or "Bonds—No," or words equivalent thereto. After the election the board of directors must canvass the votes; and upon the question of the necessary majority in order to carry such an election, the statutes also differ. In California and Colorado it is a majority of the votes cast; but in other States it varies, and in Utah it is two-thirds. If the necessary majority of the votes cast are in favor of the issuance of the bonds, the board of directors shall cause the bonds in the said amount to be issued from time to time as needed.⁴

The statutes of the States also prescribe the series in which the bonds shall be issued, their form, denomination, and when the

Revised Codes, such a qualification was not provided for in voting at an election held for the purpose of issuance of bonds of an irrigation district, and no such qualification has been required by the legislature. *Bissett v. Pioneer Irr. Dist.*, — *Idaho* —, 120 Pac. Rep. 461.

³ Where the California law required that in elections called to vote upon the issue of bonds the polls shall be opened at sunrise and close at sunset, an election for such purpose, held the 28th day of November, at which the polls were kept open until 5 o'clock, was void. *Fallbrook Irr. Dist. v. Abila*, 106 Cal. 355, 39 Pac. Rep. 793.

But see *Baltes v. Farmers' Irr. Dist.*, 60 Neb. 310, 83 N. W. Rep. 83, where it was held that, where it affirmatively appears that an election was

fairly conducted, the failure to keep the polls open for the entire time required by the statute was a harmless irregularity.

See, also, upon the subject of these elections, *Baxter v. Dickinson*, 136 Cal. 185, 68 Pac. Rep. 601; *Kinkade v. Witherop*, 29 Wash. 10, 69 Pac. Rep. 399; *Hughson v. Crane*, 115 Cal. 404, 47 Pac. Rep. 120.

See, also, *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; reversing *Id.*, 68 Fed. Rep. 948.

⁴ *Sechrist v. Rialto Irr. Dist.*, 129 Cal. 640, 62 Pac. Rep. 261, where it is held that the Wright Irrigation Act contemplates that bonds voted by an irrigation district shall be issued by the board from time to time as needed.

principal and interest are payable. Therefore, the power of these public corporations to issue bonds is to be exercised in the manner prescribed by the statute.⁵ It is also provided that when the money realized from the sale of one issue of bonds has become exhausted by the expenditures authorized therefor, and it becomes necessary to raise additional money for such purposes, that additional bonds may be issued by submitting the question at another special election in the manner as prescribed above; provided, also, the lien for taxes, for the payment of the interest and principal of any bond issue, shall be a prior lien to that of any subsequent bond issue.⁶ Where an election for bonds has been carried, their issuance may be compelled by mandamus proceedings.⁷

§ 1418. **Proceedings—The sale of bonds.**—The statutes provide that the county board may sell the bonds issued, as set forth in the previous section,¹ from time to time in such quantities as may be necessary and most advantageous to raise the money for the construction or the purchase of the canals or other works, or other property, for which they were issued. Before making any sale, the board is required at a meeting, by resolution, to declare its intention to sell a specified amount of the bonds so authorized, and the day and hour and place of such sale, and shall cause such resolution to be entered in the minutes. Notice of the sale must then be published in accordance with the provisions of the statute. The notice must state that sealed proposals will be received by the board at their office for the purchase of the bonds till the day and hour named in the resolution. At the time appointed the board must open the proposals and award the purchase of the bonds to the highest responsible bidder, and may reject all bids. In some States the board can not sell the bonds for less than the par value thereof;² in other States, however, the board may accept a percentage less than the

⁵ *Stowell v. Bialto Irr. Dist.*, 155 Cal. 215, 100 Pac. Rep. 248; *Anthony v. County of Jasper*, 101 U. S. 693, 25 L. Ed. 1005; *Wright v. East Riverside Irr. Dist.*, 138 Fed. Rep. 313, 70 C. C. A. 603.

⁶ See *Baxter v. Dickinson*, 136 Cal. 185, 68 Pac. Rep. 601; *Pioneer Irr.*

Dist. v. Campbell, 10 Idaho 159, 77 Pac. Rep. 328.

⁷ *Turlock Irr. Dist. v. Williams*, 76 Cal. 360, 18 Pac. Rep. 379; *Central Irr. Dist. v. De Lappe*, 79 Cal. 351, 21 Pac. Rep. 825.

¹ See Sec. 1417.

² *Gen. Stat. Cal., Henning*, 1908, p. 569, Sec. 32.

par value as fixed by the statute.³ The bonds can be disposed of only in the manner provided by the statute.⁴

Bona fide purchasers of bonds issued by these irrigation districts must take notice of the law under which they are issued and sold, and they can not recover thereon if the bonds show on their face that they were not issued in conformity with the statute,⁵ or if they were purchased with the knowledge of the purchaser that they were sold not in accordance with the provisions of the statute.⁶ The fact that a holder of bonds purchased them from the president of the district does not impeach the *bona fides* of his ownership where there is no law prohibiting the president of a district from purchasing or owning them.⁷

§ 1419. **Proceedings—The payment of bonds.**—The statutes provide that the bonds issued and sold as set forth in the preceding sections,¹ and the interest thereon, shall be paid by the revenue derived from the annual assessment upon the real property of the

³ In Utah and Colorado the board may accept 95 per cent of their face value.

⁴ *Hughson v. Crane*, 115 Cal. 404, 47 Pac. Rep. 120; *In re Central Irr. Dist.*, 117 Cal. 382, 49 Pac. Rep. 354, where it is held that, where the bonds of a district have been sold before the institution of confirmation proceedings, and the judgment rendered therein, that the district was duly organized, is reversed on appeal, the question touching the regularity of the sale will be left to be determined in an action by the bond holders against the district.

See, also, *Stimson v. Alessandro Irr. Dist.*, 135 Cal. 189, 67 Pac. Rep. 496; *Leeman v. Perris Irr. Dist.*, 140 Cal. 540, 74 Pac. Rep. 24; *In re Madera Irr. Dist. Bonds*, 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106; *Herring v. Modesto Irr. Dist.*, 95 Fed. Rep. 705; *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; revers-

ing *Id.*, 68 Fed. Rep. 948; *Tregea v. Modesto Irr. Dist.*, 164 Cal. 179, 41 L. Ed. 395, 17 Sup. Ct. Rep. 52; dismissing *Id.*, 88 Cal. 334, 26 Pac. Rep. 237; *Stowell v. Rialto Irr. Dist.*, 155 Cal. 215, 100 Pac. Rep. 248; *Miller v. Perris Irr. Dist.*, 99 Fed. Rep. 143; *Wright v. East Riverside Irr. Dist.*, 138 Fed. Rep. 313, 70 C. C. A. 603; *Settlers' Irr. Dist. v. Settlers' Canal Co.*, 14 Idaho 504, 94 Pac. Rep. 829.

See, also, *Rodgers v. Thomas*, 193 Fed. Rep. 952.

⁵ *Wright v. East Riverside Irr. Dist.*, 138 Fed. Rep. 313, 70 C. C. A. 603.

See, also, *Anthony v. County of Jasper*, 101 U. S. 693, 25 L. Ed. 1005.

⁶ *Stimson v. Alessandro Irr. Dist.*, 135 Cal. 389, 67 Pac. Rep. 496; *Hughson v. Crane*, 115 Cal. 404, 47 Pac. Rep. 120.

⁷ *Perris Irr. Dist. v. Thompson*, 116 Fed. Rep. 836, 54 C. C. A. 336.

¹ See Secs. 1417, 1418.

district, and the real property of the district shall be and remain liable to be assessed for such payments as provided by the Acts.²

Every treasurer of a district is required to keep a bond fund account. Out of this fund he is required to pay, when due, the interest and principal of the bonds of the district, and at the time and place specified in said bonds. In California it is also provided for the redemption of the bonds before they are due.³

An action in mandamus will lie by the bondholders of an irrigation district to enforce the payment of bonds.⁴ The fact that a plaintiff owns less than the entire issue of a series of the bonds of a district can not affect his right to maintain an action for their enforcement.⁵

§ 1420. Proceedings—Confirmation of bonds and organization of district.—The original Irrigation District Act of California of 1887¹ was added to by the supplemental statute of 1889, known as the "Confirmation Act."²

In the statutes of the other States the confirmatory provisions contained in this Act will be found embodied in the original Acts themselves as parts thereof. The statutes upon this subject provide that after the organization of an irrigation district special proceedings may be brought in the court having jurisdiction for the confirmation of the organization of the district and of the issue and sale

² See *San Diego v. Linda Vista Irr. Dist.*, 108 Cal. 189, 41 Pac. Rep. 291, 35 L. R. A. 33; *Cullen v. Glendora W. Co.*, 113 Cal. 503, 39 Pac. Rep. 769, 45 Pac. Rep. 822, 1047.

Section 17 of the original Wright Act, as amended by the Act of March 11, 1893, Stats. and Amdts. Cal., 1893, p. 175, attempted to provide for additional security for the bonds sold, by providing that the board of directors should have the power to pledge, by mortgage, trust deed, or otherwise, all property of the district. This was held by the Court to be unconstitutional. *Merchants' Bank v. Escondido Irr. Dist.*, 144 Cal. 329, 77 Pac. Rep. 937.

³ Gen. Stat. Cal., Henning, 1908, p. 575, Sec. 52.

For the special proceedings for funding bonds in California, see Gen. Laws Cal., Henning, 1908, pp. 593-596.

⁴ *Hewel v. Hogin*, 3 Cal. App. 248, 84 Pac. Rep. 1002; *Thompson v. Perris Irr. Dist.*, 116 Fed. Rep. 769; *Marra v. San Jacinto etc. Irr. Dist.*, 131 Fed. Rep. 780; *Board of Supervisors of Riverside County v. Thompson*, 122 Fed. Rep. 860, 59 C. C. A. 70.

⁵ *Perris Irr. Dist. v. Thompson*, 116 Fed. Rep. 836, 54 C. C. A. 336.

¹ For the history of law in California, see Sec. 1390.

² See Cal. Stats. and Amdts., 1889, p. 212.

of bonds.³ And upon such proceedings being had, the Court must by decree declare the validity or invalidity of the proceedings from the organization of the district, "and all other proceedings which may affect the legality or validity of said bonds, and the order of the sale and the sale thereof." The objects of these provisions are to provide a security for investors, prevent fraud, and to promote the advantage of the irrigation districts by enabling them to secure a decree as to the validity of issued bonds, which will be binding upon all the world. It has also been found from experience that bonds will sell for a much better price where their validity has been confirmed by the Court.⁴ The confirmation proceeding is dominated in

³ The fifth section of the California Act provided: "Upon the hearing of such special proceeding the Court shall have the power and jurisdiction to examine and determine the legality and validity of and approve and confirm each and all of the proceedings for the organization of said district under the provisions of the said Act (Wright Act), from and including the petition for the organization of the district, and all other proceedings which may affect the legality or validity of said bonds, and the order for the sale, and the sale thereof." *Stats. and Amdts.*, 1889, p. 212.

The latest statute upon the subject, that of Utah, approved March 22, 1909, provides as follows: "Sec. 54. Upon the hearing of such special proceeding the Court shall find and determine whether the notice of the filing of the petition has been duly given and published for the time and in the manner and in the Act prescribed, and shall have power and jurisdiction to examine and determine the legality and validity of, and approve and confirm, each and all the proceedings for the organization of said district under the provisions of said Act, from and including the petition for the organization of the district, and all other pro-

ceedings which may affect the legality or validity of said bonds, and the order of the sale and the sale thereof. The Court, in inquiring into the regularity, legality, or correctness of said proceedings, must disregard any error, irregularity, or omission which does not affect the substantial rights of the parties to said special proceedings; and the Court may by decree approve and confirm such proceedings in part, and disapprove and declare illegal or invalid other or subsequent parts of the proceedings." *Laws Utah*, 1909, p. 167, Sec. 54.

⁴ "The object of the proceeding is, of course, to compel every person interested in the district, and whose property is bound for the payment of its debts, to come into court, and within the time limited present and submit to judicial investigation any and all objections he may have to the regularity of the organization of the district, and all other matters affecting the validity of the bonds, so that it may be finally and conclusively determined by a judgment, which neither he nor his successors in interest can thereafter question, whether such bonds are legal and valid, or not." *Tregea v. Modesto Irr. Dist.*, 88 Cal. 334, 26 Pac. Rep. 237; dismissed, 164 U. S.

the Acts as a special proceeding, and it is clearly in the nature of an action *in rem*, the object being to determine the status of the district, and its power to issue valid bonds.⁵

When such an action is brought, the Court must fix the time for the hearing, and a notice of the same must be published in accordance with the statute. Such notice shall state the time and place fixed for the hearing and the prayer of the petitioners, and that any person interested in the organization of such district, or in the proceedings for the issue and sale of the bonds, may, on or before the day fixed for the hearing of said petition, demur or answer the said petition. These confirmation proceedings being *in rem*, the land owners are bound thereby, if there has been a due publication of the notice thereof in accordance with the terms of the statute, notwithstanding there has been no personal service upon them.⁶ Any person interested in the district or in the issue and sale of the bonds may demur or answer the said petition; and the

179, 41 L. Ed. 395, 17 Sup. Ct. Rep. 52.

See, also, *Crall v. Poso Irr. Dist.*, 87 Cal. 140, 26 Pac. Rep. 797; *In re Madera Irr. Dist. Bonds*, 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 575, 27 Am. St. Rep. 106; *Nampa & M. Irr. Dist. v. Brose*, 11 Idaho 474, 83 Pac. Rep. 499.

The legality of the formation of an irrigation district, and the proposed issue of bonds of said district are not affected by the fact that the canal system of said district may water lands outside of said district. *Settlers' Irr. Dist. v. Settlers' Canal Co.*, 14 Idaho 504, 94 Pac. Rep. 829.

⁵ *Crall v. Poso Irr. Dist.*, 87 Cal. 140, 26 Pac. Rep. 797; *Modesto Irr. Dist. v. Tregea*, 88 Cal. 334, 26 Pac. Rep. 237; dismissed, 164 U. S. 179, 41 L. Ed. 395, 17 Sup. Ct. Rep. 52; *In re Madera Irr. Dist. Bonds*, 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106; *Rialto Irr. Dist. v. Brandon*, 103 Cal. 384, 37 Pac. Rep. 484; *Fallbrook Irr. Dist.*

v. Abila, 106 Cal. 355, 39 Pac. Rep. 793; *Cullen v. Glendora W. Co.*, 113 Cal. 503, 39 Pac. Rep. 769, 45 Pac. Rep. 822, 1047; *Ahern v. High Line Irr. Dist.*, 39 Colo. 409, 89 Pac. Rep. 963; *Gem Irr. Dist. v. Johnson*, 20 Idaho 29, 115 Pac. Rep. 924; *Emmett Irr. Dist. v. Schane*, 19 Idaho 332, 113 Pac. Rep. 444; *Progressive Irr. Dist. v. Anderson*, 19 Idaho 504, 114 Pac. Rep. 16; *In re Bonds of South San Joaquin Irr. Dist.*, — Cal. —, 119 Pac. Rep. 198; *Sunnyside Irr. Dist. v. Stephens*, — Idaho —, 120 Pac. Rep. 169; *Black Canyon Irr. Dist. v. Fallon*, — Idaho —, 122 Pac. Rep. 850.

⁶ *Crall v. Poso Irr. Dist.*, 87 Cal. 140, 26 Pac. Rep. 797; *Nampa & M. Irr. Dist. v. Brose*, 11 Idaho 474, 83 Pac. Rep. 499; *Kinkade v. Witherop*, 29 Wash. 10, 69 Pac. Rep. 399, where it is said, "No personal service of the notice is required"; *Fogg v. Perris Irr. Dist.*, 154 Cal. 209, 97 Pac. Rep. 316; *Palmdale Irr. Dist. v. Batke*, 19 Cal. 358, 27 Pac. Rep. 783.

person so demurring or answering the petition shall be the defendant to the special proceedings, and the board of directors shall be the plaintiff. Upon the hearing of such special proceeding, the Court shall find and determine whether the notice of the filing of the petition has been duly given and published for the time and in the manner as prescribed by the Act, and shall have the power and jurisdiction to examine and determine the legality and validity of and approve and confirm each and all of the proceedings for the organization of said district under the provisions of the Act from and including the petition for the organization of said district, and all other proceedings which may affect the legality or validity of the bonds and the order of sale and the sale thereof. The Court, in inquiring into the regularity, legality, or correctness of said proceedings, must disregard any error, irregularity, or omission which does not affect the substantial rights of the parties to said special proceedings. And in the hearing the burden of proof of the validity of the proceedings to support a proposed issue of bonds by an irrigation district is upon the district itself.⁷

§ 1421. Proceedings for confirmation—Effect of judgment.—

As a judgment in these proceedings the Court must render a decree, and thereby may approve and confirm such proceedings in part or disapprove and declare illegal or invalid other or subsequent parts of the proceedings. The effect of such a decree of confirmation entered in such a proceeding as to the proper compliance with all the provisions of the Act, is not only conclusive upon all the land owners within the district, whether they appear or do not appear at the confirmation proceedings, but also upon the whole world. Therefore, the State itself is bound by such a decree.¹ Even in a case

⁷ Fallbrook Irr. Dist. v. Abila, 106 Cal. 355, 39 Pac. Rep. 793; *In re Madera Irr. Dist. Bonds*, 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106.

¹ *People v. Linda Vista Irr. Dist.*, 128 Cal. 477, 61 Pac. Rep. 86, where it is said: "If the construction of this confirmatory Act heretofore given by this Court be the correct construction; if the judgment rendered under that Act be a judicial decision, pos-

sessing the scope, effect, dignity, and efficacy of the usual and ordinary judgment of courts of general jurisdiction; if it be not only such a judgment, but a judgment *in rem*—then the State, like an ordinary individual, is estopped from questioning it. Such a judgment is binding on the whole world, and the State comes within that territory."

See, also, *Modesto Irr. Dist. v. Tregoe*, 88 Cal. 334, 26 Pac. Rep. 237;

where there was fraud in the organization of the district, a confirmatory decree having once been obtained, is binding, and furnishes a barrier against subsequent attacks upon the ground of such frauds, and thereby to protect its bondholders.² Therefore, where confirmation proceedings are had in the proper court, as provided by the respective Acts, which give the said Court power to determine the legality and validity of each and all the proceedings for the organization of an irrigation district, the decree rendered thereon declaring such district to have been duly and legally organized, is *res judicata* upon the subject, and is conclusive against any

dismissed, 164 U. S. 179, 41 L. Ed. 395, 17 Sup. Ct. Rep. 52; Rialto Irr. Dist. v. Brandon, 103 Cal. 384, 37 Pac. Rep. 484; Crall v. Poso Irr. Dist., 87 Cal. 140, 26 Pac. Rep. 797; Cullen v. Glendora W. Co., 113 Cal. 503, 39 Pac. Rep. 769, 45 Pac. Rep. 882, 1047; *In re Madera Irr. Dist. Bonds*, 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106; Fallbrook Irr. Dist. v. Abila, 106 Cal. 355, 39 Pac. Rep. 793; *People v. Selma Irr. Dist.*, 98 Cal. 206, 32 Pac. Rep. 1047; *People v. Perris Irr. Dist.*, 132 Cal. 289, 64 Pac. Rep. 399; *Id.*, 142 Cal. 601, 76 Pac. Rep. 381; *In re Central Irr. Dist.*, 117 Cal. 382, 49 Pac. Rep. 354; *Miller v. Perris Irr. Dist.*, 85 Fed. Rep. 693; *Id.*, 92 Fed. Rep. 263; *Kinkade v. Witherop*, 29 Wash. 10, 69 Pac. Rep. 399; *Nampa & M. Irr. Dist. v. Brose*, 11 Idaho 474, 83 Pac. Rep. 499; *Anderson v. Grand Valley Irr. Dist.*, 35 Colo. 525, 85 Pac. Rep. 313; *Herring v. Modesto Irr. Dist.*, 95 Fed. Rep. 705; *Alfalfa Irr. Dist. v. Collins*, 46 Neb. 411, 64 N. W. Rep. 1086; *People v. City of Los Angeles*, 133 Cal. 338, 65 Pac. Rep. 749; *Title & Document Res. Co. v. Kerrigan*, 150 Cal. 289, 88 Pac. Rep. 356, 8 L. R. A., N. S., 682, 119 Am. St. Rep. 199; *Fogg v. Perris Irr. Dist.*, 142 Cal. 18, 76 Pac. Rep. 1126,

154 Cal. 209, 97 Pac. Rep. 316; *Oregon S. L. R. Co. v. Pioneer Irr. Dist.*, 16 Idaho 578, 102 Pac. Rep. 904; *Settlers' Irr. Dist. v. Settlers' Canal Co.*, 14 Idaho 504, 94 Pac. Rep. 829; *Middle Kittitas Irr. Dist. v. Peterson*, 4 Wash. 147, 29 Pac. Rep. 995; *Purdin v. Washington Assn.*, 41 Wash. 394, 83 Pac. Rep. 773.

² "The purpose of the Act of 1889, in providing for an adjudication as to the validity of the district, was to furnish a barrier against subsequent attacks upon the ground of such frauds in the organization of the district, and thereby to protect its bondholders. It could not have been contemplated or intended that the existence of such fraud would always be open to inquiry, notwithstanding such adjudication, nor that, if subsequently shown, it would prove that the Court in the confirmation proceedings had no jurisdiction to act at all, and that its decree was void." *Fogg v. Perris Irr. Dist.*, 154 Cal. 209, 97 Pac. Rep. 316.

But see *People v. Perris Irr. Dist.*, 142 Cal. 601, 76 Pac. Rep. 381; *Fogg v. Perris Irr. Dist.*, 142 Cal. 18, 76 Pac. Rep. 1126, where it was held that a confirmatory decree may be opened in a direct attack on the ground of fraud.

collateral attack for fraud or illegality in any of the proceedings for such organization.³

As was said in a recent Idaho case:⁴ "All parties are bound by the decree of confirmation. In the Linda Vista case it is held that the confirmation statute was enacted for the very object of binding the State, as well as all others, and an attempted *quo warranto* proceeding after the confirmation proceedings is a collateral attack upon the decree, and would not be permitted."⁵

In the opinion of the Supreme Court of the United States, in the Tregoe case,⁶ Mr. Justice Brewer seemed to doubt the validity of the confirmation Acts, and said: "It may well be doubted whether the adjudication really binds anybody." This expression may be regarded as dictum, as the appeal was dismissed for lack of jurisdiction, and was not decided upon its merits. But even if it was a decision upon the validity of these proceedings, it need not, nor has it been followed by the State courts; in fact, in some decisions it has been directly repudiated, upon the theory that a State court of last resort is not bound by the judgment of the United States Supreme Court construing a State statute, but is entitled to construe the same according to its own judgment.⁷

One effect of a judgment confirming the proceedings up to and including the issue and sale of the district bonds is to declare the validity of these bonds in the hands of innocent purchasers.⁸ There was considerable loss to the purchasers of these bonds during the formative period of these laws; but as the laws upon this subject may be considered settled in this respect by the almost unanimous

³ Miller v. Perris Irr. Dist., 85 Fed. Rep. 693; *Id.*, 92 Fed. Rep. 263.

⁴ Progressive Irr. Dist. v. Anderson, 19 Idaho 504, 114 Pac. Rep. 16.

⁵ See, also, Hease v. Heitzeg, 159 Cal. 569, 114 Pac. Rep. 816; Russell v. Irish, 20 Idaho 194, 118 Pac. Rep. 501.

⁶ Tregoe v. Modesto Irr. Dist., 164 U. S. 179, 41 L. Ed. 395, 17 Sup. Ct. Rep. 52; dismissed, *Id.*, 88 Cal. 334, 26 Pac. Rep. 237.

⁷ People v. Linda Vista Irr. Dist.,

128 Cal. 477, 61 Pac. Rep. 86; Title & Document Res. Co. v. Kerrigan, 150 Cal. 289, 88 Pac. Rep. 356, 8 L. R. A., N. S., 682, 119 Am. St. Rep. 199, where it is said: "But even the acceptance of the views of Justice Brewer would not require us to hold that the proceeding here involved was not judicial."

⁸ Tulare Irr. Dist. v. Shepard, 185 U. S. 1, 46 L. Ed. 773, 22 Sup. Ct. Rep. 531; affirming *Id.*, 94 Fed. Rep. 1.

decisions of the courts, these irrigation bonds, where issued in conformity with the proceedings set forth in the statutes of the respective States, and where their issue and sale have been duly confirmed by the Court, are now among the most marketable securities of the country. At least, they rank with those of other public corporations.

§ 1422. **Proceedings—General annual assessments.**—Under the Acts it is made the duty of the board of directors of an irrigation district, on or before a certain date fixed of each year, to determine the amount of money required to meet the maintenance, operating and current expenses for the ensuing year, and to certify to the proper officers named in the Act under which the assessment is being made, the said amount, together with such additional amount as may be necessary to meet any deficiency in the payment of said expenses theretofore incurred.

All real estate, exclusive of improvements, or with the improvements, within any irrigation district must then be assessed by the officer named in the Act and for the valuation and within the manner and time prescribed in the Act under which the assessment is made. The Acts differ greatly in this respect. In some of the States the assessment is made by the county assessor, as is the case in Colorado and Utah; in California it is made by the assessor of the district. In some of the States the assessment for these purposes is made of all real estate exclusive of improvements; in others improvements are assessed. In some States the property is assessed at a fair cash valuation or an *ad valorem* assessment; in others it is provided that: "All lands within the district for the purpose of taxation under this Act shall be valued by the assessor at the same rate per acre; provided, that in no case shall any land be taxed for irrigation purposes under this Act which from any natural cause can not be irrigated, or is incapable of cultivation."¹

In California the *ad valorem* assessment was adopted,² and such an assessment was held valid by the Supreme Court of the United

¹ See Laws Utah, 1909, p. 156, Sec. 3458; Rev. Stat. Colo., 1908, Sec. 19; Laws Colo., 1905, p. 259, Sec. 19; 3458.
Colo. Stat. Ann., Morr. Ed., 1911, Sec.

² Gen. Laws Cal., Hen., 1908, p. 570, Sec. 35.

States.³ So, also, it is held that an assessment made by acreage is valid.⁴

The value of the assessable property being ascertained and the amount necessary for the use of the district, upon receipt of the certificate of the board of directors certifying the total amount required to be raised, the county commissioners in most cases are required to fix the rate of levy necessary to provide the amount of money required. In California, where the use of the regular county revenue officers are not embodied as a feature of the law, the rate of the levy is fixed by the board of directors of the irrigation districts, except in cases where the board of directors refuse to act.⁵

Mandamus will lie to compel the proper officers to levy the assessment.⁶

³ Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; reversing *Id.*, 68 Fed. Rep. 948.

See, also, Turlock Irr. Dist. v. Williams, 76 Cal. 360, 18 Pac. Rep. 379; *In re Madera Irr. Dist. Bonds*, 92 Cal. 299, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106; *Lahman v. Hatch*, 124 Cal. 1, 56 Pac. Rep. 621.

The poles, wires, etc., of a telegraph company are not real property within the meaning of the irrigation law of California, and are therefore not assessable for the revenue purposes of a district. *Western Union etc. Co. v. Modesto Irr. Dist.*, 149 Cal. 662, 87 Pac. Rep. 190, 9 Ann. Cas. 1190.

⁴ *Pioneer Irr. Dist. v. Bradley*, 8 Idaho 310, 68 Pac. Rep. 295; *Oregon S. L. R. Co. v. Pioneer Irr. Dist.*, — Idaho —, 102 Pac. Rep. 904; *Knowles v. New Sweden Irr. Dist.*, 16 Idaho 217, 101 Pac. Rep. 81, where upon rehearing it was held that, where a party owns his own water right and would not receive any benefit from the organization of the district, he may, upon proper showing, have his land excluded from the district and

from assessment; but under the facts in the case, where he failed to appear and make such a showing, he is bound by the action of the board.

⁵ See Gen. Laws Cal., Hen., 1898, p. 571, Sec. 39.

⁶ *State v. Brown*, 19 Wash. 383, 53 Pac. Rep. 548; *Nevada Nat. Bank v. Board of Supervisors of Kern County*, 5 Cal. App. 638, 91 Pac. Rep. 122; *State ex rel. Witherop v. Brown*, 19 Wash. 383, 53 Pac. Rep. 548; *Thompson v. Perris Irr. Dist.*, 116 Fed. Rep. 760; *Marra v. San Jacinto etc. Irr. Dist.*, 131 Fed. Rep. 780.

Upon the question of the power and duty to levy an annual assessment, see *Quint v. Hoffman*, 103 Cal. 506, 37 Pac. Rep. 514; *San Diego v. Linda Vista Irr. Dist.*, 108 Cal. 189, 41 Pac. Rep. 291, 35 L. R. A. 33; *Decker v. Perry*, 101 Cal. 17, 35 Pac. Rep. 1017; *Hughson v. Crane*, 115 Cal. 404, 47 Pac. Rep. 120; *Lahman v. Hatch*, 124 Cal. 1, 56 Pac. Rep. 621; *Tregea v. Owens*, 94 Cal. 317, 29 Pac. Rep. 643; *Bozkowitz v. Thompson*, 144 Cal. 724, 78 Pac. Rep. 290; *Baxter v. Dickinson*, 136 Cal. 185, 68 Pac. Rep. 601; *Best v. Wohlford*, 153 Cal. 17, 94 Pac. Rep. 98; *Nevada Nat. Bank v. Board Supra*.

The laws also provide that such assessment shall be a lien against the property so assessed until such assessments are paid or the property sold for the payment thereof.⁷

In a number of the States the county treasurer is made *ex officio* the district treasurer of any district within the county,⁸ whose duty it is to collect and receipt for all taxes levied as provided in the Acts in the same manner and at the same time as is required under the revenue laws of the State for the collection of taxes upon real estate for county purposes. In California, however, the collection of the assessments is made by the collector of the district in the manner as provided by the statute.⁹

Relative to the publication of delinquent notices for the failure to pay the assessments so levied, the sale for delinquent taxes and the redemption of property sold for the same, the laws of many of the States provide that the general revenue laws of the State shall be applicable for the purposes of the Irrigation District Act, "including the enforcement of penalties and forfeiture for delinquent taxes."¹⁰ In California, however, special proceedings for these purposes are provided by the Act itself.¹¹ Property which has been legally assessed may be sold for the non-payment of the assessments

Kern County, 5 Cal. App. 638, 91 Pac. Rep. 122; Alfalfa Irr. Dist. v. Collins, 46 Neb. 411, 64 N. W. Rep. 1086; Escondido High School Dist. v. Escondido Sem. of Univ., 130 Cal. 128, 62 Pac. Rep. 401; Oregon S. L. R. Co. v. Pioneer Irr. Dist., 16 Idaho 578, 102 Pac. Rep. 904; Cooper v. Miller, 113 Cal. 238, 45 Pac. Rep. 325; Commercial Nat. Bank v. Schlitz, 6 Cal. App. 174, 91 Pac. Rep. 750; Pioneer Irr. Dist. v. Bradley, 8 Idaho 310, 68 Pac. Rep. 295; Western Union Tel. Co. v. Modesto Irr. Dist., 149 Cal. 662, 87 Pac. Rep. 190, 9 Ann. Cas. 1190; City of Nampa v. Nampa & Meridan Irr. Dist., 19 Idaho 779, 115 Pac. Rep. 979.

⁷ A court of equity has no jurisdiction to adjudge that bonds issued by an irrigation district constitute a lien upon the lands within the district, nor to decree the enforcement of such lien,

since, if it exists, it is by virtue of the statute under which the bonds were issued, and be enforced by the levy and collection of a tax in the mode therein provided. Boskowitz v. Thompson, 144 Cal. 724, 78 Pac. Rep. 290.

⁸ Laws Utah, 1909, p. 157, Sec. 21; Laws Colo., 1905, p. 260, Sec. 21.

⁹ Gen. Laws Cal., Henning, 1908, p. 572, Sec. 41.

The collector of a district in California is paid a salary and is not entitled to offset his claim against the sum in his hands belonging to the district. Perry v. Otay Irr. Dist., 127 Cal. 565, 60 Pac. Rep. 40.

¹⁰ Laws Utah, 1909, p. 158, Sec. 22; Laws Colo., 1905, p. 262, Sec. 22; Colo. Stat. Ann., Morr. Ed., 1911, 3461; Rev. Stat., 1908, Sec. 3461.

¹¹ Gen. Laws Cal., Henning, 1908, pp. 572-575, Secs. 41-53; Best v. Wohlford, 153 Cal. 17, 94 Pac. Rep. 98.

and redeemed from such sale in the manner provided by the respective statutes.¹²

§ 1423. **Proceedings—Special assessments.**—The laws of some of the States, particularly California, in addition to the regular annual assessments discussed in the preceding section, authorize the levy and collection of special assessments in certain emergencies. Such assessments are authorized under the California law, in case the money raised by the sale of bonds is insufficient or in case the bonds be unavailable for the completion of the works authorized.¹ Or, whenever in the judgment of the board of directors of the district it is deemed advisable to raise money to be applied to any purposes of the Act, a special assessment may be levied and collected in the manner prescribed by the Act.² In order to levy and collect such special assessments, the board of directors of the district must call a special election and submit to the qualified electors of the district the question whether or not a special assessment shall be levied. Such an election must be called upon the notice prescribed, and the same shall be held in all respects in conformity with the provisions of the law upon the question of elections for voting for bonds of a district. The notice must specify the amount of money proposed to be raised and the purpose for which it is intended to be used. At such elections the ballots shall contain the words "Assessment—Yes," or "Assessment—No." And in case of an assessment to complete the works, if a majority of the votes cast are "Assessment—Yes," the board of directors shall cause an assessment in the amount named to be levied. In all other special assess-

¹² *Lahman v. Hatch*, 124 Cal. 1, 56 Pac. Rep. 621; *Best v. Wohlford*, 153 Cal. 17, 94 Pac. Rep. 98; *Escondido High School Dist. v. Escondido Sem. of Univ.*, 130 Cal. 128, 62 Pac. Rep. 401; *Cooper v. Miller*, 113 Cal. 238, 45 Pac. Rep. 325; *Hughson v. Crane*, 115 Cal. 404, 47 Pac. Rep. 120; *Purdin v. Washington etc. Assn.*, 41 Wash. 394, 83 Pac. Rep. 773.

A tax sale can not be assailed for inadequacy of price. *Rothchild Bros. v. Rollinger*, 32 Wash. 307, 73 Pac. Rep. 367.

Neither can it be assailed for the fact that the sale was made on two separate assessments, and the amount of each not separately stated. *Best v. Wohlford*, 153 Cal. 17, 94 Pac. Rep. 98.

As to the validity of assessment and sale, see, also, *Hease v. Heitzeg*, 159 Cal. 569, 114 Pac. Rep. 816.

¹ Gen. Laws Cal., Henning, 1908, p. 569, Sec. 34.

² Gen. Laws Cal., Henning, 1908, p. 577, Sec. 59.

ments there must be two-thirds or more of the votes cast for the assessment in order to make the levy. The special assessments so levied shall be computed and entered on the assessment roll by the secretary of the board, and collected at the same time and in the same manner as provided for the annual assessments.

Under these provisions a special assessment can not be lawfully levied by the directors of a district without a previous authorization by a vote of the electors of the district.³ But where they have been so authorized they may be levied, collected, or the property sold for the payment of the same; ⁴ and the burden of proving the illegality of such an assessment is on the party alleging it.⁵

In some of the other States special assessments may be levied and collected without the holding of an election upon the subject, notably Colorado and Utah.⁶ The statutes in these States provide that: "In case the money raised by the sale of bonds be insufficient, and in case bonds be unavailable for the completion of the plans of works adopted, it shall be the duty of the board of directors to provide for the completion of said plans by levy of an assessment therefor in the same manner in which levy of assessments is made for the other purposes provided for in this Act." And these Acts do not require for the general annual assessments an election authorizing them.

§ 1424. Proceedings—Construction of works.—After adopting a plan for the construction of canals, reservoirs, and other works, the board of directors must give notice, by publication as provided by the Act under which they are working, calling for bids for the

³ *Tregea v. Owens*, 94 Cal. 317, 29 Pac. Rep. 643; *Woodruff v. Perry*, 103 Cal. 611, 37 Pac. Rep. 526.

⁴ Where the notice of sale gave the aggregate of the amount due on a certain piece of property of both the annual and special assessments, it was held that the fact that the sale was made on two separate assessments, and the amount of each was not separately stated in either the notice of sale, certificate of sale, or deed, did not invalidate the proceedings. *Best v. Wohlford*, 153 Cal. 17, 94 Pac. Rep.

98; *Carter v. Tilghman*, 119 Cal. 104, 51 Pac. Rep. 34; *City of Nampa v. Nampa & Meridan Irr. Dist.*, 19 Idaho 779, 115 Pac. Rep. 979; *Hughson v. Crane*, 115 Cal. 404, 47 Pac. Rep. 120; *Baxter v. Dickinson*, 136 Cal. 185, 68 Pac. Rep. 601; *Cooper v. Miller*, 113 Cal. 238, 45 Pac. Rep. 325.

⁵ *Baxter v. Dickinson*, 136 Cal. 185, 68 Pac. Rep. 601.

⁶ *Laws Colo.*, 1905, p. 263, Sec. 25; 3 *Colo. Stat. Ann.*, Morr. Ed., 1911, Sec. 3464; *Rev. Stat. Colo.*, 1908, Sec. 3464; *Laws Utah*, 1909, p. 159, Sec. 25.

construction of said work or any portion thereof. At the time and place stated in the notice the board must open the bids in public, and as soon as convenient thereafter the board shall let the said work, either in portions or as a whole, to the lowest responsible bidder, or they may reject any and all bids and may readvertise for proposals, or they may proceed to construct the work under their own superintendence.¹ Contracts for the purchase of material shall be awarded to the lowest responsible bidder. The person or persons to whom a contract may be awarded shall enter into a bond, with good and sufficient sureties, to be approved by the board, payable to the district for its use, for not less than the percentage of the amount of the contract price named in the Act, conditioned for the faithful performance of said contract. The work shall be done under the direction and to the satisfaction of the engineer in charge and be approved by the board.²

An irrigation district may contract with a competent engineer to survey and furnish plans for the construction of the proposed works, and from which the board of directors may estimate the cost.³

§ 1425. Proceedings—Payment for claims for construction.—No claims shall be paid by the district treasurer until the same shall have been allowed by the board, and only upon warrants signed by the president, and countersigned by the secretary of the district, which warrants shall state the date authorized by the board and for what purpose. In some of the States it is provided that if the

¹ Under these provisions, the work should be advertised for by public notice, and the bid or bids received under such notice, either accepted or rejected, before the board is authorized to proceed with the construction work, under its own superintendence, with the labor of the residents of the district. *Lincoln etc. Irr. Dist. v. McNeal*, 60 Neb. 613, 83 N. W. Rep. 847.

² Gen. Stat. Cal., Henning, 1908, p. 575, Sec. 53; Laws Colo., 1905, p. 262, Sec. 23; Laws Utah, 1909, p. 158, Sec. 23.

The work for which bids are called

for described in the notice must conform substantially with the work described in the plans and specifications, otherwise an attempted acceptance and award to a bidder is void. *Healey v. Anglo-California Bank*, 5 Cal. App. 278, 90 Pac. Rep. 54.

"The board has no other powers except those which are expressly given or are implied as necessary to carry out the main purpose of the Act." *Stimson v. Alessandro Irr. Dist.*, 135 Cal. 389, 67 Pac. Rep. 496, 1034.

³ *Willow Springs Irr. Dist. v. Wilson*, 74 Neb. 269, 104 N. W. Rep. 333.

district treasurer has not sufficient money on hand to pay a warrant when it is presented for payment, he shall endorse thereon "Not paid for want of funds; this warrant draws interest from date at six per cent per annum," and endorse thereon the date when so presented, over his signature, and for the time of such presentation such warrant shall draw interest at the rate of six per cent per annum: *Provided*, when there is the sum of \$100 or more in the hands of the treasurer it shall be applied upon such warrant. All claims against the district shall be verified the same as required in the case of claims filed against counties in the State. The district treasurer is required to keep a register in which he shall enter each warrant presented for payment, showing the date and amount of such warrant, to whom payable, the date of the presentation for payment, the date of payment, and the amount paid in redemption thereof, and all warrants shall be paid in the order of their presentation for payment to the district treasurer. All warrants shall be drawn payable to claimant or bearer, the same as county warrants.¹

The costs and expenses of purchasing and acquiring property and the construction of works and improvements must be wholly paid out of the "construction fund" or "the general fund," and the bond fund can not be drawn upon for this purpose, this latter fund being for the payment of the interest and principal of outstanding bonds when due.²

§ 1426. Proceedings—Construction of works across the property of others.—The board of directors is given the power to construct the said works across any stream of water, water course, street, avenue, highway, railway, canal, ditch, or flume which the route of the canal or canals may intersect or cross; and if the owner of the thing or franchise so to be crossed can not agree as to the amount to be paid therefor, or the points or the manner of said crossing, the same shall be ascertained and determined in all re-

¹ Laws Colo., 1905, p. 262, Sec. 24;
³ Colo. Stat. Ann., Morr. Ed., 1911,
Sec. 3463; Rev. Stat., 1908, Sec. 3463;
Laws Utah, 1909, p. 159, Sec. 24;
Perry v. Otay Irr. Dist., 127 Cal. 565,
60 Pac. Rep. 40.

² For the payment of bonds, see
Sec. 1419.

See Mitchell v. Patterson, 120 Cal.
286, 52 Pac. Rep. 589; Carter v. Tilgh-
man, 119 Cal. 104, 51 Pac. Rep. 34;
Hughson v. Crane, 115 Cal. 404, 47
Pac. Rep. 120; State *ex rel.* Rush v.
St. John, 30 Wash. 630, 71 Pac. Rep.
192.

spects as is provided in respect to the taking of land for public use. A right of way is also given, dedicated, and set apart, to locate, construct, and maintain the said works or reservoirs over, through, or upon any of the lands which are now or may be the property of the State where the proceedings are being had.¹ In California there is also given, dedicated, and set apart, for the uses and purposes of the Act, all waters and water rights belonging to the State within the district.²

When ditches or canals are constructed across an existing road or highway, it is the duty of the district to construct a proper bridge across such ditch or canal.³

§ 1427. **Proceedings—Compensation of officers—Board not to be interested in contracts.**—The Acts all provide for compensation of the members of the board of directors upon a *per diem* basis for the actual time while engaged in the business of the district. The compensation of the other officers is also fixed by the allowance of a salary. In California it is provided that a special election may be held to fix a schedule of salaries and fees to be paid by the district.¹ It is also provided that no director or any officer named in the Acts shall in any manner be interested, directly or indirectly, in any contract awarded or to be awarded by the board, or in any profits to be derived therefrom; and, in some States, “nor shall he receive any bonds, gratuity, or bribe.” For the violation of these provisions any such officer shall be deemed guilty of a felony;² in California for the violation of the provisions as to contracts he shall be deemed guilty of a misdemeanor.

§ 1428. **Proceedings—Limit to indebtedness.**—The board of directors or other officers of a district are prohibited from incurring

¹ Colo. Laws, 1905, p. 264, Sec. 26;
³ Colo. Stat. Ann., Morr. Ed., 1911,
 Sec. 3465; Rev. Stat. Colo., 1908, Sec.
 3465; Laws Utah, 1909, p. 160, Sec. 26.

² Gen. Laws Cal., Hen., 1908, p.
 576, Sec. 56.

³ MacCammelly v. Pioneer Irr. Dist.,
 17 Idaho 415, 105 Pac. Rep. 1076.

¹ Gen. Laws Cal., Hen., 1908, p.
 577, Sec. 57, as amended by Act of
 April 22, 1909, Stats. and Amdts.,

1909, p. 1062; Kerr's Bien. Supp.,
 1908-1909, p. 1651.

For payment of salaries, see Perry
 v. Otay Irr. Dist., 127 Cal. 565, 60
 Pac. Rep. 40; Mitchell v. Patterson,
 120 Cal. 286, 52 Pac. Rep. 589.

² Laws Colo., 1905, p. 264, Sec. 27;
³ Colo. Stat. Ann., Morr. Ed., 1911,
 Sec. 3466; Rev. Stat. Colo., 1908, Sec.
 3466; Laws Utah, 1909, p. 160, Sec. 27.

any debt or liability whatever either by issuing bonds or otherwise, in excess of the express provisions of the Act; and any debt or liability incurred in excess of such express provisions shall be and remain absolutely void.¹ In California, for the purposes of the organization of a district, the board of directors may, before the collection of the first assessment, incur an indebtedness not exceeding the sum of \$2000, and may cause warrants of the district to be issued therefor, bearing interest at the rate of seven per cent per annum.²

§ 1429. **Proceedings—Governing the use of water.**—In case the volume of the water in any canal, reservoir, or other works in any district shall not be sufficient to supply the continual wants of the entire district susceptible of irrigation therefrom, it is made the duty of the board of directors to distribute all available water as they may, in their judgment, think best for the interests of all parties concerned, and with due regard to the legal and equitable right of all.¹ And in California it is made the duty of the board of directors to keep the water flowing through the ditches under their control to the full capacity of such ditches in times of high water.² It is also provided that navigation shall never in anywise be impaired by the operation of the Act; nor shall any vested interest in or to any mining water rights or ditches, or in or to any water or water rights, or works used in connection with the mining industry, ever be affected by or taken under the provisions of the Act, save and except rights of way may be acquired over the same.³

The California law also provides that whenever any irrigation

¹ Laws Colo., 1905, p. 264, Sec. 28; 3 Colo. Stat. Ann., Morr. Ed., 1911, Sec. 3467; Laws Utah, 1909, p. 160, Sec. 28.

² Gen. Laws Cal., Henning, 1908, p. 578, Sec. 61; Mitchell v. Patterson, 120 Cal. 286, 52 Pac. Rep. 589; Sechrist v. Rialto Irr. Dist., 129 Cal. 640, 62 Pac. Rep. 261.

³ Laws Colo., 1905, p. 264, Sec. 29; 3 Colo. Stat. Ann., Morr. Ed., 1911, Sec. 3468; Laws Utah, 1909, p. 160, Sec. 29; Gen. Laws Cal., Henning, 1908, p. 578, Sec. 62.

The fact that a land owner for five years had used water beyond the limits of a district and under a claim of right to do so, and with the knowledge of the district, gave him no right to continue such unwarranted use, where he claimed the right under the law governing such district. Jenison v. Redfield, 149 Cal. 500, 87 Pac. Rep. 62.

² Gen. Laws Cal., Henning, 1908, p. 578, Sec. 63.

³ Gen. Laws Cal., Henning, 1908, p. 578, Sec. 64.

district, in the development of its works as by law provided, may have an opportunity, without increased expenditure, to utilize the water by it owned or controlled for mechanical purposes, the board of directors may lease the same, as in the Act provided.⁴

The Acts all provide in effect that nothing therein contained shall be deemed to authorize any person or persons to divert the waters of any river, creek, stream, canal, or reservoir of any person or persons having a prior right to such waters, unless previous compensation be ascertained and paid therefor, under the laws of the State authorizing the taking of private property for public use.⁵ After the purchase of the water rights from a water company the manner of the delivery of the water to the land owners who had contracted with the old company will be presumed to be the same as that practiced by the old company.⁶

The board of directors have the power to enact a code of by-laws to regulate the distribution of the water controlled by the district. But the authority vested in the board of directors to make necessary and needed by-laws for the distribution of water among the owners of the lands, and do other lawful acts necessary to be done that sufficient water may be furnished each land owner, is for the purpose of carrying out the powers granted to the corporation by law, and does not vest it with the supervision or control of water rights belonging to private individuals.⁷ In a recent case in Idaho⁸ it was said, relative to the statute authorizing the distribution of water: "The statute is merely administrative, and is the declaration of a policy in the administration of the distribution of water by irrigation companies which the legislature deems proper and just, and which is to be followed by the canal company in the absence of a judgment of a court of competent jurisdiction directing such matters."

⁴ For the right and proceedings for leasing, see Gen. Laws Cal., Henning, 1908, p. 586, Secs. 100-105.

⁵ Laws Colo., 1905, p. 265, Sec. 30; 3 Colo. Stat. Ann., Morr. Ed., 1911, Sec. 3469; Rev. Stat., 1908, Sec. 3469; Laws Utah, 1909, p. 160, Sec. 30; Gen. Laws Cal., Henning, 1908, p. 578, Sec. 65.

⁶ Hewitt v. San Jacinto etc. Irr.

Dist., 124 Cal. 186, 56 Pac. Rep. 893.

⁷ Little Walla Walla Irr. Dist. v. Preston, 46 Ore. 5, 78 Pac. Rep. 982.

See, also, Gerber v. Nampa etc. Irr. Dist., 16 Idaho 1, 100 Pac. Rep. 80; Niday v. Barker, 16 Idaho 703, 101 Pac. Rep. 254.

⁸ Brose v. Nampa & Meridan Irr. Dist., 20 Idaho 281, 118 Pac. Rep. 504.

Mandamus will lie to compel an irrigation district to furnish water to those entitled thereto.⁹ The assignment of the right to the use of the water controlled by an irrigation district conferred by the Acts on a land owner is limited by the whole policy of the statute to an assignment for the irrigation of lands within the district.¹⁰

§ 1430. Proceedings — Change of boundaries — Inclusion of lands.—The statutes provide that the boundaries now or hereafter organized may be changed in the manner therein prescribed, but such change shall not impair or affect its organization or its rights in and to property, or any of its rights or privileges of whatsoever kind or nature, nor shall it affect, impair, or discharge any contract, obligation, lien, or charge for or upon which it was or might become liable or chargeable had such change of its boundaries not been made.¹

The boundaries of a district may be changed by the inclusion of new lands. The holders or owners of title, or evidence of title, representing a majority of the acreage of any land adjacent to or situated within the boundaries of any irrigation district, may file with the board of directors of the district a petition in writing, describing such lands, and praying that such land be included in such district. A notice must then be published, as prescribed by the statute, giving notice to all persons interested to appear at the office of said board at a time named in the notice and show cause, in writing, if any they have, why the petition should not be granted. The board of directors, at the time and place mentioned in said notice, or at such time or times to which the hearing of such petitions may have been adjourned, shall proceed to hear such petition and all objections thereto. The failure of any person interested to show cause, in writing, shall be deemed and taken as an assent on his part to the inclusion of such lands in said district as prayed for in the petition. The board of directors may require as a condition precedent to the granting of the petition that the petitioners shall

⁹ Harris v. Tarbet, 19 Utah 325, 57 Pac. Rep. 33.

¹⁰ Jenison v. Redfield, 149 Cal. 500, 87 Pac. Rep. 62.

¹ Gen. Stat. Cal., Henning, 1908, p.

580, Sec. 74; Laws Colo., 1905, p. 265, Sec. 31; 3 Colo. Stat. Ann., Morr. Ed., 1911, Sec. 3470; Rev. Stat. Colo., 1908, Sec. 3470; Laws Utah, 1909, p. 161, Sec. 31.

severally pay to the district such respective sums, as nearly as the same can be estimated by the board, as said petitioners or their grantors would have been required to pay to such district as assessments for the payment of its *pro rata* share of all bonds and interest thereon which may have been previously issued by said district had such lands been included in the district at the time the same was originally formed or when said bonds were so issued. The board, if they deem it not for the best interests of the district to include therein the lands mentioned in the petition, shall by order reject the petition; but if they deem it for the best interests of the district that the said lands be included, the board may order that the district be so changed as to include the lands mentioned in the petition. In some of the States the order of the board is final,² but in California the question must be submitted, after the decision of the board in its favor, to the electors of the district at a special election called for that purpose.³

§ 1431. Proceedings — Change of boundaries — Exclusion of lands.—The boundaries of a district may also be changed by the exclusion of lands originally included within the same; but such exclusion of land from the district shall not impair or affect its organization, or its rights in or to property, or any of its rights or privileges of whatever kind or nature; nor shall such exclusion affect, impair, or discharge any contract, obligation, lien, or charge for or upon which it would or might become liable or chargeable had such land not been excluded from the district. The proceedings upon the exclusion of lands must be upon a petition of the owners of the lands, and are similar to the proceeding had for the inclusion of land described above. The board of directors, if they deem it not for the best interest of the district that the lands mentioned in the petition, or some portion thereof, should be excluded from said district, shall order that said petition be denied; but if they deem it for the best interest of the district that the said lands,

² Laws Colo., 1905, p. 265, Secs. 32-40; 3 Colo. Stat. Ann., Morr. Ed., Secs. 3471-3479; Rev. Stat., 1908, Secs. 3471-3479; Laws Utah, 1909, p. 161, Secs. 32-40.

³ Gen. Laws Cal., Henning, 1908, p. 583, Secs. 85-97.

For the effect of the change of boundaries as to the identification of the district, see *Fogg v. Perris Irr. Dist.*, 154 Cal. 209, 97 Pac. Rep. 316.

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or some portion thereof, be excluded from the district, and if there be no outstanding bonds of the district, then the board may order the lands mentioned in the petition, or some defined portion thereof, to be excluded from the district.¹ In California, however, it is provided that if there be outstanding bonds at the time of the filing of the petition for exclusion, the holders of such outstanding bonds may give their assent in writing to the exclusion of such lands, and such lands may thereupon be excluded. But it is also provided in the California law that nothing shall in any manner operate to release any of the lands so excluded from any obligations to pay, or any lien thereon, of any valid outstanding bonds or other indebtedness of said district at the time of filing the petition, and that such liens may be enforced and such indebtedness collected in the usual manner; but the lands so excluded shall not be held answerable or chargeable for any obligation of any nature or kind whatever incurred after the filing of the said petition for exclusion; provided, that these provisions shall not apply to any outstanding bonds the holders of which have assented to the exclusion of such lands from the said district, as in the Act provided.² It is held as to these provisions that where the land attempted to be excluded from a district can be irrigated from the system of works of the district, that the decision of the board as to whether this land may or may not be excluded from the district is conclusive, and a court of equity will not interfere with its decision.³ So, too, where a party owns his own

¹ Laws Colo., 1905, p. 268, Secs. 41-46; 3 Colo. Stat. Ann., Morr. Ed., 1911, Secs. 3480-3485; Rev. Stat. Colo., 1908, Secs. 3480-3485; Laws Utah, 1909, p. 163, Secs. 41-46.

² Gen. Laws Cal., Henning, 1908, p. 580, Secs. 74-84.

The exclusion of lands from an irrigation district after its organization under the provisions of the California statute can not affect the validity of bonds issued by the district. *Herring v. Modesto Irr. Dist.*, 95 Fed. Rep. 705.

The fact that, after the original organization of a district, changes were made in its boundaries, did not render

the mere name of the district insufficient as an identification, since, if the proceedings to change the boundaries were regular and valid on their face, they were matters of record which could be ascertained by examination. *Fogg v. Perris Irr. Dist.*, 154 Cal. 209, 97 Pac. Rep. 316.

No exclusion can be made without the consent of the bond holders. *Modesto Irr. Dist. v. Tregoe*, 88 Cal. 334, 26 Pac. Rep. 237; dismissed, 164 U. S. 179, 41 L. Ed. 395, 17 Sup. Ct. Rep. 52.

³ *Andrews v. Lillian Irr. Dist.*, 66 Neb. 458, 92 N. W. Rep. 612, 97 N. W. Rep. 336.

water right, and would not receive any benefit from the organization of the district, he may, upon proper showing, have his land excluded from the district and from assessment; but where such an opportunity having been given to a land owner to show that his lands would receive no benefits, but he having failed to appear and make such showing, he is bound by the action of the board.⁴ But where the statute provides in effect that in no case shall any land be held by any irrigation district or taxed for irrigation purposes which can not, from any natural cause, be irrigated thereby, as is the case in Colorado, Nebraska, Utah, and some of the other States, the question goes to the jurisdiction of the board, and may be raised at any time in a proper case, because this provision expressly denies the jurisdiction of the board to include such land in an irrigation district or to tax it for irrigation purposes, and its inclusion would be a violation of the plain provision of the statute.⁵

§ 1432. Proceedings—Dissolution of districts.—The original Wright irrigation district law of California, enacted in 1887, made no provisions for the dissolution of such districts. Therefore, it was held by the Court that an action could not be maintained to dissolve such corporation in the absence of such statute specially conferring the right.¹ Later, however, special statutes were enacted in California granting the right to these districts to dissolve their corporate existence, when certain conditions exist and upon the compliance with the terms of the statute. In the laws of all the other States there are also provisions for the dissolution of these irrigation districts.

The proceedings for the dissolution of irrigation districts in effect are as follows: Whenever a majority of the resident land owners,

⁴ Knowles v. New Sweden Irr. Dist., 16 Idaho 217, 101 Pac. Rep. 81.

⁵ Andrews v. Lillian Irr. Dist., 66 Neb. 458; on rehearing, 97 N. W. Rep. 336.

Where the owner of land proceeds in equity to have the same detached from an irrigation district, in order to defeat the jurisdiction of the county board, it must be clearly shown, and in like manner found by the Court, that the land embraced within the dis-

trict is in fact such that from some natural cause it is non-irrigable, or is expressly exempt by the statute from the operation of the law providing for the organization of irrigation districts and taxing of lands within the boundary of such districts for irrigation purposes. Sowerwine v. Central Irr. Dist., 85 Neb. 687, 124 N. W. Rep. 118.

¹ People v. Selma Irr. Dist., 98 Cal. 206, 32 Pac. Rep. 1047.

representing a majority of the number of acres of irrigable land, or a majority of the value of said property, as the case may be, in any organized irrigation district shall petition the board of directors to call a special election for the purpose of submitting to the land owners of said irrigation district a proposition to vote on the dissolution of the said irrigation district. In the majority of the States no district can be dissolved unless the petition for dissolution shows that all bills and claims of every nature whatsoever have been fully satisfied and paid. If the board of directors are so satisfied that all bills and claims have been fully satisfied, it is made their duty to call an election, by the publication of notice for the same, as provided by the statute, and to hold the election for that purpose. If the majority of the ballots cast at such election shall contain the words, "For Dissolution—Yes," then it shall be the duty of said board of directors to declare said district to be disorganized and shall certify the same to the county clerk of the respective counties in which the said district is situated.²

In California the proceeding after the canvass of the votes is somewhat different. If two-thirds of the votes cast at such election shall be "Dissolution of the district—Yes," the board of directors shall file a petition in the Superior Court of the proper county to determine the validity of the proceedings had and of the proposed plan for dissolution. Such action shall be in the nature of a proceeding *in rem*, and jurisdiction of all parties interested may be had by publication of a notice of the pendency of the action as provided by the statute. The Court in its decree is given the power to make orders necessary to carry out the said proposition for the discharge of the indebtedness and distribution of the property of the district, including the right to apportion any indebtedness found due, and to declare said portions liens upon the various parcels and lots of land within the district, and may decree a sale of its assets in such a manner as may effectuate said proposition and as the Court may judge best. Provisions are also made for the collection of assessments due the district. Whenever all the property of such district shall have been disposed of, and all indebtedness and obligations

² Laws Colo., 1905, p. 270, Secs. 48, 1908, Secs. 3487, 3488; Laws Utah, 49; 3 Colo. Stat. Ann., Morr. Ed., 1909, p. 165, Secs. 48, 49.
1911, Secs. 3787, 3788; Rev. Stat., See *Thompson v. McFarland*, 29 Utah 455, 82 Pac. Rep. 478.

thereof, if any there be, shall have been discharged, the balance of the money of said district shall be distributed to the assessment payers in said district upon the last assessment roll in the proportion in which each has contributed to the total amount of said assessment, and the Court shall enter a final decree declaring said district to be dissolved.³ Where an irrigation district is disincorporated it can not affect the validity of the bonds it had previously issued and sold.⁴

³ Gen. Laws Cal., Henning, 1908, pp. 590-593.

⁴ Herring v. Modesto Irr. Dist., 95 Fed. Rep. 705.

CHAPTER 71.

CONTROL BY MUNICIPAL CORPORATIONS.

- § 1433. Scope of chapter.
- § 1434. Municipal corporations—Corporate nature.
- § 1435. General power of municipal corporation to own and control its own water rights and plants.
- § 1436. The appropriation of water by municipal corporations.
- § 1437. Purchase of water rights and waterworks by municipal corporations.
- § 1438. Acquisition of water rights and waterworks by condemnation.
- § 1439. Rights of municipalities succeeding to Spanish-Mexican pueblo rights.
- § 1440. Appropriations by others than the municipality for municipal purposes.
- § 1441. The alienation of its water rights by a municipality.
- § 1442. Construction of franchises granted to companies to furnish water to municipalities.
- § 1443. Duty to furnish water to the inhabitants of municipalities.
- § 1444. Right to fix water rates by city ordinance in the absence of contract.
- § 1445. The power of a municipality to fix water rates by contract with a water company.
- § 1446. Ordinances fixing water rates affecting existing contracts.
- § 1447. Regulation and control of irrigation ditches within a municipality—Where owned by municipality.
- § 1448. Regulation and control of irrigation ditches within a municipality—Where owned by other parties.

§ 1433. **Scope of chapter.**—It is not the intent of this work to go into all the features of the laws and city ordinances regulating the control and distribution of waters by a city or town. In this chapter we will therefore confine our discussion more particularly to the subject of water rights acquired by municipal corporations under the Western Doctrine of appropriation of water.

§ 1434. **Municipal corporations—Corporate nature.**—A municipal corporation, in its strict and proper sense, is defined as a body politic and corporate constituted by the incorporation of the inhabitants of a city or town for the purposes of local government

thereof.¹ While municipal corporations constitute one class of public corporation, all public corporations are not municipal corporations, although the terms are sometimes used as synonymous. Take, for example, irrigation districts; they have often been referred to as municipal corporations, while, strictly speaking, they are not municipal corporations, but public corporations.² Municipal corporations must also be distinguished from private corporations, although the latter are at times public service or quasi-public in their nature.³

§ 1435. **General power of municipal corporation to own and control its own water rights and plants.**—A municipal corporation always has the power under its charter to own water rights and the distributing plant connected therewith.¹ The city may acquire its water rights by appropriation,² by purchase, and by condemnation. It may also construct, at its own expense, or borrow money for the purpose of constructing the storing and distributing plant in order to utilize the water so acquired.

The use of water by the residents of municipal corporations for domestic, drinking, and culinary purposes, and, also, the use of water by a municipality itself, such as for sprinkling streets, flushing sewers, and protection against fires, being beneficial uses or purposes in the highest sense of the term, it therefore follows that under the Arid Region Doctrine of appropriation³ a valid appropriation of water may be made for these purposes.⁴ The essential acts of the appropriation may be performed by individuals or private corpora-

¹ Dillon's Municipal Corporations, 4th Ed., Sec. 19.

² For the distinction between public and municipal corporations, see irrigation districts—definition and corporate nature, Sec. 1404.

See, also, Board of Directors of Middle Kittitas Irr. Dist. v. Peterson, 4 Wash. 147, 29 Pac. Rep. 995; Dillon's Municipal Corporations, 4th Ed., Sec. 22; *In re Bonds of the Madera Irr. Dist.*, 92 Cal. 296, 28 Pac. Rep. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106; *Alfalfa Irr. Dist. v. Collins*, 46 Neb. 411, 64 N. W. Rep. 1086.

³ For private water corporations, see Chaps. 72-77, Secs. 1449-1529.

¹ See *Fellows v. Los Angeles*, 151 Cal. 52, 90 Pac. Rep. 137.

See, also, *South Pasadena v. Pasadena etc. Co.*, 152 Cal. 590, 93 Pac. Rep. 490; *Aylmore v. City of Seattle*, 40 Wash. 42, 92 Pac. Rep. 932.

² See Secs. 684, 696, 1436.

³ For the Arid Region Doctrine, see Chap. 31, Secs. 585-594.

⁴ For the appropriation of water for municipal purposes, see Sec. 696.

tions for the express purpose of the sale or rental of the water, or the water rights, to a municipality or to its residents;⁵ or these acts may be performed by a city or town in its municipal capacity, and such municipality may thus acquire a perfect title to the water rights for such purposes. In the performance of these essential acts necessary to constitute a valid appropriation there is no difference, as far as the law is concerned, between those which must be performed by a municipal corporation and those which must be performed by an individual or a private corporation. The law of the State wherein the appropriation is made must be complied with in either case. And as far as the power of a municipal corporation is concerned to make the appropriation, it has an equal standing with an individual or a private corporation, no more and no less. The mere fact that the appropriator is a city or town, other things being equal, does not give it any better or greater right under the law to make the appropriation than is given an individual or private corporation. The priority of the appropriation also gives the better right both as between different municipal corporations, or as between a municipal corporation and an individual or a private corporation.⁶

As we have seen, also, in previous sections, a municipality may, under certain conditions, be also a riparian proprietor.⁷

§ 1436. The appropriation of water by municipal corporations.

—The statutes of the various States authorize municipal corporations to acquire all water rights necessary to supply the inhabitants of the same with water, as well as to acquire water for the use of the municipalities. Therefore, in those jurisdictions where the acquisition of such rights by appropriation is recognized, it is generally conceded that municipal corporations in their corporate capacity may make appropriations. Therefore, a city or town being given the power to use all reasonable means to supply the people within its borders with water for all useful and beneficial purposes, and to that end to acquire all necessary water rights by appropria-

⁵ For the acts necessary to make a valid appropriation, see Secs. 710-728.

For the rights of private corporations to make appropriation of water for the purpose of sale or rental, see Secs. 703, 1470.

⁶ For the rights of prior and subsequent appropriators, see Secs. 776-786.

⁷ For a municipality as a riparian proprietor, see Sec. 482.

tion or other lawful ways, and to make and enforce reasonable rules and regulations to control the same, it is the duty of the municipal corporation to exercise that power, so far as the health, safety, convenience, and good of its inhabitants demand.¹ But the appropriation of water by a city or town from a natural stream or other source of water supply stands in law, as respects the rights of others who have acquired rights to the waters of the same stream, the same as though the appropriation was made by an individual or by a company. If the municipal corporation is first in time, it has the superior right to the use of the water to the full extent of the appropriation. If, however, the rights acquired by the municipality are subsequent in time to the rights acquired by others, they are subject to the rights of the prior appropriators. The Arid Region Doctrine of appropriation that he who is first in time has the superior right to the full extent of his appropriation, applies in full force where the appropriator is a municipality; and the mere fact that the appropriator is a municipal corporation gives it no better right to make the appropriation than though the appropriator was an individual or a private corporation.² As was well said in a recent Ore-

¹ *City of Springville v. Fulmer*, 7 Utah 450, 27 Pac. Rep. 577, where it is said: "And, having the power, it was the duty of the plaintiff to use it, so far as the health, safety, convenience, and good of its inhabitants demanded. In addition to the powers expressly conferred by its charter, the law added such implied powers as might become necessary to give effect to them."

A municipal corporation may acquire all the rights to the waters of a stream, by the appropriation thereof, and having its claim recognized by the riparian owners along the stream, although, for a considerable time it does not consume all of the water claimed. *Feliz v. Los Angeles*, 58 Cal. 73.

See, also, *Elms v. Los Angeles*, 58 Cal. 80; *Salt Lake City v. Salt Lake City etc. Co.*, 24 Utah 249, 67 Pac. Rep. 672, 25 Utah 441, 71 Pac. Rep. 1069, 61 L. R. A. 648; *Crawford Com-*

pany v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; *Kansas City v. Slangstrom*, 53 Kan. 431, 36 Pac. Rep. 706; *Lone Tree D. Co. v. Rapid City etc. Co.*, 16 S. D. 451, 93 N. W. Rep. 650; *Montecito etc. Co. v. Santa Barbara*, 144 Cal. 578, 77 Pac. Rep. 1113; *Id.*, 151 Cal. 377, 90 Pac. Rep. 935; *Santa Barbara v. Gould*, 143 Cal. 421, 77 Pac. Rep. 151; *Carlson v. City of Helena*, 43 Mont. 1, 110 Pac. Rep. 114; *Id.*, 39 Mont. 82, 102 Pac. Rep. 39; *Spokane Ranch & Water Co. v. Beatty*, 37 Mont. 342, 96 Pac. Rep. 727, 97 Pac. Rep. 838.

² *City of Santa Barbara v. Gould*, 143 Cal. 421, 77 Pac. Rep. 151; *Junction Creek etc. Co. v. City of Durango*, 21 Colo. 194, 40 Pac. Rep. 356; *City of Pocatello v. Bass*, 15 Idaho 1, 96 Pac. Rep. 120.

Where water has been appropriated and used for 30 years, the dominion

gon case:³ "The power to provide a water system is not governmental nor legislative in its character, but strictly proprietary, and the city, when engaged in prosecuting such an improvement, is clothed with the same authority and subject to the same liabilities as a private citizen."⁴

Again, in order for a municipality to have the right to the water for all of the uses for which it claims, there must be an appropriation covering such uses. Therefore, it is held that a municipality itself can not, under an appropriation for domestic purposes allowed by the statute as a preference right, appropriate all of the water of a stream for "domestic purposes" and use the same for general municipal purposes, including water for the sprinkling of streets

and right to the use and diversion thereof for beneficial purposes is vested in the appropriator, who can not be deprived of such right by a municipal corporation, except by the voluntary act of the appropriator, by forfeiture, or by operation of law. *Fisher v. Bountiful City*, 21 Utah 29, 59 Pac. Rep. 520.

See, also, *Springville v. Fullmer*, 7 Utah 450, 27 Pac. Rep. 577; *Holman v. City of Pleasant Grove*, 8 Utah 78, 30 Pac. Rep. 72.

A city which has become a riparian owner on a navigable lake and on its navigable natural outlet has no right to divert the water of the lake for municipal purposes, and thus lessen the natural flowage of the water in such outlet, to the injury of a lower riparian owner and prior appropriator, without compensating him therefor. *City of New Whatcom v. Fairhaven Land Co.*, 24 Wash. 493, 64 Pac. Rep. 735, 54 L. R. A. 190.

See *City and County of Denver v. Walker*, 45 Colo. 387, 101 Pac. Rep. 348, where it was held that where the complainant alleged an appropriation of water by a city, interference with which was sought to be enjoined, but

the proof showed that any rights of the city to the use of the water were not based on an appropriation, but on a contract, there was substantial and fatal variance, and the plaintiff could not recover.

³ *Tone v. Tillamook City*, 58 Ore. 382, 114 Pac. Rep. 938.

⁴ "The right of a city to divert water for the use of its inhabitants is not superior to the right of an individual or a farming community to divert water for domestic or other purposes, in the sense that the city may take water for that purpose from those who have previously appropriated it for the same, or some other beneficial use, without compensating the senior appropriators." *Town of Sterling v. Pawnee Extension Ditch Co.*, 42 Colo. 421, 94 Pac. Rep. 339.

See, also, *Montrose Canal Co. v. Loutsenheizer*, 23 Colo. 233, 48 Pac. Rep. 532.

Rights acquired to the use of water for irrigation by a private party can not be taken by a city for domestic use by its inhabitants without just compensation. *Strickler v. Colo. Springs*, 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245.

and to furnish power for a lighting plant.⁵ But in order to acquire this right the city must exercise the power of eminent domain.⁶

§ 1437. **Purchase of water rights and water works by municipal corporations.**—Not only may a municipal corporation appropriate water and construct the necessary system of water works in its corporate capacity,¹ but also under its general powers it may purchase water rights, where there has been a valid appropriation of the water previously made by others, and it may also purchase the system of water works where constructed and owned by others. In fact, it is the duty of municipal corporations, under the general welfare clause contained in their charter, to supply itself and its inhabitants with a sufficient supply of pure water, and that, too, whether this be by appropriation, purchase, or by the granting of franchises to private corporations for this purpose.²

⁵ *Crawford Company v. Hathaway* (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647.

See, also, the appropriation of water for domestic purposes, Sec. 692.

The fact that a city, in violation of its charter, has, from time immemorial, continuously diverted water from a stream, and sold it to consumers without its limits for extra municipal use, does not constitute an appropriation thereof, as against a lower riparian owner. *Vernon Irr. Co. v. Los Angeles*, 106 Cal. 237, 39 Pac. Rep. 762.

⁶ *Montpelier Mill Co. v. City of Montpelier*, 19 Idaho 212, 113 Pac. Rep. 741.

¹ For the appropriation of water by municipal corporations, see Secs. 696, 1436.

² "One of those powers, necessarily implied by the general welfare clauses of the charter, is to supply the city with water." *City of Joseph v. Joseph Waterworks Co.*, 57 Ore. 586, 111 Pac. Rep. 864, 112 Pac. Rep. 1083.

A mere grant of power to a city to provide and supply water to its in-

habitants gives power to acquire for that purpose water supplies without the city. *City of South Pasadena v. Pasadena etc. Co.*, 152 Cal. 390, 93 Pac. Rep. 490.

The making and filing of a plan laying out the townsite upon a desert entry will not dedicate to the public the water used upon the streets and alleys of said townsite under a water right subsequently located and acquired. *Village of Hailey v. Riley*, 14 Idaho 481, 95 Pac. Rep. 686, 17 L. R. A., N. S., 86.

See, also, *Cherryvale W. Co. v. Cherryvale*, 65 Kan. 219, 69 Pac. Rep. 176; *Fellows v. Los Angeles*, 151 Cal. 52, 90 Pac. Rep. 137; *Strickler v. City of Colorado Springs*, 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245; *Lidgerwood Park Waterworks Co. v. City of Spokane*, 19 Wash. 365, 53 Pac. Rep. 352; *Orcutt v. Pasadena etc. Co.*, 152 Cal. 599, 93 Pac. Rep. 497; *Graham v. Pasadena etc. Co.*, 152 Cal. 596, 93 Pac. Rep. 498; *City of South Pasadena v. Pasadena etc. Co.*, 152 Cal. 590, 93 Pac. Rep. 490; *City of Los Angeles v. Los Angeles etc. Co.*,

As we have discussed in previous sections, a change of the use of the water may be made from irrigation to municipal uses, provided that others are not injured thereby.³

It is held that the duty of a city in this respect is limited to the city uses and the use of its inhabitants, and that it is not a city purpose to furnish water to the board of education of a city for the use of its public schools.⁴ Water rights may not only be purchased by a corporation, but where a city owns a water right of such impure quality that it is unfit for domestic purposes, it may exchange such rights with farmers for irrigation use for pure water owned by such farmers for city use. So, where a contract between a city and certain farmers entitled to water for irrigation for an exchange of water provided that in case the city made default in furnishing the farmers the exchange water from its canal, they reserved the right to use the water they agreed to exchange only during the time the city's default continued, unless the failure of the city continued for a period of six months, when it should be optional with the farmers to terminate the contract, and the city's ability to perpetually furnish the farmers the required amount in exchange was conceded, such contract provision was a condition subsequent, and did not prevent the city from acquiring an absolute right to the farmers' water within the Utah Constitution, Article 14, Section 4.⁵

But in the purchase of water rights by a city, the property rights

124 Cal. 368, 57 Pac. Rep. 211, 571; Water-Supply Co. v. City of Albuquerque, 9 N. M. 441, 54 Pac. Rep. 969; City of New Whatcom v. Fairhaven Land Co., 24 Wash. 493, 64 Pac. Rep. 735, 54 L. R. A., 190; City of Leavenworth v. Leavenworth etc. Co., 69 Kan. 82, 76 Pac. Rep. 451; State *ex rel.* Hungate v. City of Topeka, 68 Kan. 177, 74 Pac. Rep. 647; Carlson v. City of Helena, 39 Mont. 82, 102 Pac. Rep. 39; Griffin v. City of Tacoma, 49 Wash. 524, 95 Pac. Rep. 1107.

³ Strickler v. Colorado Springs, 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245.

For changes that may be made of use, see Secs. 869-873.

⁴ Water-Supply Co. v. City of Albuquerque, 9 N. M. 441, 54 Pac. Rep. 969.

See, also, National Waterworks Co. v. School Dist. of Kansas City, 23 Mo. App. 227.

⁵ State *ex rel.* Ellerbeck v. Salt Lake City, 29 Utah 361, 81 Pac. Rep. 273.

of others must be respected not only as to the water rights,⁶ but also as to the system of water works.⁷

Again, when a city acquires the water system and rights from a corporation engaged in the supplying of water for a public use, it assumes the burden of supplying water to those entitled to the use of the water from its grantor, to which it was subject at the time of the purchase.⁸

Oftentimes where a private corporation is furnishing water to a municipality under a franchise granted by it, it is provided in the franchise itself that the city or town, at the expiration of such franchise, or a certain period of time fixed therein, may exercise the right to purchase the water rights and systems of water works from the company upon a valuation of the property at the time of the purchase, to be determined in some method prescribed in the franchise. And a usual method prescribed for the valuation of the property is by arbitration.⁹

⁶ The owner making the first appropriation can not deprive the other owners of the water from a stream by selling his rights to supply the inhabitants of a city. *Creek v. Bozeman Waterworks Co.*, 15 Mont. 121, 38 Pac. Rep. 459.

See, also, *Strickler v. Colorado Springs*, 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245; *Fisher v. Bountiful City*, 21 Utah 29, 59 Pac. Rep. 520; *Crawford Co. v. Hathaway (Hall)*, 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; *City of New Whatcom v. Fairhaven Land Co.*, 24 Wash. 493, 64 Pac. Rep. 735, 54 L. R. A. 190.

⁷ The owner of a system of waterworks, erected and maintained under a valid city ordinance granting a franchise therefor for 20 years, may enjoin the city from taking the plant in an unlawful manner, notwithstanding the expiration of such period. *City of Leavenworth v. Leavenworth City etc. Co.*, 69 Kan. 82, 76 Pac. Rep. 451.

A city without power to take pos-

session of a waterworks plant rightfully may be enjoined from doing so forcibly. *City of Los Angeles v. Los Angeles etc. Co.*, 124 Cal. 368, 57 Pac. Rep. 211, 571.

See, also, *State ex rel. Dunbar v. Galena W. Co.*, 63 Kan. 317, 65 Pac. Rep. 257.

⁸ *Orcutt v. Pasadena etc. Co.*, 152 Cal. 599, 93 Pac. Rep. 497; *Graham v. Pasadena etc. Co.*, 152 Cal. 596, 93 Pac. Rep. 498; *City of South Pasadena v. Pasadena etc. Co.*, 152 Cal. 590, 93 Pac. Rep. 490; *Fellows v. City of Los Angeles*, 151 Cal. 52, 90 Pac. Rep. 137; *City of Los Angeles v. Los Angeles etc. Co.*, 124 Cal. 368, 57 Pac. Rep. 211, 571.

See, also, for duty to furnish water, Sec. 1443.

⁹ A provision for arbitration in a contract for the sale of waterworks to a city is not void by reason of a stipulation that the finding of the arbitrators should be approved by the city council to be binding on the city. *Lidgerwood etc. Co. v. City of Spokane*, 19 Wash. 365, 53 Pac. Rep. 352.

§ 1438. **Acquisition of water rights and water works by condemnation.**—Water rights, lands, and systems of water works may be acquired by a municipal corporation by virtue of the power of eminent domain in an action for the condemnation of the same. Such a use is unquestionably a public use, for which such actions will lie.¹ But it is held in Colorado that the right to enlarge a private ditch can not be acquired by condemnation proceedings brought by a city for that purpose where the statute only recognized such a right in persons seeking to acquire a right of way for the purpose of conducting the water for use upon their own lands.² The subject of the acquisition of such rights by virtue of the power of eminent domain has been discussed in previous portions of this work.³

§ 1439. **Rights of municipalities succeeding to Spanish-Mexican pueblo rights.**—As we have seen in a previous portion of this work, that in Mexico in the foundation of pueblos or agricultural villages it was the custom to set aside for the use of the pueblo and its inhabitants a certain area of land, and also to grant certain rights to the waters flowing to and through the pueblo. Under the plan adopted for the foundation of the pueblo of Pictic, in the State of Sonora, the area of land so set aside was sixteen square leagues, and certain rights were also granted to the pueblo and its inhabit-

¹ "All private property is held subject to the demands of a public use. The constitutional guaranty of just compensation is not a limitation of the power to take, but only a condition of its exercise. . . . That the supply of water to a city is a public purpose can not be doubted, and hence the condemnation of a water-supply system must be recognized as within the constitutional limits of the power of eminent domain. It matters not to whom the water-supply system belongs, individual or corporation, or what franchises are connected with it—all may be taken for public uses upon payment of just compensation." Mr. Justice Brewer in *Long Island Water-Supply Co. v. Brooklyn*, 166 U.

S. 685, 41 L. Ed. 1165, 17 Sup. Ct. Rep. 718.

Los Angeles v. Pomeroy, 124 Cal. 597, 57 L. Ed. 585; *Hooker v. Los Angeles*, 188 U. S. 314, 47 L. Ed. 487, 23 Sup. Ct. Rep. 395, 63 L. R. A. 471; *City of Santa Barbara v. Gould*, 143 Cal. 421, 77 Pac. Rep. 151.

² *Junction Creek etc. v. City of Durango*, 21 Colo. 194, 40 Pac. Rep. 356.

³ For the condemnation of water rights, see Secs. 1087, 1088.

For the condemnation of rights of way, see Secs. 1065-1086.

See, also, *Salt Lake City v. East Jordan Irr. Co.*, — *Utah* —, 121 Pac. Rep. 592.

ants to the waters flowing through and to the pueblo.¹ Many of the cities and towns in the southwestern portion of the United States, notably in California, Arizona, New Mexico, and Texas, were originally founded as Spanish-Mexican pueblos, and, therefore, acquired certain rights to the lands set apart either by special or general ordinance promulgated, either by the King of Spain, under Spanish rule, or by the Government of Mexico, as the successor thereof. Upon the acquisition of this territory by the United States under the Treaty of Guadalupe Hidalgo,² and the Gadsden Purchase,³ it was provided by the Acts of Congress⁴ in effect that within a certain period of time individuals and cities and towns claiming under the old Spanish-Mexican land grants, or pueblo grants, might prove up their claims before the commissioners appointed under the provisions of the Acts, and upon due proof thereof an award defining the same would be made by the commissioners and thereafterward a patent would be issued from the United States to the city or town or to the individual, as the case might be. A municipality, therefore, founded upon one of these old Spanish-Mexican pueblo grants, having proven its claim, succeeded to all the rights both in the land and waters that were formerly owned by the old pueblo.⁵ And as it was held under the Spanish-Mexican law that a community right in and to waters was paramount and superior to the rights of individuals, where the same came in conflict,⁶ therefore a pueblo, as a quasi-public corporation and representing a community, acquired rights in and to the waters flowing to and through the boundaries of the pueblo, which rights were paramount and superior to the claims of individuals in and to the same waters. And hence it follows that the city or town of the United States which is the successor of one of these old pueblos, is also the successor to all the rights in and to the waters flowing to or through the pueblo lands, which rights are paramount and superior to rights of individuals. And when the right of the pueblo

¹ For the Plan of Pictic, see Sec. 581.

For the Spanish-Mexican laws governing waters, see Chap. 30, Secs. 576-583.

² For the acquisition of territory by the Treaty of Guadalupe Hidalgo, see Sec. 399.

³ See Sec. 399.

⁴ For Act of March 3, 1851, see 9 Stat. L. 631, Chap. 41.

⁵ For the rights of pueblos to waters, see Secs. 581, 582.

⁶ For the Spanish-Mexican laws, see Chap. 30, Secs. 570-584.

was prior, this is also recognized as an element giving a superior right. It therefore follows that a city succeeding to the rights of a pueblo has a preference or prior right to consume the waters of a natural stream and its tributaries, even as against an upper riparian proprietor to the full extent as may be necessary for its inhabitants and for general municipal purposes. So, in a case involving the water rights of the city of Los Angeles as successor to the rights of the pueblo of Nuestra Senora Reina de Los Angeles, where it was stipulated by the parties that: "Under the laws of the Kingdom of Spain said pueblo upon its foundation, by virtue of a grant under such laws, had the paramount right claimed by the plaintiff (the city) in the complaint herein to use all the water of the river, and such paramount right continued to exist under that government and under the Mexican government until the acquisition of California by the United States," it was held by the Supreme Court of California that the city of Los Angeles also succeeded to the rights in full of the old pueblo as against any claims which might be made by upper riparian owners also claiming under a Mexican grant.⁷ And upon appeal to the Supreme Court of the United States it was held that the decision of the State Court upon the question was decisive.⁸

⁷ *Los Angeles Milling Co. v. Los Angeles*, 152 Cal. 645, 93 Pac. Rep. 869, where it was held that, under the Mexican law, a pueblo, as a quasi-public corporation, had power to distribute to the common lands and to its inhabitants the waters of an unnavigable river on which the pueblo was situated, and a riparian owner could not appropriate the water so as to interfere with the common use or destiny which a pueblo on the stream had given to the water, and a city which is the successor of the pueblo holds the lands and water rights of its predecessor in trust for its inhabitants. This case was appealed to the Supreme Court of the United States, and there dismissed for want of jurisdiction, the Court holding "That the extent of the riparian rights belonging to pueblos or persons receiving patients are mat-

ters of local or general law." 217 U. S. 217, 54 L. Ed. 736, 30 Sup. Ct. Rep. 452.

⁸ See, also, *Lux v. Haggin*, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; *Vernon Irr. Co. v. Los Angeles*, 106 Cal. 237, 39 Pac. Rep. 762; *Los Angeles v. Pomeroy*, 124 Cal. 597, 57 Pac. Rep. 585; dismissed, *sub nom. Hooker v. Los Angeles*, 188 U. S. 314, 47 L. Ed. 487, 23 Sup. Ct. Rep. 395, 63 L. R. A. 471; *Feliz v. Los Angeles*, 58 Cal. 73; *Anaheim W. Co. v. Fuller*, 150 Cal. 327, 88 Pac. Rep. 978, 11 L. R. A., N. S., 1062; *Fellows v. Los Angeles*, 151 Cal. 52, 90 Pac. Rep. 137; *Devine v. Los Angeles*, 202 U. S. 313, 50 L. Ed. 1046, 26 Sup. Ct. Rep. 652; *Crystal Springs etc. Co. v. Los Angeles*, 177 U. S. 169, 44 L. Ed. 720, 20 Sup. Ct. Rep. 573.

As to the extent of the right to which the municipal corporation succeeded, the California cases seem to hold that as long as the city uses the water for municipal purposes and for supplying its inhabitants, for which the right was dedicated, that such an amount of water may be used from the stream as the necessities of the case demand, even to the use of all the water of the stream. And, further, it is held that if the needs of the pueblo increased in the future, the right will expand to include them, and this, too, although the population of the city is not confined to its original limits.⁹ But, upon the other hand, the water so claimed by a city as the successor to an old pueblo right must be used by the municipality for the purposes for which it was originally dedicated. And, again, the rights of the city from this source can not exceed the rights of the pueblo itself. Hence it follows that such a city has no right to divert the water of a stream running through its boundaries for the purpose of selling it to persons for irrigating lands outside of the city limits.¹⁰

It therefore seems to us that title to water rights based upon the old Spanish-Mexican pueblo right, under the authorities cited and quoted in our notes, is one of the strongest of titles that a municipality may have. It is not only a right absolute in itself to the extent of the water used for municipal purposes and for supplying its inhabitants with the necessary water, but under the case of *Los Angeles v. Pomeroy*, as the city increases in size and population, it is an expanding right, which is paramount and superior to the claims of others until the city eventually lays claim to all the water which the stream supplies.

§ 1440. Appropriations by others than the municipality for municipal purposes.—Not only may water be appropriated by a mu-

⁹ The pueblo right to water of a stream includes the right to take all the water that is reasonably necessary to give an ample supply for the use of the inhabitants, and for all municipal purposes for which the city may require water, including sewers, artificial lakes, irrigation of public parks, etc. This right is measured by the necessity, and, if the needs increase in the future, the right will

expand to include them; and this, though the population of the city is not confined to the original pueblo limits. *Los Angeles v. Pomeroy*, 124 Cal. 597, 57 Pac. Rep. 585; dismissed, *sub nom. Hooker v. Los Angeles*, 188 U. S. 314, 47 L. Ed. 487, 23 Sup. Ct. Rep. 395, 63 L. R. A. 471.

¹⁰ *Vernon Irr. Co. v. Los Angeles*, 106 Cal. 237, 39 Pac. Rep. 762.

municipality for its own use and the use of its inhabitants, but also it may be appropriated by individuals or private corporations for the express purpose of furnishing water for such purposes for profit or hire.¹ Even in the absence of statutory power a municipality, as an incident to its organization, has the right to give a franchise for the purpose of supplying itself with water.² But these appro-

¹ For right of corporations to appropriate water, see Secs. 1470, 1492.

² *City of Joseph v. Joseph Waterworks Co.*, 57 Ore. 586, 111 Pac. Rep. 864, 112 Pac. Rep. 1083; *Brenham v. Brenham Water Co.*, 67 Tex. 524, 4 S. W. Rep. 143.

It is within the power of a city to make a contract with another city to furnish it with water, where it will not interfere with the supply of water to its own inhabitants, since the making of such a contract is not an exercise of its legislative or governmental powers, but is for the private advantage of the city and its inhabitants. *City of Colorado Springs v. Colorado City*, 42 Colo. 75, 94 Pac. Rep. 316.

But see for power of a city to dispose of its water rights, Sec. 1441.

Where two corporations were formed for the purpose, among other things, of furnishing the city of San Diego and its inhabitants with water, and one owned the water supply and pipes to conduct it to the limits of the city, and the other corporation owned a system of distributing pipes in the city, it was held that a contract between the two companies to unite in furnishing the city with water, whereby the proceeds of the sales, after deducting operating expenses, were to be divided between the two companies, was not void as creating a monopoly. *San Diego Water Co. v. San Diego Flume Co.*, 108 Cal. 549, 41 Pac. Rep. 495.

Under a contract between a city and a water company, by which the latter agrees to supply the city with water sufficient for fire purposes, an individual citizen, whose property has been destroyed by fire through the alleged neglect of the water company in complying with the terms of the contract, has no right of action against the company upon the ground that there was no privity of contract between them. *Bush v. Artesian etc. Co.*, 4 Idaho 618, 43 Pac. Rep. 69; see, also, cases cited.

See, also, *San Luis W. Co. v. Estrada*, 117 Cal. 168, 48 Pac. Rep. 1075, where by legislative grant three persons and their assigns were given the exclusive right for 25 years to supply the inhabitants of a town with water, and it was held that a corporation might purchase and hold the franchise previously granted to the persons, and have the exclusive right during the period named to furnish such supply.

A city in contracting for waterworks to supply itself and inhabitants with water exercises its business or proprietary powers, as distinguished from its legislative powers; and hence the fact that the contract is to run for a long term of years does not render it void, as restricting the future legislative powers of the city. *State ex rel. Great Falls etc. Co. v. Mayor etc. of Great Falls*, 19 Mont. 518, 49 Pac. Rep. 15.

One who contracts with a town is charged with notice of the statutes

priations, as is the case where the municipality is the appropriator, stand upon the same footing as the appropriation of private individuals. Where a private corporation appropriated certain water for supplying a certain city in California, the Court said: "We do not see that this fact in and of itself could give the company a right to anything in excess of the 40 inches" (the amount appropriated). And the Court held that the supply could not be increased with the growth of the city for emergency use, as against the rights of the other appropriators.³ The supplying of pure

limiting the power of the town to fulfill such contracts. *Raton Waterworks Co. v. Town of Raton*, 9 N. M. 70, 49 Pac. Rep. 898.

The action of a city in authorizing a private corporation to erect waterworks for the purpose of supplying the city, without exclusive rights, does not deprive a city of the statutory right to erect water works of its own. *Thomas v. City of Grand Junction*, 13 Colo. App. 80, 56 Pac. Rep. 665.

See, also, *North Springs W. Co. v. City of Tacoma*, 21 Wash. 517, 58 Pac. Rep. 773, 47 L. R. A. 214.

Where a city repudiates a contract with a water company providing for the payment of hydrant rentals semi-annually, but still uses the water furnished by the company, and insists that the water supply be continued regardless of the contract, a command in a writ of mandamus that the city levy sufficient taxes to pay, not only the six months' water rentals already due, but also those due for the remaining six months of the year, is proper. *State ex rel. v. Mayor etc. of City of Great Falls*, 19 Mont. 518, 49 Pac. Rep. 15.

But that a town is not authorized to levy a special tax for this purpose, see *Raton Waterworks Co. v. Town of Raton*, 9 N. M. 70, 49 Pac. Rep. 898.

See, also, *State ex rel. Milsted v. Butte City W. Co.*, 18 Mont. 199, 44 Pac. Rep. 966; *San Luis W. Co. v. Estrada*, 117 Cal. 168, 48 Pac. Rep. 1075; *Crawford Company v. Hathaway (Hall)*, 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; *Lone Tree D. Co. v. Rapid City etc. Co.*, 16 S. D. 451, 93 N. W. Rep. 650; *South Pasadena v. Pasadena etc. Co.*, 152 Cal. 590, 93 Pac. Rep. 490; *Bothwell v. Consumers' Co.*, 13 Idaho 568, 92 Pac. Rep. 533; *Pocastello W. Co. v. Standley*, 7 Idaho 155, 61 Pac. Rep. 518; *Reno W. Co. v. Leete*, 17 Nev. 203, 30 Pac. Rep. 702; *City of Joseph v. Joseph Waterworks Co.*, 57 Ore. 586, 111 Pac. Rep. 864, 112 Pac. Rep. 1083; *Los Angeles v. Los Angeles City W. Co.*, 124 Cal. 368, 57 Pac. Rep. 210; *Town of Ukiah City v. Ukiah etc. Co.*, 142 Cal. 173, 75 Pac. Rep. 773, 100 Am. St. Rep. 107; *People ex rel. Ricks Water Co. v. Elk River etc. Co.*, 107 Cal. 221, 40 Pac. Rep. 521, 48 Am. St. Rep. 125; *Grand Junction W. Co. v. City of Grand Junction*, 14 Colo. App. 425, 60 Pac. Rep. 196; *Asher v. Hutchinson etc. Co.*, 66 Kan. 496, 71 Pac. Rep. 813, 61 L. R. A. 52.

³ *Duckworth v. Watsonville etc. Co.*, 150 Cal. 520, 110 Pac. Rep. 927; *Id.*, 158 Cal. 206, 89 Pac. Rep. 338.

A land owner may enjoin a well constructed by a grantee of the city

water by a private corporation to the inhabitants of a city, town, or other municipality is a public use, for which the right of eminent domain may be exercised.⁴

Unfortunately, every city and town does not own its own water rights and system of water works. In fact, it is a very common thing throughout the West, and, indeed, throughout the whole country, for the water rights and systems of water works used in supplying municipalities and their inhabitants with water to be owned by individuals or private corporations, who or which, operating under a franchise granted by the municipalities, construct the systems of water works and sell or rent the use of the water furnished to the cities or towns and to their inhabitants. Usually as far as the strict municipal needs are concerned, the consideration for the granting of the franchise pays for all or a portion of the water furnished for municipal purposes. All profit to the private corporation for furnishing the water must, therefore, come out of the individual users. These corporations have not been at all backward in fixing as high a rate for the use of the water as it is possible. From experience it has been proven that such corporations, unless their powers are limited and enforced by law, ordinances, or the specific terms of their franchise, are liable to become engines of oppression, dealing, as they do, with one of the elements of Nature most necessary to the welfare and prosperity of man. The extortionate water rates charged in many cases and the arbitrarily shutting off of the water of individual users for the failure to pay such rates, have probably caused as much misery as any one thing next to hunger and cold. And another unfortunate thing is that these franchises are usually granted at an early period of the history of the city or town, are exclusive in their nature, and are granted for long periods of time. Again, these franchises oftentimes themselves provide that the company may charge such a sum for the use of the water at what, at a later period, at least, may be deemed excessive rates. The franchises containing such provisions being deemed in the nature of contracts, generally can not afterward be impaired by subsequent leg-

upon the highway adjacent to the owner's well on his new land, where the new well would injure the rights of the land owner. *Bonetti v. Ruiz*, 15 Cal. App. 7, 113 Pac. Rep. 118.

⁴ *State ex rel. Stropshire v. Superior Court of Pacific County*, 51 Wash. 386, 99 Pac. Rep. 3.

isolation attempting to lower the rates provided for. It has oftentimes been put up to the municipality to either buy out the water rights and the system of water works owned by such a company, in every instance, for at least all that it is worth, and in many instances many times more than it is worth, or to condemn the property of the corporation, which is nearly as bad a predicament. And for the payment of such property, in either case, the municipality is compelled to issue bonds, the principal and interest of which has eventually to be paid by the taxpayers of the municipality. The writer has in mind two vivid examples illustrating this subject, and these are in the cities of Salt Lake and Denver. The city of Salt Lake owns its own water rights and its system of water works, and the charges for the use of water are kept down to the amount necessary for the operation of the system. The water rights and the system of water works of Denver are owned by a private corporation operating under a franchise granted for a long period of time, which has just expired. The charges for the use of water in Denver have not only been sufficient to maintain and operate the system, but also sufficient to pay a large profit to the stockholders of the private corporation. And at this writing the city of Denver, having refused to extend the franchise or to grant a new one, is in the throes of endeavoring to purchase the water rights and the system of water works from the private corporation, and the company asking for its rights many times what they are actually worth. Many other examples might be mentioned, but this is sufficient. These examples go to show that, especially in the West, where the waters of the natural streams and other sources of supply may be appropriated, or the rights to the use of the same may be purchased after the appropriation has once been made, had those in charge of the city governments at an early day exercised a slight degree of intelligence or common honesty the municipalities would not be confronted by such propositions.

§ 1441. The alienation of its water rights by a municipality.—

It is the general rule of law that a city having once acquired a title to water rights or other property, and having dedicated them to public use, has no power, without special authority conferred by statute, to sell, lease, or otherwise dispose of such rights to others. So, in a case arising in Utah, where, under a charter of a city con-

taining the provision authorizing a city to "purchase, receive, hold, sell, lease, convey, and dispose of property, real and personal, for the benefit of the city," it was held that no authority was expressly or by necessary implication given to convey or otherwise transfer "property used by the public—dedicated to a public use. The control and management of property dedicated to the use of the people of a city is given for their benefit, not for the individual benefit of the public authorities. A public corporation is not a legal entity or person whose interests can be considered separate and apart from its people. It is but an instrumentality created and perpetuated for their benefit."¹ Afterward, in a case between the same parties, where the water works system of a city was in such a condition that it was almost worthless, it was held that the city has the authority to lease its water right to another in consideration of his erecting and maintaining a water works system for the furnishing of a proper supply to the city. And where the city had so contracted for the building of a water works system, and it permitted the construction of the water works, and for more than six years availed itself of the benefits of the system and assessed and collected an annual tax thereon, the city was estopped to thereafter question the validity of the contract.² The contract in question in this case was made prior to the adoption of the State constitution, which directly prohibits municipal corporations from selling, leasing, or otherwise disposing of their water rights or water works; but it provides that nothing therein contained should be construed to prevent any municipal corporation from exchanging water rights or sources of water supply for other water rights or sources of water supply of equal value, and to be devoted in like manner to the public supply of its inhabitants.³ Under this authority Salt Lake City,

¹ Ogden City v. Bear Lake etc. Co., 16 Utah 440, 52 Pac. Rep. 697.

See, also, Huron Waterworks Co. v. City of Huron, 7 S. D. 9, 62 N. W. Rep. 976, 30 L. R. A. 848, 58 Am. St. Rep. 817.

² Ogden City v. Bear Lake etc. Co., 28 Utah 25, 76 Pac. Rep. 1069.

³ Utah Const., Art. 11, Sec. 6.

It is held that the provisions of this section do not prohibit the acqui-

sition of a secondary water right against a municipality, or forbid the acquisition by a power company of the right to connect its flume with the water canal of a city for the purpose of discharging water therein. Salt Lake City v. Salt Lake City etc. Co., 24 Utah 249, 67 Pac. Rep. 672, 25 Utah 441, 71 Pac. Rep. 1067, 61 L. R. A. 648.

owing a right to the use of water which came from Utah Lake, and which was unfit for culinary and domestic purposes on account of the large amount of silt which it carried, but on that very account being more valuable for irrigation, made an exchange with certain farmers for their rights to the pure mountain water taken from Big Cottonwood Creek, which takes source in the Wasatch Mountains, to the southeast of the city. This exchange of water has been upheld by the Supreme Court.⁴

A municipal corporation, the same as an individual or a private corporation, can lose its water rights by abandonment⁵ or by adverse possession and user by another amounting to prescription.⁶

§ 1442. **Construction of franchises granted to companies to furnish water to municipalities.**—A franchise granted within its powers by a city or town to a private corporation to construct therein a system of water works and to furnish the municipality and its inhabitants with water, is a contract between the municipality and the company. And as to the construction of such franchises, as is the case with other contracts where their terms are clear and unambiguous as to the true intent of the parties, the expressed terms must govern the rights of the parties.¹ But it is a rule of construction of franchises that if the terms of the franchise are doubtful and ambiguous as to the true intent of the parties thereto, the Court may consider the other facts and circumstances surrounding each particular case in its interpretation,² and that such a franchise is to be construed strictly against the grantee and liberally in favor of the municipality or the public. What is not unequivocally granted is withheld, and nothing passes to the private corporation by implication, except what is necessary to carry into effect the obvious intent of the grant.³ A municipal corporation has no author-

⁴ State *ex rel.* Ellerbeck v. Salt Lake City, 29 Utah 361, 81 Pac. Rep. 273.

⁵ For abandonment, see Secs. 1099-1117.

⁶ For title by prescription, see Secs. 1033-1058.

¹ For the construction of contracts, see Sec. 1513.

For contracts with corporations, see Chap. 77, Secs. 1509-1529.

² For the interpretation of ambiguous contracts, see Sec. 1513.

³ Water, Light & Gas Co. v. City of Hutchinson, 207 U. S. 385, 52 L. Ed. 257, 28 Sup. Ct. Rep. 135; Birmingham etc. Co. v. Birmingham St. Ry. Co., 79 Ala. 465, 58 Am. Rep. 615; City of Joseph v. Joseph Waterworks Co., 57 Ore. 586, 111 Pac. Rep. 864, 112 Pac. Rep. 1083; Pocatello W. Co.

ity to grant a perpetual franchise to a water company to furnish water to the city and its inhabitants, and, therefore, such a franchise, where there was an attempt to make such a contract in perpetuity, is void,⁴ and the Court can not make a new contract between the parties for a limited period.⁵ Neither has a municipal corporation the power to grant exclusive franchises for such purposes unless such power is conferred by law in explicit terms.⁶ And the terms of the franchise itself must not grant such an exclusive right. It is therefore held that without such power to grant such a franchise, or without such limitation in the franchise itself, a franchise granting to a private corporation for a limited period the right to operate a water system is not such a contract, the obligation of which is impaired by the city afterward establishing a competing system for itself⁷ or the granting another franchise to another competing company.⁸

v. Standley, 7 Idaho 155, 61 Pac. Rep. 518; Hatch v. Consumers' Co., 17 Idaho 204, 104 Pac. Rep. 670; Bothwell v. Consumers' Co., 13 Idaho 568, 92 Pac. Rep. 533; Mitchell v. Tulsa Water etc. Co., 21 Okla. 243, 95 Pac. Rep. 961, where it is said: "If an ordinance is silent about any power, it does not exist, and if a reasonable doubt on a fair reading of such an instrument arises as to the proper interpretation to be given to it, this doubt is to be resolved in favor of the public."

See, also, Helena Waterworks Co. v. Helena, 195 U. S. 383, 49 L. Ed. 245, 25 Sup. Ct. Rep. 40; Stein v. Bienville Water Supply Co., 141 U. S. 67, 35 L. Ed. 622, 11 Sup. Ct. Rep. 892.

⁴ Westminster W. Co. v. Westminster, 98 Md. 551, 56 Atl. Rep. 990, 64 L. R. A. 630, 103 Am. St. Rep. 424; City of Joseph v. Joseph Waterworks Co., 57 Ore. 586, 111 Pac. Rep. 864, 112 Pac. Rep. 1083.

⁵ City of Joseph v. Joseph Waterworks Co., 57 Ore. 586, 111 Pac. Rep.

864; Cedar Rapids W. Co. v. Cedar Rapids, 118 Iowa 234, 91 N. W. Rep. 1081; Brenham v. Brenham Water Co., 67 Tex. 524, 4 S. W. Rep. 143.

⁶ Water, Light & Gas Co. v. Hutchinson, 207 U. S. 385, 52 L. Ed. 257, 28 Sup. Ct. Rep. 135; affirming 144 Fed. Rep. 256; Freeport W. Co. v. Freeport, 180 U. S. 587, 45 L. Ed. 688, 21 Sup. Ct. Rep. 493.

⁷ North Springs Water Co. v. City of Tacoma, 21 Wash. 517, 58 Pac. Rep. 773, 47 L. R. A. 214, where it was held that empowering a city to construct waterworks, or authorize the construction of the same by others, in the absence of words of limitation or exclusion, is not a grant in the alternative; and the city, by electing private parties to do it, does not estop itself from afterward entering the field as a competitor.

"It is elementary that, unless such right is expressly made exclusive, it is not to be construed so, except under unavoidable implication arising from the terms of the grant. As well expressed sometimes, if it is in doubt,

§ 1443. **Duty to furnish water to the inhabitants of municipalities.**—It is a well-settled doctrine of law that where a private water company is organized for the purpose of furnishing water to the inhabitants of a community or neighborhood, whether inside or outside of a city or town, for profit or hire, that it is a public service or quasi-public company or corporation.¹ Such a company is not only under the duty and obligation to supply the water in proper proportions to the persons composing the class for which the use was created and without discrimination,² but, further, that if the company, upon proper demand and a payment of the established rates, refuses to furnish the water to such applicant, an action in mandamus will lie to compel the service,³ or, in case the company threatens to cut off the supply formerly enjoyed by the consumer, an injunction will be issued to prevent the deprivation thereof;⁴ and, again, in case injuries have been sustained by the consumer caused by the company failing to furnish the water when it was its duty to do so, the consumer in an action at law may recover damages for the actual injuries suffered by him from such a cause.⁵ This rule of law, as applying to public service or quasi-public corporations organized for the purpose of furnishing water to consumers for irrigation, will be discussed more thoroughly under the subject of the duties and rights of private corporations;⁶ but the rule ap-

the grant fails." Mr. Justice Frick in *Brummitt v. Ogden Waterworks Co.*, 33 Utah 289, 93 Pac. Rep. 828.

See, also, *Thompson Huston Electric Co. v. City of Newton*, 42 Fed. Rep. 723; *Long Island Water-Supply Co. v. City of Brooklyn*, 166 U. S. 685, 41 L. Ed. 1165, 17 Sup. Ct. Rep. 718; *Thomas v. City of Grand Junction*, 13 Colo. App. 80, 56 Pac. Rep. 665; *Syracuse W. Co. v. Syracuse*, 116 N. Y. 167, 22 N. E. Rep. 381, 5 L. R. A. 546; *Stein v. Bienville Water-Supply Co.*, 34 Fed. Rep. 145; *Carlson v. City of Helena*, 39 Mont. 82, 102 Pac. Rep. 39.

³ *Rockland W. Co. v. Camden etc. Co.*, 80 Me. 544, 15 Atl. Rep. 785, 1 L. R. A. 388; *Watuppa Res. Co. v. Fall River*, 147 Mass. 548, 18 N. E.

Rep. 465, 1 L. R. A. 466; *Freeport W. Co. v. Praeger*, 129 Pa. 605; *Syracuse W. Co. v. Syracuse*, 116 N. Y. 167, 22 N. E. Rep. 381, 5 L. R. A. 546; *Twitcheil v. City of Spokane*, 55 Wash. 86, 104 Pac. Rep. 150, 24 L. R. A., N. S., 290, 33 Am. St. Rep. 1021; *Madera Water Co. v. City of Madera*, 185 Fed. Rep. 281.

¹ For public service corporations, see Secs. 1493, 1494:

² For the duty to furnish water, see Secs. 1498-1500.

³ For compulsory service of water, see Sec. 1506.

⁴ See Sec. 1506.

⁵ For damages for the failure to furnish water, see Sec. 1507.

See, also, Chap. 83.

⁶ See Chap. 76, Secs. 1490-1508.

plies with equal force to corporations organized for the purpose of furnishing a municipality and its inhabitants with water. Therefore, a corporation receiving a franchise from a municipality authorizing it to supply the inhabitants with water, by accepting such franchise and attempting to operate thereunder, enters into an implied contract to serve all the inhabitants of such municipality without distinction or discrimination upon such persons paying the established rates and complying with the reasonable rules and regulations of the company.⁷ Again, it may be said that the same duty is imposed upon the municipality itself, where it has acquired the ownership of the water rights and the system of water works. So it is held that where a city has acquired the water system of a quasi-public corporation engaged in supplying water for a public use it does so as a corporation engaged in supplying a public use, and on its refusal to furnish those with water who are entitled thereto, an action in mandamus will lie to compel the furnishing of the water.⁸

§ 1444. Right to fix water rates by city ordinance in the absence of contract.—Where a municipality owns its own water rights and its system of water works, there is no question as to its

⁷ As was said in a recent Idaho case: "It is not permitted like a private party to charge whatever it pleases or to serve those only whom it may choose to serve. It must, on the contrary, serve the inhabitants of the municipality from which it receives a franchise for a reasonable uniform compensation to be established in conformity with law, and it must serve all persons without distinction or discrimination who pay the rate established and comply with the reasonable rules and regulations of the company." *Hatch v. Consumers' Co.*, 17 Idaho 204, 104 Pac. Rep. 670.

See, also, *Bothwell v. Consumers' Co.*, 13 Idaho 568, 92 Pac. Rep. 533; *Pocatello Water Co. v. Standley*, 7 Idaho 155, 61 Pac. Rep. 518; *Fellows v. Los Angeles*, 151 Cal. 52, 90 Pac. Rep. 137; *Long Branch Commission v. Tintern Manor W. Co.*, 70 N. J.

Eq. 71, 62 Atl. Rep. 474; affirmed, 71 N. J. Eq. 790, 71 Atl. Rep. 1143; *Mahoney v. American Land etc. Co.*, 2 Cal. App. 186, 83 Pac. Rep. 267; *Haugen v. Albina etc. Co.*, 21 Ore. 411, 28 Pac. Rep. 244, 14 L. R. A. 424; *Watauga W. Co. v. Wolfe*, 99 Tenn. 429, 41 S. W. Rep. 1060, 63 Am. St. Rep. 841; *American W. Co. v. State*, 46 Neb. 194, 64 N. W. Rep. 711, 30 L. R. A. 447, 50 Am. St. Rep. 610.

But see *State ex rel. Foley v. Hillyard W. Co.*, 49 Wash. 232, 94 Pac. Rep. 1080.

⁸ *Orcutt v. Pasadena etc. Co.*, 152 Cal. 599, 93 Pac. Rep. 497; *Graham v. Pasadena etc. Co.*, 152 Cal. 596, 93 Pac. Rep. 498; *City of South Pasadena v. Pasadena etc. Co.*, 152 Cal. 599, 93 Pac. Rep. 490; *Fellows v. Los Angeles*, 151 Cal. 52, 90 Pac. Rep. 137.

power to fix the rates which it shall charge to its inhabitants for the use of the water. Such rates must, however, be reasonable and without discrimination as between the persons furnished. Therefore an ordinance which prohibits consumers from taking from its mains any water except such as shall have been measured by means of a water meter, and that meters of the kind and make ordered by the mayor and council shall be furnished, or the expense thereof borne by the consumers severally, also reserving to the city the right to stop the supply of water for a violation of the regulation, is held not to be unreasonable, but to be valid.¹

Again, where the municipality and its inhabitants are supplied with water by a private corporation or other parties operating under a franchise granted to it, or them, unless the municipality is so bound down by a contract with the private corporation for a definite period of time in respect to the rates which may be charged that an attempted reduction of those rates by city ordinance would be in effect the impairment of the contract, and therefore, within the constitutional inhibition, the city may by ordinance fix the water rates which the company may charge its consumers.² Such rates so fixed must be reasonable both as far as the consumers' rights are concerned and also with due regard to the right of the company to make a reasonable profit upon its investment.³

¹ *Cooper v. City of Goodland*, 80 Kan. 121, 102 Pac. Rep. 244.

But see *Spring Valley Waterworks v. San Francisco*, 82 Cal. 286, 22 Pac. Rep. 910, 1046, 6 L. R. A. 756, 16 Am. St. Rep. 116; *Albert v. Davis*, 49 Neb. 579, 68 N. W. Rep. 945; *Twitcheil v. City of Spokane*, 55 Wash. 86, 104 Pac. Rep. 150, 24 L. R. A., N. S., 290, 33 Am. St. Rep. 1021; *South Pasadena v. Pasadena etc. Co.*, 152 Cal. 590, 93 Pac. Rep. 490; *Contra Costa W. Co. v. City of Oakland*, 157 Cal. 323, 113 Pac. Rep. 668.

² For the impairment of contracts by city ordinances, see Sec. 1446; *Brummitt v. Ogden Waterworks Co.*, 33 Utah 289, 93 Pac. Rep. 828, where it is said: "That the fixing and regulating of water rates is a governmental

function and can not be surrendered nor suspended by the city council is agreed by all concerned in this action."

See, also, *San Diego etc. Co. v. National City*, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. Rep. 804.

³ Where the water rates, as fixed by ordinance of a city council, produced a revenue of \$65,788.65 for the year, and it appeared that the actual operating expenses of the water company were \$40,000 for the year, and that the actual cost of the works was \$750,000, such rates were held to be wholly insufficient to allow the company the compensation to which it was legally entitled; and it was therefore the duty of the court, under Constitution, Article 14, construed with Ar-

Again, in the absence of the fixing of the water rates by law which a private company may charge to the inhabitants of a municipality, or by contract, ordinance, or in the franchise itself under which the company operates the company may by its own regulations fix reasonable water rates; and as to what are reasonable rates depend upon the facts of each particular case.⁴

§ 1445. **The power of a municipality to fix water rates by contract with a water company.**—The question of the power of a municipality to fix the water rates which a private corporation engaged in the furnishing of a city and its inhabitants with water may charge for the use of the water furnished, either by direct contract, by ordinance, or by way of the franchise under which the corporation operates, has arisen in many cases. The rule of law upon this subject is that while the fixing and the regulating of water rates is a governmental function, which can not be surrendered or suspended by a city council, the city may enter into such a contract which fixes thereby the temporary rates which the company may charge its consumers for the water furnished by it.¹ But, upon the other hand, it is held that a municipality has no power to enter into such a con-

ticle 1, Section 14, to declare such ordinance void. *San Diego W. Co. v. City of San Diego*, 118 Cal. 556, 50 Pac. Rep. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261.

See, also, *Spring Valley Waterworks v. City of San Francisco*, 82 Cal. 286, 22 Pac. Rep. 910, 1046, 6 L. R. A. 756, 16 Am. St. Rep. 116; *Redlands etc. Co. v. City of Redlands*, 121 Cal. 365, 53 Pac. Rep. 843, holding that on an issue as to the reasonableness of water rates established by ordinance, the items of necessary expenditure by the water company should not include the interest on the company's indebtedness, nor the sum the plant will depreciate annually aside from the sum requisite for its maintenance and repairs.

See, also, *Hatch v. Consumers' Co.*, 17 Idaho 204, 104 Pac. Rep. 670; *San Diego etc. Co. v. National City*, 174

U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. Rep. 804.

⁴ "Water rates are established in order to compensate the company for its investment, and it can not be allowed, in addition to these rates, to require a citizen to pay for a part of its system before supplying him with water." *Bothwell v. Consumers' Co.*, 13 Idaho 568, 92 Pac. Rep. 533; *Pocatello W. Co. v. Standley*, 7 Idaho 155, 61 Pac. Rep. 518; *Contra Costa W. Co. v. City of Oakland*, 159 Cal. 323, 113 Pac. Rep. 668.

See, also, for State control of water rates, Chap. 69, Secs. 1368-1385.

¹ *Brummitt v. Ogden Waterworks Co.*, 33 Utah 289, 93 Pac. Rep. 823; *Rogers Park Water Co. v. Fergus*, 180 U. S. 624, 45 L. Ed. 702, 21 Sup. Ct. Rep. 490; affirming *Id.*, 178 Ill. 571, 53 N. E. Rep. 363.

tract for long periods of time or for the entire period of the life of the franchise granted to the company; and that, should it appear that the water rates charged in accordance with the terms of such contract or franchise at any time during its life under the then existing conditions are excessive, both the city and its taxpayers may sue to enforce reasonable rates.² It is also held that the water company itself may sue to prevent confiscatory rates.³

§ 1446. **Ordinances fixing water rates affecting existing contracts.**—Having seen in the previous sections that the power of a municipal corporation to fix water rates is a governmental function which can not be contracted away or suspended by the municipality covering long periods of time,¹ we now come to the question of the power of a city council to fix water rates by ordinance which directly affect the rights claimed by a water company operating under the franchise or contract granted by the municipality, and the terms of which franchise purported to fix such water rates for a definite period of time. In other words, has the municipality the power to change the water rates purported to have been fixed by the franchise or contract to the detriment of the water company during the time for which the rates were fixed by the terms of the contract? The answer to this question must depend, first, upon the question of law as to the power of the municipality to make such a binding contract, and, second, upon the question of fact as to whether or not the water rates so fixed in the contract are reasonable, both as far as the rights of the consumers and the rights of the company are concerned. And upon the first of these propositions the authorities hold that if the municipality did not have the power conferred upon it by constitutional or legislative provisions to make such a contract covering a considerable portion of time, that an ordinance passed during the

² Rogers Park Water Co. v. Fergus, 180 U. S. 624, 45 L. Ed. 702, 21 Sup. Ct. Rep. 490; affirming *Id.*, 178 Ill. 571, 53 N. E. Rep. 363; Brummitt v. Ogden Waterworks Co., 33 Utah 289, 93 Pac. Rep. 828; Flynn v. Little Falls etc. Co., 74 Minn. 180, 77 N. W. Rep. 38, 78 N. W. Rep. 106; City of Brenham v. Brenham Water Co., 67 Tex. 524, 4 S. W. Rep. 143; Ed-

wards County v. Jennings, 89 Tex. 618, 35 S. W. Rep. 1053.

³ Brummitt v. Ogden Waterworks Co., 33 Utah 289, 93 Pac. Rep. 828; Contra Costa W. Co. v. City of Oakland, 159 Cal. 323, 113 Pac. Rep. 668.

See, also, for the power of the State to fix water rates, Chap. 69, Secs. 1368-1385.

¹ See Sec. 1442.

life of the contract altering the rates therein fixed was not such an impairment of a contract as to come within the constitutional inhibition.² The right to fix water rates comes within the police powers of the municipality. And, as said in a Minnesota case, "In short, while a municipality can not impair the obligation of its contract under the guise of exercising its police power, yet it can not surrender or barter away its police powers under the guise of making a contract."³ Where, however, the city had the power to make such a contract with a water company that existing water rates to private consumers should not be reduced during the life of the contract, such a contract can not be impaired by an ordinance attempting to reduce the water rates where such rates may be considered within the bounds of reason.⁴

Upon the second phase of the question, in all cases the water rates under the existing circumstances must be reasonable, both as far as the company is concerned and the consumers which it supplies. And where under an existing contract the rates charged by a private corporation are clearly excessive and unreasonable, it is also held that a city council by ordinance may so regulate such rates as to bring them within the limits of what, under the circumstances of the case, are deemed reasonable.⁵ As was said by the Supreme Court of the

² A contract giving a water company the right to charge certain rates for 30 years without interference by new ordinances changing rates was held to be not authorized. *Freeport Water Co. v. Freeport*, 180 U. S. 587, 45 L. Ed. 679, 21 Sup. Ct. Rep. 493; affirming *Id.*, 186 Ill. 179, 57 N. E. Rep. 862.

See, also, *Rogers Park Water Co. v. Fergus*, 180 U. S. 624, 45 L. Ed. 702, 21 Sup. Ct. Rep. 490; affirming *Id.*, 178 Ill. 571, 53 N. E. Rep. 363; *Danville Water Co. v. Danville*, 180 U. S. 619, 45 L. Ed. 696, 21 Sup. Ct. Rep. 505; affirming *Id.*, 186 Ill. 326, 57 N. E. Rep. 1129; *Brummitt v. Ogden Waterworks Co.*, 33 Utah 289, 93 Pac. Rep. 828.

³ *State v. St. Paul etc. R. Co.*, 78 Minn. 331, 81 N. W. Rep. 200.

⁴ *Los Angeles v. Los Angeles City W. Co.*, 177 U. S. 558, 44 L. Ed. 886, 20 Sup. Ct. Rep. 736; affirming *Id.*, 88 Fed. Rep. 720.

⁵ *County of Stanislaus v. San Joaquin etc. Co.*, 192 U. S. 201, 48 L. Ed. 406, 24 Sup. Ct. Rep. 241; reversing *Id.*, 113 Fed. Rep. 930; *Id.*, 90 Fed. Rep. 516; *Boise City etc. Co. v. Boise City*, 123 Fed. Rep. 232, 59 C. C. A. 236; *Boise City etc. Co. v. Clark*, 131 Fed. Rep. 415, 65 C. C. A. 399; *Leadville W. Co. v. City of Leadville*, 22 Colo. 297, 45 Pac. Rep. 362; *City of Denver v. Denver Union W. Co.*, 41 Colo. 77, 91 Pac. Rep. 918.

See, also, power of the legislature to regulate water rates, impairment of contracts, Secs. 1347-1382.

United States: "A reasonable rate the law assured, and assured even against governmental regulation."⁶ But to this extent only does the power of a city council go. They can not so regulate water rates in the face of an existing contract as to make them unreasonably low as far as the rights of the company are concerned. It can not fix a rate so low that it is in effect confiscatory and the taking of private property without just compensation.⁷

§ 1447. Regulation and control of irrigation ditches within a municipality.—Where owned by municipality.—The soil within a city or town located in the West is as dry and arid as is that of the country outside of its limits, yet many of the Western cities and towns are noted for their beautiful gardens and shade trees. This is due to the fact that water is supplied for irrigation within the city limits either from water rights owned by the municipalities or from those owned by private individuals or corporations. One of the most remarkable features of Salt Lake City, and one of everlasting curiosity to the summer tourists, is the fact that during the hot summer months pure water runs on each side of every street in the city. This is due to the fact that the city not only owns its own water rights and water works for municipal purposes and for supplying its inhabitants with ample water for culinary and domestic purposes, but it also owns sufficient water rights to supply the entire city and those of its inhabitants who choose to avail themselves of it, with irrigation water for the trees and gardens. Again, in many instances, where the limits of the city have been extended, they have taken in farming communities and lands which were supplied with irrigation water from some source. Of course, where a city owns its own water rights and ditches and canals conveying the water, it is always given the power to pass such ordinances as it may see fit,

⁶ *Rogers Park W. Co. v. Fergus*, 180 U. S. 624, 45 L. Ed. 702, 21 Sup. Ct. Rep. 490; affirming *Id.*, 178 Ill. 571, 53 N. E. Rep. 363.

See, also, *Brummitt v. Ogden Waterworks Co.*, 33 Utah 289, 93 Pac. Rep. 828.

⁷ *Knoxville Water Co. v. Knoxville*, 189 U. S. 434, 47 L. Ed. 887, 23 Sup. Ct. Rep. 531; *Id.*, 212 U. S. 1, 53 L.

Ed. 371, 29 Sup. Ct. Rep. 148; *San Diego W. Co. v. San Diego*, 118 Cal. 556, 50 Pac. Rep. 633, 62 Am. St. Rep. 261; *Des Moines v. Des Moines Waterworks Co.*, 95 Iowa 348, 64 N. W. Rep. 269; *Boise City etc. Co. v. Clark*, 131 Fed. Rep. 415, 65 C. C. A. 399; *Spring Valley Waterworks Co. v. San Francisco*, 124 Fed. Rep. 574.

regulating the use and distribution of irrigation water within the city limits, and the care and maintenance of the ditches and canals. Usually in such cases there is a separate branch of the water department, over which there is a superintendent of irrigation, who, and his subordinates, constitute the executive officers of this branch and attend to the distribution of the water and the enforcement of the ordinances relative thereto.¹

§ 1448. Regulation and control of irrigation ditches within a municipality—Where owned by other parties.—Where the water rights and the ditches and canals used in connection therewith and running within the limits of a municipality are owned by parties other than by the city or town itself, the question has often arisen as to the power of the municipality to pass ordinances regulating and controlling such rights and ditches and canals tending to restrict the original rights and privileges of the owners. A large, open irrigation canal running through the heart of a city may be dangerous at times to the life and property of the inhabitants. Oftentimes children, and sometimes older persons, fall in and are drowned. Their waters sometimes overflow or seep through their banks and the neighboring property is flooded and injured; or, again, the waters become stagnant with the accumulation of rubbish and breed disease. It is therefore necessary that there should be some control over such ditches and canals passing within the limits of municipalities so as to prevent, as far as possible, the interference with the rights and property of the municipality itself and the danger to the lives, health, and property of its inhabitants. This regulation and control may come from two sources: First, direct statutory enactment under the police power of the State; and, second, by the way of municipal ordinances under the powers granted by the constitution and statutes of the State. By direct statutory enactment the legislature may require the owners of such ditches and canals operating within municipal limits to do certain things and perform certain duties for the protection of the public.¹ And,

¹ *Levy v. Salt Lake City*, 5 Utah 302, 16 Pac. Rep. 598; affirming *Id.*, 3 Utah 63, 1 Pac. Rep. 160; *Lehi Irr. Co. v. Moyle*, 4 Utah 327, 9 Pac. Rep. 867; *Ysleta v. Babbitt*, 8 Tex. Civ. App. 432, 28 S. W. Rep. 702; *Boulder v. Fowler*, 11 Colo. 396, 18 Pac. Rep. 337.

¹ So, a statute which required the owners of such canals operating within the limits of municipal corporations to construct certain devices such

again, by municipal ordinance the owners may be required, under the police powers of the city, to do practically the same things and to perform the same duties toward the public; provided, that in so doing the city council keeps within the limitation of the powers granted to the municipality by either special or general enactments of the legislature and does not thereby seriously interfere with the vested property rights of the owners.²

as lattice work and slats at the head of flumes to prevent persons and animals from being drawn through the flumes, was held to be valid as a proper exercise of the police power of the State; and, further, that the failure to perform such statutory duty specifically imposed was negligence *per se*, and in the absence of contributory negligence, a recovery may be had for an injury thereby occasioned. *Platte etc. Co. v. Dowell*, 17 Colo. 376, 30 Pac. Rep. 68.

See, also, *Platte etc. Co. v. Lee*, 2 Colo. App. 184, 29 Pac. Rep. 1036; *Platte etc. Co. v. Anderson*, 8 Colo. 131, 6 Pac. Rep. 515..

"The council of Baker City are empowered by the charter now in force to make such reasonable regulations by ordinance for conducting water along the streets as may be prescribed, and when this has been done, the plaintiff must accede thereto." *Baker City Mut. Irr. Co. v. Baker City*, 58 Ore. 306, 110 Pac. Rep. 392, 113 Pac. Rep. 9.

The city has the power to destroy an irrigation ditch in lawfully changing the grade of its streets, but it is not a destruction of the ditch owner's easement or right of way in the streets. *City of Nampa v. Nampa & Meridan Irr. Dist.*, 19 Idaho 779, 115 Pac. Rep. 979.

² So, it is held that a city, under its police power, can not require a ditch which was constructed through

lands embraced within the public domain of the United States prior to such lands being taken in the city limits, to be so confined and reconstructed, by boxing and fluming, or otherwise, as to prevent the further washing and cutting away of the property along the line of such ditch, and the Court enjoined the city from prosecuting the owner of such ditch for the violation of such invalid ordinance. *Platte etc. Co. v. Lee*, 2 Colo. App. 184, 29 Pac. Rep. 1036.

An injunction will lie restraining a city from interference with the use of ditch property which has not been lawfully ascertained and declared to be a nuisance. *City of Denver v. Mullen*, 7 Colo. 345, 3 Pac. Rep. 693.

See, also, *Fresno v. Fresno etc. Co.*, 98 Cal. 179, 32 Pac. Rep. 943; *Platte etc. D. Co. v. Anderson*, 8 Colo. 131, 6 Pac. Rep. 515.

The right of a municipality to the exclusive control and regulation of water within its limits, to which others have acquired a paramount right, prior to the incorporation of the municipality, is based upon the acquiescence of such owners. *Fisher v. Bountiful City*, 21 Utah 29, 59 Pac. Rep. 520.

In a late case in Oregon it was held that a delay of two months in suing to enjoin the interference with a company's ditches during the construction of improvements by the city under an ordinance did not equitably estop the company from maintaining an injunc-

And it is further held that where ditches and canals run through a city and the water is used therefrom by the inhabitants for irrigation, although both the water rights and the ditches and canals may be owned by others, the municipality has the power to assume the control and management of the ditches and canals and the method of distribution of the water within the city limits. And having once acquired the right to control and to regulate the distribution of the waters, and such authority having been given to be exercised for the benefit of the people, this duty becomes obligatory upon the municipality.³ And where a city with the consent of the original appropriators took control of such waters and distributed them to the inhabitants of the city, the right to exercise such control vested in the city, and it was therefore held that it was not only the right of the city, but also its duty, to employ such remedies as the law or rules of equity authorized to defend and maintain such right to control the use of such waters by the people.⁴ And where a municipality has once assumed control of such waters, it does so in its ministerial capacity, and is therefore bound to manage the control and distribution with reasonable care so as to prevent the overflow or seepage of the water from such ditches to the injury of adjacent land owners; and it is held that a city is liable for an injury occurring through its negligence from water overflowing a ditch constructed over private property.⁵

tion against the city. *Baker City Mut. Irr. Co. v. Baker City*, 58 Ore. 306, 110 Pac. Rep. 392, 113 Pac. Rep. 9.

"It will be conceded that there is no statute of this State which compels ditch companies to construct bridges over highways in cases where the highway was not laid out or dedicated to the public prior to the construction of the ditch." *Boise City v. Boise City etc. Co.*, 19 Idaho 717, 115 Pac. Rep. 505.

See, also, *MacCammelly v. Pioneer Irr. Dist.*, 17 Idaho 415, 105 Pac. Rep. 1076.

³ *Ysleta v. Babbitt*, 8 Tex. Civ. App. 432, 28 S. W. Rep. 702; *Lehi Irr. Co.*

v. Moyle, 4 Utah 327, 9 Pac. Rep. 867; *Springville v. Fulmer*, 7 Utah 450, 27 Pac. Rep. 577.

⁴ *Springville v. Fulmer*, 7 Utah 450, 27 Pac. Rep. 577.

⁵ *Levy v. Salt Lake City*, 5 Utah 302, 16 Pac. Rep. 598; affirming *Id.*, 3 Utah 63, 1 Pac. Rep. 160.

A municipality, the same as an individual, has no right to divert surface water from the channel in which it flows in the street, whether natural or artificial, and however it may have come into the street, and throw it onto the land of another. *Larrabee v. Cloverdale*, 131 Cal. 96, 63 Pac. Rep. 143.

PART XII.

CONTROL BY PRIVATE WATER COMPANIES.

CHAPTER 72.

SUBJECT IN GENERAL AND CLASSIFICATION OF PRIVATE WATER COMPANIES.

§ 1449. Contents of part.

§ 1450. The subject in general.

§ 1451. "Public use" and "public service" distinguished.

§ 1452. Classification of companies.

§ 1449. Contents of part.—During the past thirty years the growth and importance of irrigation, and, in fact, all the uses of water, based upon the Arid Region Doctrine of appropriation, are evidenced by the vast number of private water companies which have been organized and are now operating in all the States of the arid and semi-arid portions of this country. The scope of this chapter is to discuss, in all their phases, the organization and nature of these water companies, their powers and duties, and their relations to the State, to other companies, to their stockholders and joint owners, and to the consumers who are furnished with water by these companies. The companies treated in this part of our work are what are known as private companies or corporations, as distinguished from public corporations or irrigation districts,¹ or municipal corporations,² treated in other chapters of our work.

Actions involving corporations as parties thereto will be discussed in the next part.³

§ 1450. The subject in general.—These private water companies are designated and called by many names, such as "irrigation com-

¹ For irrigation districts, see Chap. 70, Secs. 1386-1432.

² For municipal corporations, see Chap. 71, Secs. 1433-1448.

³ See Chaps. 78-83.

panies," "ditch and canal companies," "reservoir companies," "ditch companies," "canal companies," and the like. But whatever they may be called, their ultimate object is usually the same, which is the furnishing of water to their stockholders, or co-owners, or for the furnishing of water to consumers, who may or may not be stockholders or co-owners in the company, either for the purpose of irrigation or for some other useful or beneficial purpose. The object of their organization is for the combination of capital or the combination of its equivalent in labor, in order that greater results may be obtained. As time has gone on and the West has become more and more settled up, the available irrigable lands were found to be further and further back from the streams or other water supply. Larger diverting works and larger and longer ditches and canals are required to be constructed in order to conduct the water to these lands than were required by the early settlers, who usually located their farms upon lands near the streams, where with but little expense and labor the water might be diverted and conducted to their lands. Again, the waters of the smaller streams all having been appropriated, resort had to be made to the waters of the larger streams, reservoirs for the storage of water had to be constructed, and other expenses had to be incurred which were unheard of in the early days. All this required a large amount of capital, oftentimes far beyond the means of any individual or of any community of individuals. Then, again, there would be no community of individuals until the works were constructed and the water available for use. In many sections of the West, which are now thickly settled, the settlers would not come until the water was available for the lands, for the reason that the land was in its wild condition, arid and barren, and in order that it be successfully cultivated it was absolutely necessary that it should be irrigated. This, therefore, required a large investment of capital in the advance of all settlement. It therefore follows that these private corporations operating throughout the entire arid and semi-arid West have been of the greatest influence in the settlement and development of this part of our country. The necessity of these water companies or corporations has been recognized by the statutes of the respective States and Territories, and their formation has been encouraged.

The results of irrigation companies and private corporations far exceed at the present time the results of all other enterprises put

together. Under the Thirteenth Census, for 1910, it is reported that at the end of the year 1909, under co-operative enterprises, there were 4,646,039 acres under actual cultivation; under the commercial enterprises, 1,444,806; under individual and partnership enterprises, 6,258,401 acres. There are also reported under the Carey Act, which enterprises are operated by private corporations in connection with National Government and State, 288,553 acres under actual cultivation in 1909.

§ 1451. "Public use" and "public service" distinguished.—As far as the use of the water appropriated and controlled by private water companies is concerned, whether they are incorporated, or unincorporated, under the later authorities, a distinction must be observed between the terms "public use," and "public service." An individual may alone be engaged in the conducting of water from a natural source of supply solely for the purpose of irrigating his own tract of land, and such a use of the water is deemed a public use, for the utilization of which he may condemn a right of way over the private lands of others,¹ yet it could not be contended for an instant that this person was engaged in a public service, as the term is used in connection with public service companies.² Again, to carry our illustration further, a group of individuals owning lands in the same immediate neighborhood, and each owning a water right, which he used to irrigate his own particular tract, may band themselves together and organize a water company, either incorporated, or unincorporated, for the purpose of furnishing water to others, and the use to which the water is put is a public use,³ yet this company, where the distribution of the water is exclusively to its shareholders, is not a public service company, or comes within the restrictions imposed by the statutes regulating

¹ Clark v. Nash, 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; affirming *Id.*, 27 Utah 158, 75 Pac. Rep. 371, 1 L. R. A., N. S., 208, 101 Am. St. Rep. 953.

See, also, for the acquisition of rights of way by power of eminent domain, Secs. 1059-1098.

² For public service corporations, see Secs. 1493-1508.

³ See voluntary unincorporated associations, Secs. 1453-1463.

See mutual corporations, Secs. 1479-1489.

See, also, Lindsay Irr. Co. v. Mehrtens, 97 Cal. 676, 32 Pac. Rep. 802; Hildreth v. Montecito etc. Co., 139 Cal. 22, 70 Pac. Rep. 672, 72 Pac. Rep. 395.

2614 CLASSIFICATION OF PRIVATE WATER COMPANIES.

such companies.⁴ "Public service" or "quasi-public" water companies, may be defined as those companies, either incorporated, or unincorporated, which are engaged in the business of furnishing or carrying water for hire, to all consumers who can be provided with water under their systems, and who may apply for the same, up to the full capacity of such systems. Such a company is, therefore, a public agency, and the use to which the water is put is also a public use. As was said by the Supreme Court of the United States, in a case arising in New Mexico, "As all owners of land within the service capacity of appellee's canal will possess the right to use the water which may be diverted into such canal, the use is clearly public, and the appellee is, therefore, a public agency."⁵ Such companies are subject to all the rules of law regulating and controlling public service companies, more fully discussed in subsequent sections of this part.⁶

§ 1452. *Classification of companies.*—There are but two main classes of these private water companies, and these are unincorporated water companies,¹ and those which are duly incorporated under the laws of some State or Territory.² These companies, either unincorporated, or incorporated, may be organized solely for the purpose of furnishing and conveying water to others for hire, or they may be organized, by associations of landowners, for the purpose of constructing the necessary works and conveying the water to their own lands and not for hire. These latter may be either unincorporated, or incorporated, and are usually termed "mutual companies."

Unincorporated water companies are also divided into two classes: First, tenancies in common;³ and, second, partnerships.⁴

⁴ *McFadden v. Board of Supvrs. of Los Angeles County*, 74 Cal. 571, 16 Pac. Rep. 397; *Shorb v. Beaudry*, 56 Cal. 446.

See Secs. 1479-1489.

⁵ *Gutierrez v. Albuquerque Land & Irr. Co.*, 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338; affirming *Id.*, 10 N. M. 177, 61 Pac. Rep. 357; and citing *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 41 L. Ed. 369, 17

Sup. Ct. Rep. 56; reversing *Id.*, 68 Fed. Rep. 948.

⁶ See Secs. 1491-1508.

See, also, for the regulation of water rates, Chap. 69, Secs. 1368-1385.

¹ See Secs. 1453-1463.

² For incorporated companies, see Secs. 1464-1508.

³ See Secs. 1454-1459.

⁴ See Secs. 1460-1462.

For the purpose of this work, corporations duly organized under the laws of some State, or Territory, will be divided into two classes: Corporations organized solely for the mutual benefit of the shareholders,⁵ and corporations organized for the purpose of profit or hire.⁶

It must be noted that certain corporations organized originally for profit may, upon the happening of a certain contingency, be afterward absorbed by the water consumers, and thereafter become corporations for mutual benefit of shareholders.⁷

It must be also noted here that corporations organized for the purpose of furnishing water to the general public, or to consumers, other than the shareholders of mutual corporations, are sometimes designated as public service, or quasi-public, corporations.⁸

⁵ For mutual corporations, see Chap. 75, Secs. 1479-1489.

⁶ For corporations for profit, see Chap. 76, Secs. 1490-1508.

⁷ For corporations organized to turn

the control over to its consumers, see Secs. 1516-1518.

⁸ For public service or quasi-public corporations, see Secs. 1493-1508.

CHAPTER 73.

UNINCORPORATED COMPANIES.

- § 1453. Scope of chapter.
- § 1454. Tenants in common—Who are.
- § 1455. Tenants in common—Rights as between each other.
- § 1456. Tenants in common—Right of partition.
- § 1457. Tenants in common—Contribution for necessary expenses.
- § 1458. Tenants in common—Rights as against third parties.
- § 1459. Mutual water associations—Voluntary associations.
- § 1460. Partnerships.
- § 1461. Analogous to mining partnerships.
- § 1462. Right of majority in interest to control.
- § 1463. Authority of individual members.

§ 1453. **Scope of chapter.**—In this chapter we will discuss the subject of unincorporated water or ditch companies, including tenants in common, partnerships, and voluntary or community associations, also the rights of the respective owners therein.

§ 1454. **Tenants in common—Who are.**—Tenants in common are such as hold lands and tenements by several and distinct titles, and not by joint title, but occupy in common, the only unity recognized between them being that of possession.¹

It has oftentimes happened that the owners of several neighboring farms have together constructed the ditches and diverting works, and have made the appropriation of the water necessary for the irrigation of all their lands, and that, too, without the formal organization of any company. Where a ditch through which water is appropriated and applied to any beneficial purpose is owned by several proprietors, and their relation is not defined by special agreement to the contrary, they are to be regarded as tenants in common of the ditch, and their rights are to be determined and governed by the rules of law governing tenancy in common.² So,

¹ Bouvier, Law Dict., Sub., Tenant; 996; Beers v. Sharpe, 44 Ore. 386, 75 Pac. Rep. 717; Rodgers v. Pitt, 89 Fed. 2 Bla. Comm. 191.

² Crowder v. McDonnell, 21 Mont. Rep. 420, 129 Fed. Rep. 932; Johnston 367, 54 Pac. Rep. 43; Miller v. Lake v. Little Horse Cr. Irr. Co., 13 Wyo. Irr. Co., 27 Wash. 447, 67 Pac. Rep. 208, 79 Pac. Rep. 22, 70 L. R. A. 341,

too, where several persons join in making an appropriation of water, and where no special, or other agreement exists among joint users of the waters of the ditch as to their proprietary interests, their rights are to be governed by the rules of law relating to tenants in common,³ but as each ditch may have a number of priorities, ap-

110 Am. St. Rep. 986; *Candelaria v. Vallejos*, 13 N. M. 140, 81 Pac. Rep. 589; *Smith v. North Canyon W. Co.*, 16 Utah 194, 52 Pac. Rep. 283, all citing and quoting *Kinney on Irr.*, 1st Ed., Sec. 301.

See, also, *Bradley v. Harkness*, 26 Cal. 69, 11 Morr. Min. Rep. 389; *Hayes v. Fine*, 91 Cal. 391, 27 Pac. Rep. 772; *Jones v. Parsons*, 25 Cal. 100; *Reed v. Spicer*, 27 Cal. 58, 4 Morr. Min. Rep. 330; *Parke v. Kilham*, 8 Cal. 77, 68 Am. Dec. 310, 4 Morr. Min. Rep. 522; *Carpenter v. Webster*, 27 Cal. 524; *Duryea v. Burt*, 28 Cal. 569; *Griseza v. Terwilliger*, 144 Cal. 456, 77 Pac. Rep. 1034; *Decker v. Howell*, 42 Cal. 636; *McConnell v. Denver*, 35 Cal. 365, 95 Am. Dec. 107; *Campbell v. Shivers*, 1 Ariz. 161, 25 Pac. Rep. 540; *Carns v. Dalton*, 56 Ore. 596, 110 Pac. Rep. 170.

The dam and ditch of an unincorporated irrigating ditch association is held by its members as tenants in common. *Biggs v. Utah etc. Co.*, 7 Ariz. 331, 64 Pac. Rep. 494.

Owners of a ditch, constructed for the purpose of dividing the waters diverted through it, are tenants in common. *Hough v. Porter*, 51 Ore. 318, 372, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

See, also, *Abel v. Love*, 17 Cal. 233, 11 Morr. Min. Rep. 350; *Lytle Creek etc. Co. v. Perdew*, 65 Cal. 447, 4 Pac. Rep. 426; *Frey v. Lowden*, 70 Cal. 550, 11 Pac. Rep. 838; *Moss v. Rose*, 27 Ore. 595, 41 Pac. Rep. 666, 50 Am. St. Rep. 743.

³ For appropriation of water by tenants in common, see Sec. 862.

See, also, *Griseza v. Terwilliger*, 144 Cal. 456, 77 Pac. Rep. 1034; *Abel v. Love*, 17 Cal. 233, 11 Morr. Min. Rep. 350; *Frey v. Lowden*, 70 Cal. 550, 11 Pac. Rep. 838; *Lytle Creek W. Co. v. Perdew*, 65 Cal. 447, 2 Pac. Rep. 732; *Id.*, 4 Pac. Rep. 426: "It is said that the waters are appropriated severally by those who did appropriate them. Concede this to be so and we can not perceive that it makes any difference. If they are tenants in common of the water and each of them are tenants seized *per my* and not *per tout* and entitled to the possession of the whole. This must be so, because no one of them can certainly state which part of them is his own. They hold by unity of possession, though their titles are distinct"; and holding that where different persons separately appropriate the waters of a stream, and are severally using the same under certain regulations as to time and manner of such use, they are tenants in common, and each of them may maintain an action to enjoin a trespasser from diverting any portion of the water thus appropriated.

When parties claim their rights through the same diversion and from the same ditch, through which the appropriation was originally made by them or by their predecessors in interest, they are tenants in common. *Hough v. Porter*, 51 Ore. 318, 372, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

propriators of different dates may be tenants in common in the dam and ditch or other works, without losing their priority of appropriation, and, too, without there being any tenancy in common in the water rights.⁴ Tenants in common may also agree among themselves as to how and when the water appropriated by all may be used by the respective co-tenants.⁵

Where both the construction of the diverting works, and the works necessary to conduct the water to the place of use are constructed and owned by several persons acting together, they are tenants in common, both in the works and in the water rights, and their respective rights in each are to be determined according to the law of tenancy in common.⁶

But where two persons join in an appropriation and diversion of water, and conduct the same through a common ditch for a certain distance, with the understanding that each was entitled to one-half of the water, and the water was turned from the common ditch to be used on each one's separate and individual land, it was held under "these circumstances, the right of unity of possession necessary to constitute a tenancy in common did not extend to the right of user, which was essential to the existence of such a tenancy in a water right."⁷

There is a conflict of authority as to whether or not riparian owners are tenants in common in the use of the waters of the same

⁴ Farmers' High Line etc. Co. v. Southworth, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767; Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278; Romminger v. Squires, 9 Colo. 327, 12 Pac. Rep. 213.

It was held in a late California case that though a conveyance created a tenancy in common between the parties as to the ditch with a right to the grantee to extend it, it only gave the grantee, as a subsequent appropriator, a right to the excess water not used on the land of the grantor. Hufford v. Dye, — Cal. —, 121 Pac. Rep. 400.

⁵ "Such an agreement between several persons who have appropriated water as tenants in common does not

seem to be objectionable in itself." Johnston v. Little Horse Cr. Irr. Co., 13 Wyo. 208, 79 Pac. Rep. 22, 70 L. R. A. 341, 110 Am. St. Rep. 986.

⁶ See cases cited *supra*.

See, also, Shilling v. Rominger, 4 Colo. 100; Moss v. Rose, 27 Ora. 595, 41 Pac. Rep. 666, 50 Am. St. Rep. 743; Biggs v. Utah etc. Co., 7 Ariz. 331, 64 Pac. Rep. 494; Rodgers v. Pitt, 129 Fed. Rep. 932, 89 Fed. Rep. 420.

⁷ City of Telluride v. Davis, 33 Colo. 355, 80 Pac. Rep. 1051, 108 Am. St. Rep. 101.

To constitute a tenancy in common in a water right, there must be a right to unity of user of the water, and, if such right was destroyed, the common

stream, flowing by their lands. It was said in a recent Oregon case:⁸ "One of the distinctions between appropriation of water and use by a riparian proprietor is that the former contemplates tenancy in severalty, while the latter is essentially a tenancy in common with all other riparian proprietors on the same stream,"⁹ but the English authorities hold that the law of tenancy in common has no application.¹⁰

§ 1455. Tenants in common—Rights as between each other.—

Where the title to a water right is in tenants in common, the right of one to the use of the water as against his co-tenants will be protected by the courts. The law may be considered as well settled that, where any one of two or more co-tenants in the use of the water of a stream, which has been appropriated by them for a beneficial purpose, diverts for his own use a greater quantity of the water than of right belongs to him, and to the extent to diminish the quantity to which the others are entitled, in consequence of which they are damaged, and their rights violated, such parties are entitled to an injunction enjoining the wrong-doer from diverting the water to their injury.¹ One tenant in common may change the

tenancy ceases to exist. *Norman v. Corbley*, 32 Mont. 195, 79 Pac. Rep. 1059.

See, also, *Crowder v. McDonald*, 21 Mont. 367, 54 Pac. Rep. 43.

⁸ *Caviness v. Le Grande Irr. Co.*, — Ore. —, 119 Pac. Rep. 731.

⁹ See, also, *Charnock v. Higuerra*, 111 Cal. 473, 44 Pac. Rep. 171, 32 L. R. A. 190, 52 Am. St. Rep. 195; *Pratt v. Lamson*, 2 Allen (Mass.) 287; *Roberts v. Claremont etc. Co.*, 74 N. H. 217, 66 Atl. Rep. 485, 24 Am. St. Rep. 962.

¹⁰ See *Shury v. Piggott*, 339 Poph. 169, 79 Eng. Reprint 1263, 81 Eng. Reprint 280.

¹ *Lorenz v. Jacobs*, 63 Cal. 73; *McGillivray v. Evans*, 27 Cal. 92, 11 Morr. Min. Rep. 209; *City of Salem Co. v. Salem Flouring Mills Co.*, 12 Ore. 374, 7 Pac. Rep. 497; *Combs v. Slay-*

ton, 19 Ore. 99, 26 Pac. Rep. 661, where it was held that in the absence of direct proof to the contrary, that it was evidence of a tacit agreement between them that each should be entitled to enjoy an equal share of the flow of the stream, which a court of equity in a proper case would enforce.

In a division of the water, seepage and evaporation must be considered, where the diversion is not at the same place. *Anderson v. Cook*, 25 Mont. 330, 64 Pac. Rep. 873, 65 Pac. Rep. 113, 66 Pac. Rep. 504; *Carns v. Dalton*, 56 Ore. 596, 110 Pac. Rep. 170, where it is held that a tenant in common in an irrigation ditch or water right may sue for unlawful interference therein by another tenant.

A court of equity has the power to ascertain and determine the extent of the rights of property flowing in a

beneficial use of the water from that to which it was originally applied to some other use, provided that the rights of his co-tenants, or those of others, are not seriously injured thereby.² As the possession of the right by a part of the co-tenants is the possession of the rights of all, the mere non-user by one for a period of time does not affect his right to resume the use, even where all of the water was used during the interval by the other co-tenants.³ It, therefore, must follow that there is no element of hostility in such possession, and that such a holding will not operate to acquire the right by prescription, or even set the statute of limitations running toward that end, until there has been an actual ouster and notice to, or knowledge of, the co-tenant out of possession of the hostile intention upon the part of his co-tenants.⁴ To show an ouster of one tenant in common by his co-tenant requires much stronger and more convincing evidence than is necessary to sustain an ordinary claim of adverse possession. As was said in a recent case decided by the Supreme Court of Washington:⁵ "We recognize the well-established rule that, when adverse possession is relied upon as an ouster, either the tenant out of possession must have actual notice

natural water course, acquired by persons who hold and are entitled to them, and to regulate, between or among them, the use in the flow of the water in such a way as to maintain equality of rights in the enjoyment of the common property. *Frey v. Lowden*, 70 Cal. 550, 11 Pac. Rep. 838.

See, also, *Meagher v. Hardenbrook*, 11 Mont. 385, 28 Pac. Rep. 451; *Nichols v. McIntosh*, 19 Colo. 22, 34 Pac. Rep. 278; *Campell v. Shivers*, 1 Ariz. 161, 25 Pac. Rep. 540; *Lytle Creek v. Perdew*, 65 Cal. 447; *Id.*, 2 Pac. Rep. 732, 4 Pac. Rep. 426; *Rodgers v. Pitt*, 129 Fed. Rep. 932, 89 Fed. Rep. 420.

² For the change of the use of water, see Secs. 869-871.

A tenant in common in certain water rights for mining purposes, its use for mining having been abandoned, may recapture and use his proportion of the water for irrigation or other lawful purposes. *Meagher v. Harden-*

brook, 11 Mont. 385, 28 Pac. Rep. 451.

³ *Smith v. North Canyon W. Co.*, 16 Utah 194, 52 Pac. Rep. 283, where it is said: "The possession of one tenant in common is the possession of all his co-tenants."

See, also, *Beers v. Sharpe*, 44 Ore. 386, 75 Pac. Rep. 717.

⁴ For the acquisition of rights by prescription, see Secs. 1033-1058; *Smith v. North Canyon W. Co.*, 16 Utah 194, 52 Pac. Rep. 283; *Beers v. Sharpe*, 44 Ore. 386, 75 Pac. Rep. 717; *Unger v. Mooney*, 63 Cal. 586, 49 Am. Rep. 100; *Colman v. Clements*, 23 Cal. 245; *Morrill v. Morrill*, 20 Ore. 96, 25 Pac. Rep. 362, 11 L. R. A. 155, 23 Am. St. Rep. 95; *Wheeler v. Taylor*, 32 Ore. 421, 52 Pac. Rep. 183, 67 Am. St. Rep. 540; *Oliver v. Burnett*, 10 Cal. App. 403, 102 Pac. Rep. 223.

⁵ *Church v. State*, — Wash. —, 117 Pac. Rep. 711.

of the adverse holding, or the hostile character of the possession must be so manifest, open, and notorious that notice on his part will be presumed."

One of the incidents of tenancy in common is that each member has the right to sell or assign his interest, or any portion thereof, as he sees fit, with or without the consent of the other co-tenants, and the purchaser of such interest, or interests, succeeds to all the rights of the vendor,⁶ but one co-tenant, in the absence of special authority, can not transfer any greater interest than that owned by him.⁷

It is within the general powers of a court of equity to settle by proper decree all disputes between tenants in common as to the diversion and use of the water, and to appoint a commissioner to distribute the water. In some of the States special proceedings are provided for when two or more joint owners are unable to agree as to the relative distribution of the water appropriated by both. But it is held that this special proceeding does not exclude a joint owner from obtaining relief by the ordinary legal and equitable remedies in an action for damages, or for an injunction.⁸ Again, a tenant in common of a water ditch, and the water right used through the same, where they are in the possession of his co-tenants who are selling the water rights, may maintain an action

⁶ *Biggs v. Utah Irr. D. Co.*, 7 Ariz. 331, 64 Pac. Rep. 494, where it is said: "One of the incidents of tenancy in common is that a change in its membership does not affect the relations of the tenants, and that each tenant may sell or encumber his interest at pleasure, without regard to the knowledge, consent, or wish of his co-tenant."

A water right may be sold in parts and the purchasers with them become tenants in common. *Rose v. Mesmer*, 142 Cal. 322, 75 Pac. Rep. 905; *Bullerdick v. Hermesmeyer*, 32 Mont. 541, 81 Pac. Rep. 334.

⁷ *Beers v. Sharpe*, 44 Ore. 386, 75 Pac. Rep. 717; *Arnett v. Linhart*, 21 Colo. 188, 40 Pac. Rep. 355; *Anderson*

v. Cook, 25 Mont. 330, 64 Pac. Rep. 873, 65 Pac. Rep. 113, 66 Pac. Rep. 504.

⁸ *Stoner v. Mau*, 11 Wyo. 366, 72 Pac. Rep. 193; *Id.*, 73 Pac. Rep. 548.

The distributor of water in an irrigation ditch, appointed as provided by Rev. Stat., 1899, Secs. 908, 916, as amended by the laws of 1903, p. 122, Chap. 93, acts officially by virtue of his appointment, and has exclusive control of the ditch for the purpose of dividing and distributing the water received into the same until he is removed from office. *Mau v. Stoner*, 14 Wyo. 183, 83 Pac. Rep. 218, 15 Wyo. 109, 87 Pac. Rep. 434, 89 Pac. Rep. 466.

to recover his share of the rents and profits against his co-tenants in possession, and collecting the same.⁹

§ 1456. **Tenants in common—Right of partition.**—Although the ditch, dam, and other works for diverting and conveying the water to the place of use are real property,¹ there is one peculiarity which arises from the very nature of such real property, and that is, that it is not subject to a suit in partition. Such works can not be cut up into several portions, and so divided among the respective owners thereof. Neither could the Court decree, with any justice, where two persons were the owners, that one should have one end of the ditch, and the other person the other end. Neither could the ditch be divided between them horizontally in the middle, and one person be decreed the owner of one side, and the other the other side,² but water rights under certain circumstances may be divided in a partition suit, especially where such a division will not injure the rights of the respective owners. This may be done by a suit in equity by either apportioning the time and extent of the use, or by a sale of the rights and a division of the proceeds.³

§ 1457. **Tenants in common—Contribution for necessary expenses.**—Each tenant in common is individually bound to keep the ditch or other works in repair. Those making such repairs may compel a contribution upon the part of those who failed to bear

⁹ *Abel v. Love*, 17 Cal. 233, 11 Morr. Min. Rep. 350.

¹ See Secs. 833, 834.

² *McGillivray v. Evans*, 27 Cal. 92, 11 Morr. Min. Rep. 209; *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9, 28 L. Ed. 889, 5 Sup. Ct. Rep. 441; *Lenfers v. Henke*, 73 Ill. 405, 24 Am. St. Rep. 263; *Allard v. Carleton*, 64 N. H. 24, 3 Atl. Rep. 313; *Brown v. Cooper*, 98 Iowa 444, 67 N. W. Rep. 378, 33 L. R. A. 61, 60 Am. St. Rep. 190.

³ *Verdugo etc. Co. v. Verdugo*, 152 Cal. 655, 93 Pac. Rep. 1021; *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9, 28 L. Ed. 889, 5 Sup. Ct. Rep. 441, where it is said: "Water rights held in com-

mon, incapable of partition at law, may be the subject of partition in equity, either by apportioning the time and extent of use, or by a sale of the right and a division of the proceeds." Citing *Smith v. Smith*, 10 Paige 470; *De Witt v. Harvey*, 4 Gray 486; *McGillivray v. Evans*, 27 Cal. 92; *Lorenz v. Jacobs*, 59 Cal. 262; *Brown v. Cooper*, 98 Iowa 444, 67 N. W. Rep. 378, 33 L. R. A. 61; *Warren v. Westbrook Mfg. Co.*, 86 Me. 32, 29 Atl. Rep. 927, 26 L. R. A. 284.

That riparian rights to the use of water may be apportioned between the riparian owners, see Chap. 78, Sec. 1538.

their share of the expense, or labor. So, where plaintiff and defendants were tenants in common of a ditch, and the plaintiff neglected to repair his portion of the same, and the defendant stopped up the ditch, and thereby prevented the water from flowing to the plaintiff's lands, it was held that the defendant had no right to stop up the ditch, for the reason that, being a tenant in common, he was equally bound to make the repairs, and that he was liable in damages for his act.¹

But where the expenses have been borne by a portion of the co-tenants, in the most of the States there are statutory provisions for a contribution of these expenses between co-tenants or co-owners of a ditch, or other works, for the necessary repairs, from those who have failed in the first instance to bear their proportion. But it is held that the work done for which the money or labor was expended, must be necessary, and be of some actual benefit to the co-owner, in order to make him liable for his share.² These necessary expenses may include the expenses of collection, including attorneys' fees, of the proportion from the parties who have refused to pay their share of the necessary expenses of maintenance.³

¹ Moss v. Rose, 27 Ore. 595, 41 Pac. Rep. 666.

The fact that a person entitled to the use of one-half of the water of an irrigation ditch is denied such right by the other owner is no defense to an action by the latter for damage caused by the former digging another trench and appropriating all the water. Arnett v. Linhart, 21 Colo. 188, 40 Pac. Rep. 355.

See, also, Smith v. North Canyon W. Co., 16 Utah 194, 52 Pac. Rep. 283; Kimball v. Gearhart, 12 Cal. 27, 1 Morr. Min. Rep. 615; Carns v. Dalton, 56 Ore. 596, 110 Pac. Rep. 170, holding that the defaulting owner is liable for his *pro rata* of the necessary expenses.

Fillmore City v. Fillmore Roller Mill Co., 36 Utah 339, 103 Pac. Rep. 967, where it was held that a co-tenant can not be compelled to contribute for the expenses in replacing a dam or recon-

structing a ditch where the original ones had been washed out at a point other than where they were previously located, unless it be shown that the new works answered the same purpose and gave the co-tenant the same rights as he previously had.

See, also, Rogers v. West Riverside etc. Co., — Cal. App. —, 124 Pac. Rep. 447.

² Arroyo etc. Co. v. Bequette, 149 Cal. 543, 87 Pac. Rep. 10, where it is held that a co-tenant can be compelled to contribute his share of the expenses for repairs made above his point of diversion, but not for those made below that point.

³ Where the expenses of maintaining and repairing an irrigating canal is to be borne ratably by the parties entitled to convey water through the same in proportion to the amount of water used, the expenses of collecting their ratable proportion from the par-

§ 1458. Tenants in common—Rights as against third parties.—

As co-tenants of a water right, they are entitled to use all of the water appropriated by them. Therefore, when an outsider wrongfully diverts from them, or one of them, he is injuring each and all of them. He may be doing more injury to the one who is entitled to the use of the water at the time he is diverting it than to the other co-tenants; but, he is at all times, when he is so wrongfully diverting the water, guilty of a trespass on the right of each and every one of the co-tenants. It therefore follows that each co-tenant has the right to have the preventive powers of the court put a stop to the illegal acts of a trespasser, and that, too, without joining in the suit all of the other co-tenants as parties plaintiff.¹ So, too, whether they are joint appropriators, holding the estate as joint tenants, or as tenants in common, the right is the same as against the common enemy. Each has the right, without joining the others,

ties who have refused to pay is a part of the necessary expenses of maintenance, since, unless the rate due from such parties is collected, there would be no fund for maintenance and repair. *Rogers v. Riverside etc. Co.*, 132 Cal. 9, 64 Pac. Rep. 95.

¹ That one tenant in common may preserve the common estate for the benefit of his co-tenants, see *Cache La Poudre Irr. Co. v. Larimer & Weld Res. Co.*, 25 Colo. 144, 53 Pac. Rep. 318, 71 Am. St. Rep. 123; affirming *Id.*, 8 Colo. App. 237, 45 Pac. Rep. 525, where it is said: "One tenant in common may preserve the entire estate held in common. This doctrine is applicable where the common estate is a water right, so long as the tenant in common has both the necessity for use, and actually uses the water for a beneficial purpose."

See, also, *Meagher v. Hardenbrook*, 11 Mont. 385, 28 Pac. Rep. 451; *Moss v. Rose*, 27 Ore. 595, 41 Pac. Rep. 666; *Union Consol. M. Co. v. Taylor*, 100 U. S. 37, 25 L. Ed. 541, 5 Morr. Min. Rep. 323; *Clymer v. Dawkins*, 44

U. S. 3 How. 674, 11 L. Ed. 778; *Vanwinkle v. Curtis*, 3 N. J. Eq. 2 Green Ch. 422; *Smith v. North Canyon W. Co.*, 16 Utah 194, 52 Pac. Rep. 283; *Union M. & M. Co. v. Danberg*, 81 Fed. Rep. 73; *Miller & Lux v. Rickey*, 127 Fed. Rep. 573; *Lytle Creek etc. Co. v. Perdew*, 65 Cal. 447, 2 Pac. Rep. 732, 4 Pac. Rep. 426; *Rodgers v. Pitt*, 129 Fed. Rep. 932, 89 Fed. Rep. 420.

When parties claim their rights through the same diversion and from the same works through which the appropriation was originally made by them or by their predecessors in interest, they are tenants in common; and it is held by the Oregon Court that where, in a suit with others on the stream involving rights thereon, no issues are framed between such tenants in common, their relative rights may be left undetermined and only the rights as against other parties to the suit will be decreed in the action. *Hough v. Porter*, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

to protect the whole estate against the acts of a trespasser,² and, where, in a suit against others on the stream involving the rights thereon no issues are framed between tenants in common, their relative rights may be left undetermined, and only their rights as a whole as against the other parties of the suit will be decreed.³

§ 1459. **Mutual water associations—Voluntary associations.**—It has oftentimes happened throughout the West that a number of landowners, living in the same community, and along the same source of water supply, for the purpose of better protecting their rights, and the division of the water of the stream between the respective owners, without formally incorporating, have banded themselves together into voluntary associations. These associations are sometimes called "community associations," or "mutual associations," and the ditches and canals are referred to as "community ditches, or canals." These associations are organized for the purpose of constructing the necessary works for the diversion of the water, and to conduct it only to the lands of the members of the association, and not for hire. The only distinctions between these voluntary associations, and mutual corporations, is that the latter are formally incorporated under the laws of some State or Territory, while the former are not.¹ The title to the water rights remains in the individual members, and is not in the association. These associations are oftentimes organized with a considerable degree of formality, officers being elected, and by-laws, rules, and regulations being adopted for the government of the respective rights of its members, and of the general affairs of the association.²

By associating themselves together in this manner the water users become tenants in common of all of the waters which all of the members of the association own, or control, and also of the diverting works, ditches, and canals, used in connection with the same; and each landowner of such association is entitled to his distributive share of the water, according to his rights. The title

² Lytle Creek W. Co. v. Perdew, 65 Cal. 447, 4 Pac. Rep. 426, 2 Pac. Rep. 732; Carpenter v. Webster, 27 Cal. 524; Williams v. Sutton, 43 Cal. 71.

³ Hough v. Porter, 51 Ore. 318, 372, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

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¹ For mutual corporations, see Secs. 1479-1489.

Helm, C. J., in Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275.

² Biggs v. Utah etc. Co., 7 Ariz. 331, 64 Pac. Rep. 494.

to the water rights not being in the association, as is the case where there is a corporation, but in the individual members of the association, according to each one's respective share,³ and, as evidencing the share of water to which each member is entitled, sometimes a certificate is issued to him by the association, duly executed by the officers thereof, which certificate is somewhat similar to stock certificates issued by corporations. But whether the shares of an individual members of these associations are represented by certificates, or not, as is the case of other tenants in common, he has the right to sell, or assign his interest, or any portion thereof, as he sees fit, with or without the consent of the other members of the association, and the purchaser of such interest or interests succeeds to all the rights of the vendor.⁴ A person joining such a voluntary association does not vest in the majority the power to injure the rights of such person. So, by entering into such a community enterprise, the minority does not vest in the majority the power to change the course of the ditch constructed by the association to the injury of the rights of the minority, and an injunction against such a change will be granted by the Court.⁵ The associations thus created are not endowed with the general powers pertaining to corporations. They have only the powers expressly, or by necessary implication, granted to them by the Acts creating them, and no more.⁶

In some jurisdictions the status of these voluntary associations

³ "By associating together under the irrigation laws of 1876, Rolfson and his associates became tenants in common of the waters of that stream, and each land owner of such district was equally entitled to the use of the water brought into such district, according to their rights, by paying their proportionate share of the expense." *Smith v. North Canyon W. Co.*, 16 Utah 194, 52 Pac. Rep. 283; *Hildreth v. Montecito Cr. W. Co.*, 139 Cal. 22, 72 Pac. Rep. 395; *Candelaria v. Vallejos*, 13 N. M. 140, 81 Pac. Rep. 589.

⁴ *Biggs v. Utah etc. Co.*, 7 Ariz. 331, 64 Pac. Rep. 494, where it is held that certificates issued by an unincor-

porated voluntary association to its members, and treated by them as evidence of the right to control its property, and to appropriate water by means of a common ditch, must be construed as water right contracts, and a sale thereof by the holder is, in effect, a conveyance of his interests in the property.

⁵ *Candelaria v. Vallejos*, 13 N. M. 140, 81 Pac. Rep. 589.

For the right of the majority to control in voluntary associations, see Sec. 1462.

⁶ See *Elmore v. Drainage Commissioners*, 135 Ill. 269, 25 N. E. Rep. 1010, 25 Am. St. Rep. 363.

is defined by statute. This is especially true in Arizona and New Mexico, where the community ditch, or "public acequia," was the usual and ordinary means for the diversion and distribution of the water. Each village or group of farmers constructed its own common ditch. The management and control of this ditch was regulated by law, and not by the agreements and contracts of the consumers of the water diverted by it. Hence, every landowner under such a ditch, whether he used the water or not, was required to contribute his quota of labor, or money, required in the maintenance and preservation of the ditch. Such ditches are recognized and treated as public property, in much the same way that a public road under our laws is regarded. In these jurisdictions it is provided that all community ditches, or acequias, or rather the communities using them, shall be considered as corporations, or bodies corporate, with power to sue or be sued as such.⁷ In this respect, the old Spanish and Mexican laws were closely followed in the early statutes of these Territories.⁸

§ 1460. **Partnerships.**—There is no doubt but that diverting works, ditches, canals, and water rights, may be owned and controlled as partnership property, as is the case with any other property; and, when so held, for the purpose of changing the partnership relations, or settling the partnership affairs, such property will be subject in equity to all the incidents of other partnership property. And oftentimes the determination of the respective rights in controversy regarding interests in ditch and canal properties, together with the water rights, in the Western States depends upon the question whether such property was held as partnership property, in the strict sense in which this term was used, or was held in the more common mode of holding such property in common. So, where three persons became the equal owners in two ditches, and they formed a partnership, the ditches forming the main part of the partnership property, and they owed partnership debts, and one of the partners mortgaged his interest in the property to se-

⁷ Comp. Laws N. M., 1887, Sec. 8; *Candelaria v. Vallejos*, 13 N. M. 140, 81 Pac. Rep. 589; Comp. Laws. Ariz., Chap. 55, Secs. 1, 3, 7; *Slosser v. Salt*

River Val. C. Co., 7 Ariz. 376, 65 Pac. Rep. 332.

⁸ For the Mexican and Spanish laws regulating water rights, see Chap. 30, Secs. 570-584.

cure his individual debt, it was held in an early California case that the mortgagee acquired only the mortgagor's interest in the surplus after the payment of the partnership debts; and, if these debts equaled, or exceeded the value of the property, and it was afterwards sold by the partners to pay the partnership debts, the mortgagee, as against the purchaser, held no interest in the property, liable to be sold, and the mortgage could not be foreclosed.¹ Again, such was the case where decedent posted notices of appropriation of water, intending to acquire a partly completed irrigation canal, and use it in distributing the water appropriated. Being without sufficient means, he interested two other persons, it being agreed that a corporation should be formed to carry on the enterprise. Decedent conveyed all his rights to the other parties in trust, to be conveyed by them to the corporation on its formation. Afterward one of these parties obtained, individually, a lease on the canal, and posted notices of appropriation substantially covering the water claimed under the previous notices. Upon a suit to establish a constructive trust in the enterprise, it was held that the decedent and the defendants were partners in the enterprise until the formation of the corporation, and that the defendants were trustees of the partnership, holding, as such, the rights conveyed by the decedent.² So, again, where the owner of the legal title to a canal and water right entered into a partnership, and retained the legal title at all times to such canal and water right, and the partnership was thereafter dissolved, and a partnership settlement had, a subsequent deed, by the outgoing partner, to any interest he might formerly have had in such canal and water right, passed no title.³

In the ownership and control of water rights and other property incident thereto, oftentimes the relations of the several owners have some of the incidents of both tenancy in common and a co-

¹ Jones v. Parsons, 25 Cal. 100; 477, 14 Pac. Rep. 198, where it was held that no partnership existed. Goodenow v. Ewer, 16 Cal. 461, 76 Am. Dec. 540; Lytle Cr. W. Co. v. Perdew, 65 Cal. 447, 2 Pac. Rep. 732, 4 Pac. Rep. 426; Bradley v. Harkness, 26 Cal. 69, 11 Morr. Min. Rep. 389.

² Beckwith v. Sheldon, 15½ Cal. 393, 97 Pac. Rep. 867.

See, also, Fitzell v. Leaky, 72 Cal.

One partner in a water right acquired by appropriation can not sell and convey the interest of his co-partner. Henderson v. Nichols, 67 Cal. 152, 7 Pac. Rep. 412.

³ Briggs v. Murray, 29 Wash. 245, 69 Pac. Rep. 765.

partnership. As, for example, there may be a tenancy in common in the ownership of the ditch, and a strict partnership between the owners thereof for the purpose of diverting the water and selling it to consumers. The rule that applies to mining claims also applies to ditch property and water rights. The title to the claims may be held by the parties as tenants in common, while upon the other hand, there may be a strict business partnership for the purpose of working the claims and selling the ore produced therefrom; or there may be a partnership, both in the ownership of the mining property, and in the working of the same. Whether the relationship of the owners is one or the other, must depend upon the facts in each particular case.⁴ So, where two corporations entered into an agreement that the proceeds from the sales of water, after deducting operating expenses, including the necessary extension of pipes, were to be divided between the two companies, and two trustees were named in the contract, one appointed by each corporation, who were given general charge under the contract, it was held that no partnership was created between the two corporations, for the reason that the contract did not cover all of the business of either party, though the whole of the business of each corporation related to the sale of water.⁵

As is the case with a tenancy in common, so it is with a partnership; some of the statutes of the States provide that in case of a dispute as to the division of the water between the respective partners, a distributor, or a commissioner, will be appointed to divide the water between the owners thereof.⁶

⁴ *Bradley v. Harkness*, 26 Cal. 69, 11 Morr. Min. Rep. 389; *Duryea v. Burt*, 28 Cal. 569; *Henderson v. Nichols*, 67 Cal. 152, 7 Pac. Rep. 412; *O'Connor v. North Truckee D. Co.*, 17 Nev. 245, 30 Pac. Rep. 882.

"A mere joint ownership or community of interest in property does not necessarily constitute a partnership, though the income from it may be divided." *Consolidated Canal Co. v. Peters*, 5 Ariz. 80, 46 Pac. Rep. 74.

⁵ *San Diego W. Co. v. San Diego Flume Co.*, 108 Cal. 549, 41 Pac. Rep. 495, 29 L. R. A. 839.

⁶ The jurisdiction of the District Court to appoint a distributor of water flowing in a partnership irrigation ditch, authorized by Rev. Stat., 1899, Secs. 908, 916, as amended by Laws, 1903, p. 122, Chap. 93, does not depend on the consent of the parties, but on the filing of a verified petition alleging joint ownership of the ditch, that the parties can not agree on a distribution of the water, and praying for the appointment of a distributor. *Mau v. Stoner*, 15 Wyo. 109, 87 Pac. Rep. 434; *Id.*, 14 Wyo. 183, 83 Pac. Rep. 218.

§ 1461. **Analogous to mining partnerships.**—Unless otherwise defined by specific agreements between them, the relations between the owners of ditch and canal property, and the water rights used in connection therewith, where they are defined as a co-partnership, are more in the nature of what are known in the West as mining partnerships than those of the ordinary trading partnerships. This undoubtedly grew out of the fact that the water rights first appropriated under the Arid Region Doctrine of appropriation were first used for the purpose of working the mining claims in California.¹ As was said by Mr. Justice Field, in an opinion rendered in the Supreme Court of the United States,² "Mining partnerships as distinct associations, with different rights and liabilities attaching to their members from those attaching to members of ordinary trading partnerships, exist in all communities; indeed, without them successful mining would be attended with difficulties and embarrassments much greater than at present." In an ordinary partnership one can not buy in, or sell out, an interest. Such an act would of itself work a dissolution of the partnership and necessitate its final settlement and closing out. Upon the other hand, in a mining partnership, this very thing can be done, and that, too, without a dissolution of the partnership.³

See, also, *Stoner v. Mau*, 11 Wyo. 366, 72 Pac. Rep. 193, 73 Pac. Rep. 548.

¹ For the history of the doctrine, see Secs. 595-626.

² *Kahn v. Central Smelting Co.*, 102 U. S. 641, 26 L. Ed. 266.

³ *Bissel v. Foss*, 114 U. S. 252, 29 L. Ed. 126, 5 Sup. Ct. Rep. 851, where it is said: "This case settles two propositions: First, that the members of a mining association have no right to object to the admission of a stranger into the association who buys the share of one of the associates; and, second, that the sale and assignment by one of the associates, of his interest, does not dissolve the mining partnership. It follows from these propositions that one member of a mining partnership has the right, without consulting his associates, to sell

his interest in the partnership to a stranger, and that such sale injures no right or property of the other associates. Much less does the purchase by one associate of the share of another inflict any wrong upon the other members of the partnership. There is no relation of trust or confidence between mining partners which is violated by the sale and assignment by one partner to a stranger or one of the associates of his share in the property and business of the association."

See, also, *Duryea v. Burt*, 28 Cal. 569; *Settembre v. Putnam*, 30 Cal. 490; *Taylor v. Castle*, 42 Cal. 367; *Montgomery v. Harrington*, 58 Cal. 270; *McConnell v. Denver*, 35 Cal. 365; *Bradley v. Harkness*, 26 Cal. 69, 11 Morr. Min. Rep. 389; *Skillman v. Lachman*, 23 Cal. 198, 83 Am. Dec. 96.

§ 1462. **Right of majority in interest to control.**—Whether the status of the parties of an unincorporated water company be that of tenants in common, or partners,¹ as to the general policy which shall govern the affairs of the company, the general rule of law is that the majority in interest has the right to control. As from the nature of this kind of property it oftentimes happens that it can only be used in its entirety, it is at times indispensable to the successful conduct of the business that those owning the major portion of the property should have the power to control the policy of the company in cases where all can not agree, otherwise the operations might be wholly discontinued, or worked to a disadvantage. “A majority of such tenants in common have the right to control the affairs of the ditch. . . . Neither law nor equity will aid a stubborn minority in preventing the majority from doing an act for the manifest good of the whole community, where no one is injured, but all are benefited.”² The proposition contained in the above quotation must be conceded, whereby the policy adopted by the majority does not materially injure the vested rights of the minority. But to go still further, as held in the majority opinion of the same case, while under the original community plan, no power was vested in the majority to change at will the location of the main ditch, so as to injuriously affect the rights of the minority, except by the consent of such minority, where the maintenance of the ditch becomes a practical impossibility this rule does not obtain, and such main ditch may, under such circumstances named, be changed to an extent sufficient to avoid such insuperable obstacle, and that, too, without the consent of the minority to the change.³

¹ For tenants in common, see Secs. 1455-1458.

For partnerships, see Secs. 1460-1462.

² Mills, C. J., in dissenting opinion, *Candelaria v. Vallejos*, 13 N. M. 140, 81 Pac. Rep. 589, citing *Kinney on Irr.*, 1st Ed., Sec. 304; *Abel v. Love*, 17 Cal. 233, 11 Morr. Min. Rep. 350; *Bartholomew v. Fayette Irr. Co.*, 31 Utah 1, 86 Pac. Rep. 481, 120 Am. St. Rep. 912; affirmed in 31 Utah 220, 87 Pac. Rep. 707.

³ *Candelaria v. Vallejos*, 13 N. M.

140, 81 Pac. Rep. 589, but where an injunction against such a change was affirmed for the reason that the right to have the original community ditch run through or near the lands of the plaintiffs upon its ancient course was a property right in the plaintiffs, secured by the original mutual agreement by which the ditch was constructed upon such course, and “where it would take away, to a certain extent, the value of property which has been improved in reliance upon that agreement.”

Therefore, it may be stated as a general proposition that, notwithstanding the danger at times of the abuse of power in such cases, what may be necessary and proper for the carrying on of the business of voluntary associations, and mining partnerships, for the joint benefit of all interested should be determined by those holding in the aggregate the major part of the property, especially where the rights of the minority owners are not materially injured. And, if the powers which are thus attempted to be exercised are not necessary and proper for the general success of the enterprise, those whose interests are materially injured thereby, have a right to resort to the courts for redress, either by way of an action for damages, or for injunctive relief.⁴

Neither has such an association composed of the majority of the water users from a certain stream a right or the power to interfere with, or regulate, the use of the water of the minority owners who did not join the association. As was said in a Utah case: "Assuming now, that a majority of the tenants in common, in a meeting where all are entitled to representation and to participate in the proceedings, have power to control the minority with respect to the regulation and distribution of the water when no vested right of the minority is impaired by the exercise of such power, still a majority of such co-tenants may not control the minority at a meeting or proceeding in which they have no right of representation nor voice in the action taken."⁵

§ 1463. Authority of individual members.—The power of the individual members of an unincorporated water company to bind the company, or his associates, also depends upon the status of the company. If it is a strict business partnership one member has this power; but, upon the other hand, if the company is a mere tenancy in common, one member can neither bind his co-tenants, nor the association, without direct authority granted to him for

⁴ *Candelaria v. Vallejos*, 13 N. M. 140, 81 Pac. Rep. 589; *Elmore v. Drainage Commissioners*, 135 Ill. 269, 25 N. E. Rep. 1010, 25 Am. St. Rep. 363; *Abel v. Love*, 17 Cal. 233, 11 Morr. Min. Rep. 350; *Dougherty v. Creary*, 30 Cal. 290, 89 Am. Dec. 116; *Duryea v. Burt*, 28 Cal. 569.

⁵ *Bartholomew v. Fayette etc. Co.*, 31 Utah 1, 86 Pac. Rep. 481, 120 Am. St. Rep. 912; *Id.*, 31 Utah 220, 87 Pac. Rep. 707; *Fisher v. Bountiful City*, 21 Utah 29, 59 Pac. Rep. 520.

that purpose. In a partnership, each partner has the authority to represent all the partners, and to bind them by his acts so far as they relate to the partnership business.¹

But, where the company, or association, is founded upon a tenancy in common, a member of such association has no general authority by virtue of such membership to bind either the association or his co-tenants by his contracts. The same proposition is true as to mining partnerships. One mining partner has not the power to bind his associates by engagements with third persons to the same extent that an individual partner of an ordinary trading concern is competent to bind the firm of which he is a member.² Although a tenancy in common may have some of the incidents of a partnership, the powers of the several members are different from those of the members of the commercial partnerships. They are not formed from the *delectus personae*, from which principle the rights and obligations of ordinary trading partnerships are derived. They are founded upon a union of property of the individual owners. Therefore, the power of one member of such an association is limited to what is directly granted him by his co-tenants. However, full power may be granted to one co-tenant to bind them. So, if an unincorporated ditch company duly authorizes its superintendent to give the company notes for materials purchased by the company, all members of the association are bound thereby, whether they were such members at the time when the materials were purchased or not.³

¹ San Diego W. Co. v. San Diego Flume Co., 108 Cal. 549, 41 Pac. Rep. 495, 29 L. R. A. 839; Duryea v. Burt, 28 Cal. 569; Jones v. Clark, 42 Cal. 180.

² For mining partnerships, see Sec. 1461; McConnell v. Denver, 35 Cal.

365; Jones v. Clark, 42 Cal. 180; Skillman v. Lachman, 23 Cal. 198, 83 Am. Dec. 96 Bradley v. Harkness, 26 Cal. 69, 11 Morr. Min. Rep. 389; Settembre v. Putnam, 30 Cal. 490.

³ McConnell v. Denver, 35 Cal. 365.

CHAPTER 74.

ORGANIZATION AND POWERS OF CORPORATIONS.

- § 1464. Incorporated water companies—In general.
- § 1465. Objects of incorporation.
- § 1466. Organization of water corporations.
- § 1467. Organization of water companies—Incorporation by legislative enactment.
- § 1468. General powers of water corporations.
- § 1469. The purposes of a corporation must be determined from its articles.
- § 1470. Power of acquiring water rights by appropriation.
- § 1471. Power of acquiring water rights by purchase—Prescription.
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- § 1474. Acquisition of rights of way—Purchase—Prescription—Condemnation.
- § 1475. Relation to consumers—Title to the water rights.
- § 1476. Relation to consumers—Where the company is deemed merely the carrier—Colorado rule.
- § 1477. Relation to consumers—Where the company is deemed the appropriator and owner of the rights.
- § 1478. The exemption from taxation.

§ 1464. Incorporated water companies—In general.—Incorporated water companies are those which are duly organized under the corporate laws of some State, or Territory. For the purposes of this work we have divided these corporations into two classes: ¹ First, corporations which are organized solely for the mutual benefit of its stockholders;² second, corporations organized solely for the purpose of furnishing water to others than to its stockholders, and for the express purpose of profit.³

There are certain rules of law which appertain to all corporations regardless of the above classifications. In this chapter we will discuss the steps necessary to be taken for the organization of corporations, their general powers, and the relation of corporations to consumers.

¹ For the classification of water companies, see Sec. 1452.

³ For corporations for profit, see Secs. 1490-1502.

² For mutual corporations, see Secs. 1479-1489.

§ 1465. **Objects of incorporating.**—The principal objects for the organization of water corporations is to secure in the aggregate a larger amount of working capital, in order that larger, better, and more permanent diverting works, larger and longer ditches may be constructed, and thereby a greater area of land may be brought under cultivation by means of the same works, thereby insuring a greater economy in the use of water, and at a smaller cost, than though the same area of land was brought under irrigation and cultivation through many works constructed by individual effort. Then, again, the difficulties arising where the ownership and control of the ditch property and the water rights used in connection therewith are in two or more individuals, either as tenants in common,¹ or as partners with their different ideas for the management and operation of the property, and especially of those of “an obstinate minority,” and the troubles occasioned in securing the contribution from the co-owners for the necessary expenses of maintenance,² compel, at times, the organization of a corporation in order that the affairs of the company and the operation of the common property may be governed by one distinct policy, and under a definite and single management. As was said in an Arizona case:³ “The great cost of constructing dams, and canals, and the maintenance of these when constructed, and the advantages in the way of conservation and saving of water which result on the erection and maintenance of large and permanent dams and canals, preclude the policy of restricting the ownership and control of such dams and ditches to actual appropriators. The difficulties arising from the ownership and control of such means of diversion by one or more individuals as tenants in common are such as to make it necessary, almost, that corporations be organized for this purpose. Such corporations have been organized, and their rights to the ownership and control of their property have been recognized, in all the arid States and Territories.”⁴ And, therefore, the

¹ For tenants in common, see Secs. 1454-1458.

² For contribution of expenses, see Sec. 1457.

³ *Slosser v. Salt River Valley Canal Co.*, 7 Ariz. 376, 65 Pac. Rep. 332.

⁴ “But it is only by the outlay of large sums of money in constructing

and maintaining canals or ditches that the business of agriculture, in portions of the State, can be successfully carried on. The average farmer is often too poor to make the expenditure necessary in owning and operating a main ditch of his own. Besides, it is almost always a matter of economy to

recognition of the necessity for these water corporations has been both by statutory law,⁵ and by the decisions of the courts in every State and Territory of the arid and semi-arid West, including that of the Supreme Court of the United States,⁶ and their formation has been encouraged, and their conduct and operations regulated.⁷

§ 1466. **Organization of water corporations.**—As private corporations exist only by virtue of the laws of the State, or Territory, under which they are organized, the statutes of the State, or Territory, must be strictly followed in respect to the requisites required in its articles of incorporation. Although the general corporation laws usually apply, in most of the States of the arid and semi-arid West, there are special provisions of the statutes governing the organization and operations of water companies, especially when they are organized for the purpose of the irrigation and reclamation of lands.¹ These special statutes also regulate

convey water long distances through a single large main, and there distribute it to the consumers by means of small laterals." *Golden Canal Co. v. Bright*, 8 Colo. 144, 6 Pac. Rep. 142.

⁵ For statutes relating to water corporations of the various States, see Part XIV.

⁶ *Gutierrez v. Albuquerque Land & Irr. Co.*, 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338; affirming *Id.*, 10 N. M. 177, 61 Pac. Rep. 357.

"Individuals may organize a company, either by or without incorporation, for the construction of an irrigating ditch, and may by such means divert the unappropriated waters of a natural stream. They may provide that their several interests in such enterprise shall be represented by shares of stock." *Combs v. Agricultural D. Co.*, 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275.

See, also, *Wheeler v. Northern Colo. Irr. Co.*, 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; *Thorpe v.*

Tenem D. Co., 1 Wash. 566, 20 Pac. Rep. 588; *McFadden v. Los Angeles County*, 74 Cal. 571, 16 Pac. Rep. 397.

⁷ See for the regulation of the water rates which may be charged, Chap. 69, Secs. 1368-1385.

For the regulation of corporations, see the following sections.

¹ For special statutes governing such corporations, see Part XIV.

A corporation organized under the laws of a Territory have the same rights in this respect as those organized under the laws of a State. *Gutierrez v. Albuquerque etc. Co.*, 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338; affirming *Id.*, 10 N. M. 177, 61 Pac. Rep. 357.

Prima facie proof of the existence of a corporation is made by the introduction by its original articles of incorporation, and the extension or renewal thereof. *Reno v. Reno Juchem D. Co.*, — Colo. —, 119 Pac. Rep. 473.

these corporations respecting their powers of securing water rights and rights of way, the protection of these rights, and the duties of such corporations and their liabilities.

The provisions of the statutes relative to the filing of the articles of incorporation of the State where the corporation is organized must also be strictly complied with. And, where the corporation is organized under the laws of one State, or Territory, and its operations are carried on in another, the statutes relative to the filing of the articles in the latter must also be complied with. There must also be an acceptance of the constitution and laws of the State where the operations are to be carried on.² If a foreign corporation is not willing to subject itself to the burden imposed by the constitution and laws of the State wherein it is to carry on its operations, relative to the appropriation, distribution, and sale of waters, it should not go into that State, and avail itself of the rights of appropriation conferred by the same constitution and laws. Taking those benefits, it assumes the corresponding burden, and will not thereafter be heard to assert the one and repudiate the other. It is, therefore, held that, if a foreign corporation does not comply with the laws of the State where its operations are proposed to be carried on, it has no power to acquire water right by appropriation under the laws of such State.³ It therefore follows that the stat-

² A foreign corporation coming into California and acquiring water and water rights under the provisions of the State constitution (Const., 1879, Art. 14, Sec. 1), which declares that the use of water appropriated for sale, rent, or distribution is a public use, subject to the regulation and control by the State, and that the rates of compensation shall be fixed annually by cities, counties, and towns, will not be heard to assert that the constitution and laws under which it has acquired such rights are in contravention of the Constitution of the United States. Such corporation may, however, question the reasonableness of the rates established by any municipality. *San Diego Land & Town Co. v. City of National City*, 74 Fed. Rep.

79; affirmed, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. Rep. 804.

³ "The appellant corporation did not comply with the laws of this State (Utah), and has no power to engage in its business of mining, or to acquire any water rights under the laws of this State. . . . The appellant corporation never filed with the Secretary of State of the State of Utah a copy of its articles of incorporation, by either name under which it was incorporated, and never accepted the laws or the constitution of Utah, nor has it appointed any agent or fixed any place of business within the State as required by law. The defendant corporation, therefore, is not entitled to the benefit of the laws of this State with reference to corporations." *Tel-*

utes of both the States where the corporation is organized and where its operations are proposed to be carried on, must be strictly complied with. And, where the statute requires that the articles of incorporation must be filed in the county where the property of the company is located and its operations carried on, this provision must also be complied with.⁴

§ 1467. **Organization of water companies—Incorporation by legislative enactment.**—Although the most of the States of the Union have general corporation laws under which all private corporations must be organized, in some, however, the power of incorporation lies only with the legislature itself. Therefore, in order to incorporate a company in one of these States, its promoters must have presented to that body a bill to that effect, which must be passed the same as any other bill, before it becomes a law; and, upon its passage, a charter is issued by the State to such corporation, granting the powers therein set forth. However, the authority granted by the legislature to corporations so organized, to acquire water rights, does not confer the water rights themselves. Water rights can only be acquired in the manner prescribed by the law of the State where such rights are sought to be acquired, whether it is by a corporation, or by a private individual,¹ and a corporation organized by legislative enactment stands on no bet-

luride Pr. Trans. Co. v. Rio Grande W. R. Co., 175 U. S. 639, 44 L. Ed. 305, 20 Sup. Ct. Rep. 245; *Id.*, 187 U. S. 569, 47 L. Ed. 307, 23 Sup. Ct. Rep. 178; see same case below, 23 Utah 22, 63 Pac. Rep. 995.

See, also, *State v. Southern P. R. Co.*, 52 La. Ann. 1822, 28 So. Rep. 372; *Oregon R. & Nav. Co. v. Oregonian R. Co.*, 130 U. S. 1, 32 L. Ed. 837, 9 Sup. Ct. Rep. 409; *Barse Live Stock Co. v. Range Valley Cattle Co.*, 16 Utah 59, 50 Pac. Rep. 630.

⁴ *Emigrant D. Co. v. Webber*, 108 Cal. 88, 40 Pac. Rep. 1061.

¹ *Mud Creek Irr. Co. v. Vivian*, 74 Tex. 170, 11 S. W. Rep. 1078; *Platte Water Co. v. Northern Colo. Irr. Co.*, 12 Colo. 525, 21 Pac. Rep. 711, where

it was contended by the appellant, that by its charter from the Territory of Kansas, confirmed by the Territory of Colorado, it acquired the exclusive right to all the waters of the South Platte River, and the exclusive privilege of using the same for mechanical, agricultural, mining, and city purposes; and where the Court held that there was no law or decision of either Kansas or Colorado which declares that a party may secure a legislative grant to the exclusive use of waters of a natural stream, which would allow the same to remain in abeyance for a long series of years without making use of the exclusive privilege so granted; and that, from the earliest times, rights to the bene-

ter footing in this respect than corporations organized under general laws, or than private individuals; although some of the legislatures, at an early day, attempted to confer upon certain corporations and individuals certain special rights.² This was attempted by the Territory of Utah, and it was undoubtedly these illegal Acts which prompted Mr. Justice Boreman in rendering the opinion in the case of *Munroe v. Ivie*,³ to say: "Water is something that the appellants could not control in any other way than by appropriation. They could not go and dig ditches and bring

ficial use of water from natural streams have been acquired by diversion, through prior appropriation, rather than by grant.

² See for example the early Act of the legislature of the State of Deseret (now Utah), approved Jan. 9, 1850, wherein it was provided: "Be it ordained by the General Assembly of the State of Deseret: That Brigham Young have the sole control of City Creek and Canyon; and that he pay into the public treasury the sum of five hundred dollars therefor." *Comp. Laws Utah Territory*, 1855, p. 63.

And again the Act approved Jan. 9, 1851, wherein it is provided: "Sec. 1. Be it ordained by the General Assembly of the State of Deseret: That Heber C. Kimball have the exclusive privilege of conveying the waters of North Mill Creek Canyon, and the waters of the canyon next north, to wit: about half a mile distant, to some convenient point below the mouth of the two canyons, and of appropriating the same to the use of a saw mill, grist mill, and other machinery.

"Sec. 2. Nothing herein contained shall prevent the waters aforesaid from being used, whenever and wherever it is necessary for irrigating." *Comp. Laws Utah Territory*, 1855, p. 64.

See, also, the Act to incorporate the Provo Canal and Irrigation Company,

approved Jan. 17, 1853, where in Section 2 it is provided that: "The aforesaid company shall have the right and privilege, and the same are hereby conferred, to take out one-half of the waters of the Provo River, at or near the mouth of the canyon." *Comp. Laws of Utah*, 1855, p. 233.

Many other examples of a similar character might be cited. The illegality of these Acts need not be commented upon. And, with a quotation from another illegal Act attempting to legalize the above and other illegal Acts, we will leave the subject without comment. The Act referred to was that approved Jan. 14, 1854, Section 1 of which provides as follows: "Sec. 1. Be it enacted by the Governor and Legislative Assembly of the Territory of Utah: That all questions of law, and the admissibility of testimony, shall be decided by the Court; and no laws nor parts of laws shall be read, argued, cited, or adopted in any court, during any trial, except those enacted by the Governor and Legislative Assembly of this Territory, and those passed by the Congress of the United States, when applicable; and no report, decision, or doings of any court shall be read, argued, cited, or adopted as precedent in any other trial." *Comp. Laws of Utah*, 1855, p. 260.

³ 2 Utah, 535.

water down and let it run to waste. If they failed to appropriate it, any stranger could appropriate it, and it was not necessary that such stranger should be a member of the irrigating company, nor could such company injure, or trample upon his rights. This is a free country and the lands are open to all, and the appropriation of the water is open to all and the legislature can not pass any law that will put it into the power of an irrigating company to control and manage the waters of any part of the Territory, regardless of the rights of parties. Nor will the Court allow irrigating companies to become engines of oppression."

For an example of incorporation by legislative enactment, see the case where the Willamette Woolen Manufacturing Company was incorporated by an Act of the Territorial legislature of Oregon, on the 17th day of December, 1856, and thereby had conferred upon it "power to bring water from the Santiam River to any place near Salem," and Section 6 of the Act providing: "Said corporation shall have the exclusive right to the hydraulic powers and privileges created by the water which is taken from the Santiam River, and may use, rent, and sell the same, or any portion thereof, as it may deem expedient." ⁴

§ 1468. General powers of water corporations.—The general powers of private incorporated water companies, although limited by their articles of incorporation, and the laws of the respective States under which they are incorporated, and where their operations are carried on,¹ are still many and varied. They have the power to make direct appropriations of the water of the natural streams and other sources of water supply, either for the purpose of applying such waters themselves to some beneficial uses or purposes, or for the express purpose of selling the rights to others who will so apply them.² They may also acquire the title to water rights by purchase;³ and, in some of the States, by condemnation proceedings. Among the powers granted to these corporations is

⁴ *Willamette etc. Co. v. Bank of British Columbia*, 119 U. S. 191, 30 L. Ed. 384, 7 Sup. Ct. Rep. 187; see, also, the case of *Salem Capital Flour Mills v. Stayton etc. Co.*, 33 Fed. Rep. 146, involving the same facts.

¹ See Sec. 1469.

² Right of corporations to appropriate water, see Secs. 684, 1470.

³ For the sale of water rights, see Chap. 53, Secs. 994-1032.

the right to acquire rights of way for their diverting works, ditches, and canals, either by purchase, or by the right of eminent domain.⁴ They also have the power of taking advantage of the various right of way Acts of Congress.⁵ They have the power to construct the necessary diverting works, ditches, canals, and the other works necessary to divert the waters from the natural sources of supply, and to conduct them to the place of use. They may also sell the water rights to the water appropriated to others than to the stockholders of the corporation.⁶ They may also limit, by their articles of incorporation, the power to furnish water only to the stockholders of the corporations, who must then be land owners, or in the position to apply the water to some beneficial use, or purpose.⁷ They may be specially organized to work in co-operation with the National Government in irrigation projects constructed and operated under the National Reclamation Act.⁸ And, again, they may be organized to work in co-operation with both the National Government and a State, as is the case where such private corporations are organized to take advantage of the Carey Act.⁹

They may be given the power to raise money for their operations by the mortgaging of their property for security of the payment of the money so borrowed.¹⁰ They may also raise money for the sale of water rights,¹¹ or by assessments levied upon the outstanding stock of the corporation.¹²

⁴ For the sale of ditches and canals, see Sec. 1003.

For rights of way over the public lands, see Secs. 927-971.

For rights of way over private lands, see Secs. 972-993.

⁵ See Chap. 51, Secs. 927-971.

⁶ For the power of corporations to sell water rights, see Sec. 1492.

It must be noted, however, that in those States which regard the consumer as the appropriator of the water, and, therefore, the owner of the water right, and the water company as merely the carrier of the water for hire, that it is held that the terms "selling" and "renting" water or water rights is a misapplication

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of those terms. See *Wheeler v. Northern Colo. Irr. Co.*, 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; *Wyatt v. Larimer etc. Co.*, 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; reversing *Id.*, 1 Colo. App. 480, 29 Pac. Rep. 906.

See, also, for the relation of company to consumers, Secs. 1475-1477.

⁷ For mutual corporations, see Secs. 1479-1489.

⁸ See water users' associations, Secs. 1281-1286.

⁹ For the Carey Act, see Chap. 67, Secs. 1312-1336.

¹⁰ See Secs. 1019-1022.

¹¹ See Secs. 703, 1492-1507.

¹² For assessments, see Sec. 1489.

The statutes of the various States of the arid and semi-arid West encourage the organization of these corporations and their operations. They protect the property rights of these companies and provide severe penalties for their injury and destruction. In a number of the States, owing to the fact that the operations of ditch and canal companies so increase the value of the taxable property in the neighborhood, the irrigation works of the companies are made exempt from taxation, either for a certain number of years after their organization or perpetually. In most of the States, there are statutory provisions providing for the fixing of maximum rates for water rights which may be charged for the sale of water by these companies; and, when the rate is fixed, according to the statute, the companies affected thereby must comply with it.¹³ These corporations are made liable in damages for all injuries to the property of others which may be caused by their negligence.¹⁴

These subjects have already been discussed in this work, or will be discussed in the succeeding sections.

§ 1469. The purposes of a corporation must be determined from its articles.—The purposes for which a corporation is organized are limited to such as are expressly defined in its articles of incorporation, except such as are expressly incidental to such purposes.¹ The articles of incorporation under the general corporate laws of a State, with the provisions defining their effect, constitute the charter of a corporation; and from them the purposes of a corporation, and the uses to which its property may be put, must be ascertained and limited.² So, in a case decided in Utah, where the object and business of a canal company, as expressed in its articles of incorporation, were “to construct (the canal described) for the purpose of diverting a portion of the Jordan River from its present channel, and causing it to flow into” Great Salt Lake at a point named, “thereby preventing the western portion of Salt Lake City and

¹³ For water rates, see Chap. 69, Secs. 1368-1385.

¹⁴ See Chap. 83.

¹ *Davis v. Flagstaff M. Co.*, 2 Utah 74; 4 *Thomp. Corp.*, Sec. 5638.

² “Conceding that the rule applicable to all statutes, that what is fairly implied is as much granted as

what is expressed, it remains that the charter of a corporation is the measure of its powers and that the enumeration of these powers implies the exclusion of all others.” *Thomas v. West Jersey R. Co.*, 101 U. S. 71, 25 L. Ed. 950.

the lands along the Jordan River from being submerged in times of high water, and making practicable the draining, irrigating, and cultivating of large tracts of land hitherto unavailable for agricultural purposes; and to this end the association may construct and maintain all necessary dams, headgates, flumes, and other means which may be necessary to control, regulate, and distribute said water for the purposes herein indicated," it was held, that the purpose of the canal, and the powers the corporation was authorized to exercise, must be determined from its articles of incorporation, and not from the opinions of witnesses. It was also held that the two purposes enumerated in the articles were, first, the diversion of a portion of the water of the river to prevent overflow of adjacent lands; and, second, the irrigation and cultivation of lands. And that the enumeration of these two purposes implies the exclusion of all others, and forbids the use of the canal for drainage to the exclusion of its use for irrigation, or for irrigation to the exclusion of its use for drainage; and, further, that the use of the canal for the drainage of water unfit for irrigation excludes the use of its waters for irrigation or domestic purposes. Therefore, the drainage of water through it, unfit for irrigation, is excluded.⁸ Again, it was held by the same Court, that a corporation, the object of which is "to construct, manage, and control the number of canals and ditches hereinafter described, taken from Huntington creek," followed by the number and description of each canal and ditch,

⁸ North Point Consol. Irr. Co. v. Utah etc. Co., 16 Utah 246, 52 Pac. Rep. 168, 40 L. R. A. 851, 67 Am. St. Rep. 607.

The words "other purposes" in a charter giving a company the right to furnish water "for the extinguishment of fires and for domestic, sanitary, and other purposes" must be considered, in determining the right of eminent domain, to mean "other like purposes," or "other like public purposes," and did not include the furnishing power for running small motors for light manufacturing, for which water could be taken to the detriment of mill owners on the stream.

In re Barre Water Co., 62 Vt. 27, 20 Atl. Rep. 109, 9 L. R. A. 195.

See, also, *Gould v. Maricopa C. Co.*, 8 Ariz. 429, 76 Pac. Rep. 598; *Mud Creek Irr. Co. v. Vivian*, 74 Tex. 170, 11 S. W. Rep. 1078; *Diana Shooting Club v. Lamereaux*, 114 Wis. 44, 89 N. W. Rep. 880, 91 Am. Dec. 898.

"The powers of a corporation are defined and limited by its articles. Especially as against a stranger, it can not go beyond them." *Caviness v. La Grande Irr. Co.*, — Ore. —, 119 Pac. Rep. 731.

See, also, *Just v. Idaho Canal & Imp. Co.*, 16 Idaho 639, 102 Pac. Rep. 381.

"for the purpose of diverting the waters of said creek" through the canals, or ditches, for irrigation, and which is empowered to construct all the necessary works to "control, regulate, and distribute the said waters for the purposes herein mentioned," is not authorized to construct reservoirs for storing water; and, hence, an assessment on the capital stock for the construction of such reservoirs was void.⁴ But in a Colorado case, where it was contended that, by the declared objects of a corporation, it was a mutual company, that it was not organized for the purpose of carrying water for hire; and that its only obligation in the matter of carrying water was to supply its stockholders, it was held by the Court that there was nothing in the articles to indicate that it might not be the legitimate business of the corporation to carry and supply water for irrigation generally to those owning lands within the vicinity of the ditch, and, therefore, mandamus would lie to compel the delivery of the water to others than to its stockholders.⁵

Should, however, the original articles of incorporation not meet the requirements, they may be amended, under the conditions imposed by the statutes of the respective States.⁶

The powers of a corporation being limited to those contained in its articles of incorporation and as granted by the constitution and laws of the State where it is organized, it follows that a corporation organized under the laws of one State can not bring into another State, where its operations are proposed to be carried on, more or greater powers than those with which it was endowed by its charter in the State where organized.⁷

It is held in Montana that a certificate of incorporation issued by the Secretary of State shall be *prima facie* evidence of the corporate character of the company, but this does not refer to a corpora-

⁴ Seeley v. Huntington etc. Assn., 27 Utah 179, 75 Pac. Rep. 367.

⁵ Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275.

⁶ McDermont v. Anaheim etc. W. Co., 124 Cal. 112, 56 Pac. Rep. 779.

⁷ "A corporation of Colorado coming into this State (Utah) can not bring with it powers with which it is not endowed in Colorado. It can only

have existence under the express laws of the State where it is created, and can exercise no power which is not granted by its charter or some legislative Act." Telluride Power Trans. Co. v. Rio Grande W. R. Co., 175 U. S. 639, 44 L. Ed. 305, 20 Sup. Ct. Rep. 245; *Id.*, 187 U. S. 569, 47 L. Ed. 307, 23 Sup. Ct. Rep. 178; see same case below, 23 Utah 22, 63 Pac. Rep. 995.

tion organized prior to 1895, since up to that time there was no provision for the issuance of certificates of incorporation.⁸

§ 1470. Power of acquiring water rights by appropriation.—These private water corporations have the power of acquiring exclusive rights to the waters of the natural streams and other sources of water supply, the same as any individual, or group of individuals.¹ There are several methods by which these rights to water may be acquired, and one is by the direct appropriation of the water by the corporation and in the corporate name, under the rules of law as embodied in the Arid Region Doctrine of appropriation.² And, for this purpose, a corporation organized and existing under the laws of one of the States of the Union, and operating in the same State, or a corporation duly organized under the laws of one State and operating in another State, having complied fully with the laws of the latter, are to be considered citizens within the law for this purpose.³ Upon the same theory it is decided by the Supreme Court of the United States, that a corporation created under the laws of one of the States of the Union, all of whose members are citizens of the United States, is competent to locate, or join in the location of a mining claim upon the public lands of the United States, in like manner as individual citizens.⁴ So it is held that a corporation, in its corporate name, can both appropriate mining lands upon the public domain, by complying with the mining laws relative to the location of the same, and that it can also appropriate, in its corporate name, the water necessary for the operations to be carried on upon those lands, by complying with the rules of law of the Arid Region Doctrine of the appropriation of waters. In fact, it is now well settled in all the Western States that a corporation's title to water rights by appropriation

⁸ *Billings Realty Co. v. Big Ditch Co.*, 43 Mont. 251, 115 Pac. Rep. 828.

¹ For who may make appropriations of water, see Chap. 36, Secs. 678-689. See, also, tenants in common, Secs. 1454-1458.

Partnerships, Secs. 1461-1463.

² For the Arid Region Doctrine of appropriation, see Chap. 31, Secs. 585-594.

For the appropriation of water, see Chap. 38, Secs. 706-732.

³ *North Noonday Min. Co. v. Orient M. Co.*, 6 Sawy. 299, 1 Fed. Rep. 522.

⁴ *McKinley v. Wheeler*, 130 U. S. 630, 32 L. Ed. 1048, 9 Sup. Ct. Rep. 638.

See, also, *Thomas v. Chisholm*, 13 Colo. 105, 21 Pac. Rep. 1019.

is recognized and upheld, and that, too, regardless of the fact as to whether the corporation itself applies the water to some beneficial use or purpose, or rents or sells it to others who so apply it.⁵

The appropriation of water by corporations follows the general rule of the Arid Region Doctrine as to the priority of right, as though the appropriation was made by individuals. If the appropriation is prior in time it has the superior right. But, upon the other hand, if other rights have vested in and to the use of the waters of a certain stream, or other source of water supply, prior to those of the company, its appropriation is subsequent and subject to those rights. Identically the same rules govern in this respect as govern appropriations between private individuals.⁶ As was held by the Supreme Court of Colorado, individuals may organize a company, either by or without incorporation, for the construction of an irrigating ditch, and may by such means divert the unappropriated waters of a natural stream. They may provide that their several interests in such enterprise shall be represented by shares of stock. But neither the company itself, nor any stockholder of the company, can thus withhold the water from beneficial use, nor reserve it for future use of junior appropriators to the prejudice of prior appropriators, nor to the exclusion of those, who, in the meantime, may undertake in good faith to make a valid appropriation thereof.⁷

⁵ "In this State a corporation's title to water either by appropriation or prescription has been recognized and upheld from the earliest day." *Montecito Valley W. Co. v. City of Santa Barbara*, 144 Cal. 578, 77 Pac. Rep. 1113.

See, also, *Gutierrez v. Albuquerque Land & Irr. Co.*, 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338; affirming *Id.*, 10 N. M. 177, 61 Pac. Rep. 357; *Slosser v. Salt River Valley C. Co.*, 7 Ariz. 376, 65 Pac. Rep. 332; *Farmers' Ind. D. Co. v. Agricultural D. Co.*, 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149; reversing *Id.*, 3 Colo. App. 255, 32 Pac. Rep. 722; *Bear River etc. Co. v. New York M. Co.*, 8 Cal. 327, 68 Am. Dec. 325, 4

Morr. Min. Rep. 526; *Heyneman v. Blake*, 19 Cal. 579; *Stein Canal Co. v. Kern Island etc. Co.*, 53 Cal. 563; *Lakeside D. Co. v. Crane*, 80 Cal. 181, 22 Pac. Rep. 76; *South Yuba W. Co. v. Rosa*, 80 Cal. 333, 22 Pac. Rep. 222; *San Luis W. Co. v. Estrada*, 117 Cal. 168, 48 Pac. Rep. 1075; *Gould v. Maricopa etc. Co.*, 8 Ariz. 429, 76 Pac. Rep. 598.

⁶ For the rights of the prior and subsequent appropriators, see Secs. 776-786.

⁷ *Combs v. Agricultural Ditch Co.*, 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; *Farmers' High Line C. Co. v. Southworth*, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767; *Wheeler v. Northern Colo. Irr. Co.*, 10

§ 1471. **Power of acquiring water rights by purchase—Prescription.**—One of the powers usually granted to private water corporations by their charters is to purchase water rights, and this power has often been exercised.¹ The subject of the sale of water rights has been treated in a previous portion of this work, and but a short discussion here is necessary. The fact that a corporation is the purchasing party involves no new principle relative to the sale or transfer of water rights, provided that the articles of incorporation give it the power to make such purchases. As a general rule, one corporation has the power to purchase water rights, either from the individuals owning the same, or it may purchase such rights from another corporation.² But the corporation can not purchase more than its grantor has to sell. Therefore, where a corporation succeeded to the rights of a former company and the rights of other individual owners, it took only the property of the latter, which the former owned, subject to any rights of an individual in the water rights of the old company not surrendered by him to the new company.³

Water rights may also be acquired by private incorporated water companies by adverse user sufficient to amount to title by prescription. No new or different rules of law are prescribed for the acquisition of water rights by corporations by this means than are prescribed for their acquisition by the same means by individuals.

Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; *New Mercer D. Co. v. Armstrong*, 21 Colo. 357, 40 Pac. Rep. 989.

¹ For the sale of water rights, see Secs. 995-1024.

² The right of a company, incorporated "to obtain an additional water supply for those then owning rights in a certain ditch," to purchase from another company, composed of the same stockholders, the existing rights in such ditch can be questioned only by the State. *Water-Supply etc. Co. v. Tenney*, 24 Colo. 344, 51 Pac. Rep. 505.

See, also, *State ex rel. Bradford v. Western Irr. C. Co.*, 40 Kan. 96, 19 Pac. Rep. 349, 10 Am. St. Rep. 166;

North Point Consol. Irr. Co. v. Utah etc. Co., 16 Utah 246, 52 Pac. Rep. 168, 40 L. R. A. 851, 67 Am. St. Rep. 607; *Doyle v. San Diego etc. Co.*, 46 Fed. Rep. 709; *Bliss v. Kaweah Canal & Irr. Co.*, 65 Cal. 502, 4 Pac. Rep. 507.

Evidence that a corporation is in possession of certain works, and that it had for several years collected water rates, and had increased the extent of its works during such possession, shows a presumption of ownership. *Reno W. Co. v. Leete*, 17 Nev. 203, 30 Pac. Rep. 702.

³ *Beck v. Pasadena etc. Co.*, 130 Cal. 50, 59 Pac. Rep. 387, 62 Pac. Rep. 219.

This subject has been sufficiently discussed in a previous chapter.⁴ But an officer of a corporation occupies such a fiduciary relation to the company that, during his term of office, he can not acquire any interest by adverse user in the water rights, or other property owned by the corporation.⁵

§ 1472. **Power of acquiring water rights by condemnation.**—In certain cases corporations in the exercise of the powers granted to them to acquire water rights may also acquire such rights by condemnation proceedings by virtue of the power of eminent domain, but this power is to be exercised only for a public use, and upon the payment of just compensation. In fact, it may be said that the right to exercise the power of eminent domain by means of condemnation proceedings for the acquisition of water rights is limited to private corporations of a quasi-public nature,¹ to public corporations,² and to municipal corporations.³ The author has no case in mind where a private corporation was held to have the right to condemn a water right for its own private use, and the same is not allowed by law. And, in this respect the law governing condemnation proceedings differs from the law where the action is brought to condemn a right of way over the lands of others. Under the more modern authorities, including late cases decided by the Supreme Court of the United States, it is held that one person may condemn, under the power of eminent domain, a right of way over the lands of others for a ditch or canal and that, too, where it was to be used only for the purpose of conducting water to the private lands of the condemner.⁴ The general subject of eminent domain has been discussed sufficiently in another chapter of this work.⁵

⁴ See Chap. 54, Secs. 1033-1058.

⁵ *Center Creek etc. Co. v. Lindsay*, 21 Utah 192, 60 Pac. Rep. 559.

A corporation is not estopped from challenging the validity of a contract made on behalf of its directors, interested therein adversely to the corporation, by laches on the part of such directors in not causing the contract to be set aside, but allowing the other party to expend money on the strength of the contract. *Goodell v. Verdugo etc. Co.*, 138 Cal. 308, 71 Pac. Rep. 354.

¹ See Secs. 1059-1098.

² See irrigation districts, Secs. 1386-1432.

³ For municipal corporations, see Secs. 1433-1448.

For the acquisition of water rights by the power of eminent domain, see Chap. 55, Secs. 1059-1098.

⁴ *Clark v. Nash*, 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; affirming *Id.*, 27 Utah 158, 75 Pac. Rep. 371, 1 L. R. A., N. S., 208, 101 Am. St. Rep. 953.

⁵ See Chap. 55, Secs. 1059-1098.

§ 1473. Power of acquiring water rights by purchase of other entire systems and rights.—Not only may a corporation purchase from individuals or other corporations certain portions of their property and rights,¹ but an incorporated water company has the power to purchase from another corporation, and the latter corporation has the power, with the assent of the requisite number of stockholders required by the law, to legally sell and convey to another corporation all of its property, including its water rights, rights of way, diverting, and carrying works, franchises, and business, and all other personal and real property of whatsoever kind or nature, if the same is done in good faith, and not for the purpose of delaying or defrauding creditors.² Again, an officer who is the owner of all of the stock of a corporation may dispose of its property with the consent of the nominal directors.³

But the rights of consumers which vested under the operations of the selling corporation are not affected by the transfer to another company, but they have the right to have the water supply "continued by whomsoever may be in control thereof."⁴

¹ See Sec. 1471.

² "With the consent of the stockholders thereof, holding of record at least two-thirds of its issued capital stock (expressed in the prescribed manner), any corporation in this State may make a valid sale, lease, assignment, transfer, or conveyance of its business, franchises, and property, as a whole." *South Pasadena v. Pasadena etc. Co.*, 152 Cal. 590, 93 Pac. Rep. 490.

"If the corporation could convey a part, it could convey all, if its stockholders assented, and its creditors, if it had any, did not interfere or object. . . . It had absolute *jus disponendi*." State *ex rel. Bradford v. Western etc. Co.*, 40 Kan. 96, 19 Pac. Rep. 319, 10 Am. St. Rep. 166.

See, also, *The Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300; *Colorado etc. Co. v. Rocky Ford etc. Co.*, 3 Colo. App. 545, 34 Pac. Rep. 580; *Western etc. Co. v. Chap-*

man, 8 Kan. App. 778, 59 Pac. Rep. 1098; *Hildreth v. Montecito etc. Co.*, 139 Cal. 22, 70 Pac. Rep. 672, 72 Pac. Rep. 395; *Stanislaus W. Co. v. Bachman*, 152 Cal. 716, 93 Pac. Rep. 858, 15 L. R. A., N. S., 359; *Oreutt v. Pasadena etc. Co.*, 152 Cal. 599, 93 Pac. Rep. 497.

A stockholder of a quasi-public corporation, engaged in supplying water for a public use, is bound by the action of two-thirds of the stockholders and the directors, consenting to a transfer of the property, franchise, and business of the corporation. *Graham v. Pasadena etc. Co.*, 152 Cal. 596, 93 Pac. Rep. 498.

³ *Toyaho Creek Irr. Co. v. Hutchins*, 21 Tex. Civ. App. 274, 52 S. W. Rep. 101.

⁴ *South Pasadena v. Pasadena etc. Co.*, 152 Cal. 590, 93 Pac. Rep. 490; *Hildreth v. Montecito etc. Co.*, 139 Cal. 22, 70 Pac. Rep. 672, 72 Pac. Rep. 395; *Stanislaus W. Co. v. Bachman*,

§ 1474. **Acquisition of rights of way — Purchase — Prescription—Condemnation.**—Private incorporated water companies are universally granted the right to acquire rights of way for their diverting works, ditches, and canals over the lands of others. This is true, regardless of the fact as to whether the lands are owned by the United States, and, therefore, are a part of the public domain,¹ whether they are owned by a State,² by another corporation or company, or by private individuals.³ These rights of way may be acquired by all of the methods known to law for the acquisition of such property. Rights of way may be acquired by purchase,⁴ by the adverse user, amounting to prescription,⁵ by condemnation proceedings, by virtue of the power of eminent domain,⁶ by lease,⁷ or by license.⁸

These subjects have also been discussed in previous portions of this work, and no further discussion here is necessary.

§ 1475. **Relation to consumers—Title to the water rights.**—In order to make a valid appropriation of water, there must not only be a diversion of the water from the natural streams, or other source of water supply, but there must also be an actual application of the water, within a reasonable time, to some beneficial use or purpose.¹ It therefore follows that, where the company is not itself the consumer, but simply furnishes and distributes the water to others, in order to perfect the appropriation, it takes the joint action of both the corporation and the consumers. Therefore, where the water is furnished and distributed to consumers by incorporated companies, there has arisen in the different States a considerable divergence of opinion between the authorities, as to the ownership of the title of the water rights. In Colorado, and in some of the other States following its rule, it is held that the title to the

152 Cal. 716, 93 Pac. Rep. 858, 15 L. R. A., N. S., 359; *Western etc. Co. v. Chapman*, 8 Kan. App. 778, 59 Pac. Rep. 1093; *Crow v. San Joaquin etc. Co.*, 130 Cal. 309, 62 Pac. Rep. 562, 1058.

¹ For rights of way over the public lands, see Chap. 51, Secs. 927-970.

² For rights of way over State lands, see Sec. 971.

³ For rights of way over private lands, see Chap. 52, Secs. 972-993.

⁴ See Secs. 1003, 1004.

⁵ See Secs. 1044, 1045.

⁶ See Secs. 1059-1098.

⁷ See Secs. 1003, 1004.

⁸ See Secs. 981-985.

¹ For the appropriation of water, see Chap. 38, Secs. 706-732.

water rights is in the consumer, and that the company is merely the carrier of the water.² While in other States, it is held that the consumers' relation to the company is that of contract only; and that such consumers have no proprietary right in either the water rights, or in the works necessary for the utilization of the same.³

As to strictly mutual water corporations, or those corporations organized by several land owners, and themselves the consumers of the water, for the better protection of their rights, and also for the better distribution of the water between them, and to whom only the corporation furnishes water, it must be conceded that the equitable title to the water rights, and to the works, is in the consumers, even though as former owners of the rights such shareholders have made a conveyance of the same to the corporation. Such a conveyance must be considered to be one in trust, and that the corporation as the trustee for all of its shareholders, holds the legal title, both to the water rights and to the system of diverting and carrying works, merely for the purpose of protecting the rights of all its shareholders, and of better distributing the water to them, according to the respective holdings of each in the corporation.⁴

² For water companies as carriers merely, see Sec. 1476.

³ For water companies as owners of the water rights, see Sec. 1477.

⁴ For mutual water corporations, see Secs. 1479-1489.

See the case of Wadsworth D. Co. v. Brown, 39 Colo. 57, 88 Pac. Rep. 1060, where the Court held that a stockholder of a mutual ditch corporation had the right to withdraw his portion of the water from the entire water diverted by the company, and to change the point of diversion of such water, so long as the rights of others are not thereby injuriously affected.

Goodell v. Verdugo Canyon Water Co., 138 Cal. 308, 71 Pac. Rep. 354, where the corporation was organized for the purpose of developing and distributing water to its stockholders for irrigation and domestic uses, it is said: "The stockholders were and

are the owners of the water of said canyon, which was developed and controlled by the company for the benefit of the stockholders by a system of pipes and other facilities for its distribution, and ever since its organization it has continued to distribute said water for the benefit of its stockholders, including plaintiff, pursuant to and in accordance with the rules and regulations established by it for that purpose."

See, also, Supply Ditch Co. v. Elliott, 10 Colo. 327, 15 Pac. Rep. 691, 3 Am. St. Rep. 586; Rocky Ford C. Co. v. Sampson, 5 Colo. App. 30, 36 Pac. Rep. 638; Farmers' Ind. D. Co. v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149; reversing *Id.*, 3 Colo. App. 253, 32 Pac. Rep. 722; Montrose Canal Co. v. Loutsenheiser D. Co., 23 Colo. 233, 48 Pac. Rep. 532; Center Creek v. Lindsay, 21 Utah 192, 60 Pac. Rep. 559;

It therefore follows that it is only where corporations are organized for the purpose of furnishing water to others than to its stockholders for profit or hire, that the question arises as to which holds the title to the water rights, the consumer or the corporation.⁵ But as to these latter corporations, regardless of the question as to whether they are deemed to hold the title to the water rights and sell or rent the use of the water, according to the terms of their contracts with consumers, or whether they are regarded merely as the carrier of the water for the consumers, who are deemed to hold the title, they are regarded as public service or quasi-public corporations,⁶ and are subject, under its police powers, to the same reasonable regulations imposed by the State where their operations are carried on.⁷ So it seems to us that there has been a whole lot of useless discussion by the courts, and others, as to who was the owner of the title to the water rights.

§ 1476. **Relation to consumers—Where the company is deemed merely the carrier—Colorado rule.**—The courts of Colorado were the first to advance the theory that an incorporated company, organized for the purpose of furnishing water to others than to its stockholders, for profit or hire, was merely the carrier of the water, sometimes analogous to what is known in law as a common carrier, and that the consumers of the water, or the persons to whom the company sold or rented the rights to the use of the water, and who actually applied the same to the beneficial use or purpose, were the appropriators of the water, in whom the title to the water rights was vested. This was due to a somewhat

Fuller v. Azusa etc. Co., 138 Cal. 204, 71 Pac. Rep. 98; *Richey v. East Redlands etc. Co.*, 141 Cal. 221, 74 Pac. Rep. 754.

See, also, for the relation of mutual corporations to their shareholders, Sec. 1482.

⁵ For corporations for profit, see Secs. 1490-1508.

⁶ See Sec. 1493.

⁷ For public service or quasi-public corporations, see Secs. 1492-1508.

For State regulations, see Secs. 1495, 1508.

For the regulation of water rates, see Chap. 69, Secs. 1368-1385.

“The status of the defendant company could in no aspect affect these rights. Its duty to these plaintiffs would be the same whether that duty was to furnish water under their contracts as proprietor or carrier of water.” *Wyatt v. Larimer etc. Co.*, 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; reversing *Id.*, 1 Colo. App. 480, 29 Pac. Rep. 906.

strained construction of the Colorado constitution, which, among other things, provides: "The water of every natural stream not heretofore appropriated, within the State of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the State." "The right to divert the unappropriated water of any natural stream for beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose." "All persons and corporations shall have the right of way across public, private, and corporate lands for the construction of ditches, and canals, for the purpose of conveying water" for beneficial uses.¹ However, the Supreme Court of Colorado has been consistent in this holding, and it may therefore be considered as the settled law in that State.²

In fact, as far as Colorado is concerned, there seems to be but one case decided by its appellate courts which held to the contrary to the above doctrine. This was a decision by the Court of Appeals,³ wherein it was held that the liability of a corporation for failing to supply a certain amount of water to the holders of water

¹ Colo. Const., Art 16, Secs. 5-7. See Part XIV.

² "The constitution unquestionably contemplates and sanctions the business of transporting water, for hire, from natural streams to distant consumers. The Colorado doctrines of ownership and appropriation (as declared in the constitution, statutes, and decisions) necessarily give the carrier of water an exceptional status; a status differing in some particulars from that of the ordinary common carrier. Certain peculiar rights are acquired in connection with the water diverted. . . . But, giving these rights all due significance, I can not consent to the proposition that the carrier becomes a 'proprietor' of the water diverted." *Wheeler v. Northern Colo. Irr. Co.*, 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603.

See, also, *Combs v. Agricultural D.*

Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; *Farmers' High Line etc. Co. v. Southworth*, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767; *Strickler v. Colorado Springs*, 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245; *Farmers' High Line etc. Co. v. New Hampshire etc. Co.*, 40 Colo. 467, 92 Pac. Rep. 290; *Standart v. Farmers' etc. Co.*, 25 Colo. 202, 54 Pac. Rep. 626; *Grand Valley Irr. Co. v. Leshner*, 28 Colo. 273, 65 Pac. Rep. 44; *Wyatt v. Larimer etc. Co.*, 18 Colo. 289, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; reversing *Id.*, 1 Colo. App. 480, 29 Pac. Rep. 906; *Wright v. Platte Valley Irr. Co.*, 27 Colo. 322, 61 Pac. Rep. 603; *La Junta etc. Co. v. Hess*, 6 Colo. App. 497, 42 Pac. Rep. 50; *Northern Colorado etc. Co. v. Poupit*, 47 Colo. 490, 108 Pac. Rep. 23.

³ *Wyatt v. Larimer etc. Co.*, 1 Colo. App. 480, 29 Pac. Rep. 906.

rights, according to contract, could not be determined upon the theory that the company was a common carrier,⁴ but this case was again appealed to the Supreme Court of the State, and while deciding the case upon other grounds, the Court, in reversing the Court of Appeals,⁵ said: "But, inasmuch as the views expressed in that opinion are so at variance with numerous decisions of this Court, we feel impelled to express our disapproval thereof, and our adherence to the doctrine heretofore announced by this Court in relation to the status of canal companies organized for the purpose of carrying water for general purposes of irrigation. We ad-

⁴ Mr. Justice Reed in delivering the opinion of the Court upon the subject in question said: "In a case like the present the facts and conditions stated in the complaint divest the appellee of every legal element necessary to constitute it a common carrier. Take the earliest definition of a 'common carrier' and we have, 'to render a person liable as a common carrier he must exercise the business of carrying as a public employment, and must undertake to carry goods for all persons indiscriminately, and hold himself out as ready to engage in the transportation of goods for him as a business.' *Coggs v. Bernard*, 1 Salk 26, 2 Ld. Raym. 909, 92 Eng. Rep., F. R., 107; *Ingate v. Christie*, 3 Car. & K. 61; *Chit. Carr.* 15. Adopted and recognized as correct in 1 Kent, Com., p. 498, Sec. 40; *Story Bailm.*, Sec. 495; *Satterlee v. Groat*, 1 Wend. 272; *Citizens Bank v. Nantucket Steamboat Co.*, 2 Story 161, Fed. Cas. No. 2730; and generally in all subsequent American decisions. *Anderson's Law. Dict.*, 'Common Carrier: One who undertakes, for hire or reward, to transport the goods of such as choose to employ him, from place to place.' See *Dwight v. Brewster*, 1 Pick. 50: 'If the carrier be employed in carrying for one or a definite number of persons, by

way of special undertaking, he is only a private carrier.' *Redf. Car.*, Sec. 19. These definitions are so elementary that they would not be stated except for purposes of illustration, to show that in the case presented the corporation is not brought within the definition in any respect of either a 'common' or 'private' carrier, coming nearer the definition of private than 'common' carrier, but lacking several indispensable elements of either. In order to constitute a carrier of either class (1) the goods or thing to be carried must be the property of the bailor; (2) The thing must be delivered by the bailor to the carrier to be transported; (3) the carrier must transport and deliver to the consignee the identical goods delivered to him for transportation; (4) a person who contracts to transfer and deliver to another, at a given place, a certain portion of a common lot of material, to be separated from it at the place of the consumer, to which the consumer had no title prior to transportation and delivery, is in no legal sense a carrier, but a vendor of the commodity."

⁵ *Wyatt v. Larimer etc. Co.*, 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; reversing *Id.*, 1 Colo. App. 480, 29 Pac. Rep. 906.

here to the doctrine that such a canal company is not the proprietor of the water diverted by it, but that it must be regarded as an intermediate agency existing for the purpose of aiding consumers in the exercise of their constitutional rights, as well as a private enterprise prosecuted for the benefit of its owners."

The Colorado rule of treating the consumer as the appropriator, and the owner of the water rights, and the corporation merely as the carrier of the water, has been followed in other jurisdictions, which do not have the same constitutional provisions as Colorado, and, therefore, upon other grounds. Take, for example, Arizona, where it is held that a corporation, not the owner or possessor of arable and irrigable land, though it may lawfully construct a dam, canal, or other conduit of water, and divert water from a stream for irrigation purposes, does not thereby become the appropriator, or owner of the water so diverted, for the reason that in that State the ownership and possession of arable and irrigable land are essential to the acquisition of the right of appropriation of water from a natural stream for the purposes of irrigation.⁶ In Kansas it is held that irrigation companies authorized to carry water for hire are quasi-public carriers, and as such, are under the same rules as to the regulation of rates as other public carriers.⁷ And Nebraska⁸ and New Mexico adhere to the same rule.⁹

§ 1477. Relation to consumers—Where the company is deemed the appropriator and owner of the rights.—In other jurisdictions of the West, than those mentioned in the preceding section,¹ the status of a water corporation, organized for profit, is regarded as

⁶ *Slosser v. Salt River etc. Co.*, 7 Ariz. 376, 65 Pac. Rep. 332; *Id.*, 9 Ariz. 104, 96 Pac. Rep. 1117; *Gould v. Maricopa etc. Co.*, 8 Ariz. 429, 76 Pac. Rep. 598; *Hargrave v. Hall*, 3 Ariz. 252, 73 Pac. Rep. 400; *Salt River etc. Co. v. Nelssen*, 10 Ariz. 9, 85 Pac. Rep. 117, 12 L. R. A., N. S., 711; *Oury v. Goodwin*, 3 Ariz. 255, 26 Pac. Rep. 376; *Montezuma Canal Co. v. Smithville Canal Co.*, 11 Ariz. 99, 89 Pac. Rep. 512; *Marlar v. Maricopa etc. Co.*, 9 Ariz. 102, 96 Pac. Rep. 1116; *Salt River Valley etc. Co. v. Slosser*, 9 Ariz. 102, 76 Pac. Rep. 1125.

⁷ *Lake Koen etc. Co. v. Klein*, 63 Kan. 884, 65 Pac. Rep. 684.

⁸ *Farmers' Irr. Dist. v. Frank*, 72 Neb. 136, 100 N. W. Rep. 286.

⁹ *Albuquerque etc. Co. v. Gutierrez*, 10 N. M. 177, 61 Pac. Rep. 357; affirmed, 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338; *Farmers' etc. Co. v. Brumbaugh*, 81 Neb. 641, 116 N. W. Rep. 512.

¹ See Sec. 1476.

something more than that of merely the carrier of water for consumers, and as the appropriator and owner of the water rights; and that the consumer has no proprietary right, either in the water rights, or the system of works, aside from the rights given under the contract with the water company. But, as there can not be a valid or, at least, a subsisting appropriation of water, unless there be an actual application of the water to some beneficial use or purpose,² and as the company itself is not a consumer of the water, or so applies it, the question has arisen as to how a valid appropriation might be effected by such a corporation. And, for this purpose, it is held that the company is enabled to finally consummate its appropriation through the agency of its consumers. It therefore follows that the situation of the company and the consumer, under this holding, is exactly reversed from the situation of the same parties, where the company is considered merely the carrier of the water, and discussed in the previous section.³ And, instead of the company being regarded as the "intermediate agency existing for the purpose of aiding consumers," who are regarded as the owners of the water rights,⁴ the consumers are regarded as the agents of the company in the consummation of the appropriation by the company, which is considered the owner of the water rights.⁵ How-

² For the appropriation of water, see Chap. 38, Secs. 706-732.

³ See Sec. 1476.

⁴ *Wyatt v. Larimer etc. Co.*, 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; reversing *Id.*, 1 Colo. App. 480, 29 Pac. Rep. 906.

⁵ "Irrigation companies construct ditches and canals, and divert water by means thereof, for the purpose of irrigating lands lying under their distributing works, but their property is valueless without consumers." *Hard v. Boise etc. Co.*, 9 Idaho 589, 76 Pac. Rep. 331, 65 L. R. A. 407.

"Thus the appropriator is enabled to complete and finally establish his appropriation through the agency of the user." *Nevada D. Co. v. Bennett*, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777.

"The appropriation of waters carried in the ditch operated for sale, rental, and distribution of waters, does not belong to the water users, but rather to the company." *Farmers' Co-op. D. Co. v. Riverside Irr. Dist.*, 14 Idaho 450, 94 Pac. Rep. 761.

See, also, *Souther v. San Diego etc. Co.*, 112 Fed. Rep. 228, 121 Fed. Rep. 347, 57 C. C. A. 561.

In an action brought by a user of water against an irrigation company, based upon a contract between such company and such user, in which the user seeks to have his rights to the use of the water determined in accordance with the contract, it is error for the trial court to render a decree in favor of such user, as an appropriator of water, not based on such contract. *Jackson v. Indian Creek*

ever, it is held that the title to the water rights having been once perfected in the company, by appropriation through the joint actions of the company and consumers, and the right to the use of the water having been once sold to a consumer, it becomes a perpetual right of that consumer, "subject to defeat only by failure to pay annual water rents and comply with the lawful requirements as to the conditions of the use."⁶

It is, therefore, held in a recent case in Idaho that a purchaser of a perpetual water right from an irrigation company, with the right to receive the water so purchased from the company's canal, carries with it such a right in the appropriation itself, and such an easement or servitude in the canal system as to authorize and enable the purchaser himself to go upon the property and protect the appropriation, and maintain the diversion and repair the canal, and carry the water through the canal system to the extent of the purchaser's water right, in the event the company fails, neglects, or refuses to do so.⁷

§ 1478. **The exemption from taxation.**—In order to induce the organization and operation of irrigation corporations, the constitutions and statutes of a number of States provide that their property, and systems of works shall be exempt from taxation, or shall be exempt from taxation for a certain period after their organization.¹ This is upon the theory that the State will be recompensed from the added assessable value of the lands upon which the water is used.² In some of the States, however, this exemption extends only to those companies where the ditches and other works are owned and used

etc. Co., 16 Idaho 430, 101 Pac. Rep. 814.

⁶ *Farmers' Co-op. D. Co. v. Riverside Irr. Dist.*, 14 Idaho 450, 94 Pac. Rep. 761.

"This right is perpetual, if the owner of the rights keeps up his annual payments." *Hard v. Boise etc. Co.*, 9 Idaho 589, 76 Pac. Rep. 331, 65 L. R. A. 407; *Creer v. Bancroft W. Co.*, 13 Idaho 407, 90 Pac. Rep. 228; *Wilterding v. Green*, 4 Idaho 773, 45 Pac. Rep. 134; *Bardsly v. Boise Irr. etc. Co.*, 8 Idaho 155, 67 Pac. Rep.

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428; *Stanislaus W. Co. v. Bachman*, 152 Cal. 716, 93 Pac. Rep. 858; *Knowles v. New Sweden Irr. Dist.*, 16 Idaho 217, 101 Pac. Rep. 81; *Leavitt v. Lassen Irr. Co.*, 157 Cal. 82, 106 Pac. Rep. 404; *Lassen Irr. Co. v. Long*, 157 Cal. 94, 106 Pac. Rep. 409.

⁷ *Idaho Fruit Land Co. v. Great Western Beet Sugar Co.*, 18 Idaho 1, 107 Pac. Rep. 989.

¹ For the statutes of the various States, see Part XIV.

² See Statutes of the States, Part XIV.

by the individuals and corporations for irrigating lands owned by such individuals and corporations, or the individual members thereof. In other words, the works must be owned by mutual companies, or corporations, in order to be exempt from taxation. This is the case in Colorado, and a number of the other States.³ And, therefore, the property of all corporations organized for the purpose of profit from the sale of water rights, or for the carriage of water for hire, is not exempt from taxation.⁴ And in California it is held that, where a corporation was authorized to acquire property, appropriate and distribute water, construct canals, and establish, collect, and receive rates, water rents, and was authorized to exercise the right of eminent domain, the actual exercise of such powers by the construction of canals in a county other than that in which the corporation's principal place of business was located, constituted the use of a franchise by the corporation in such county which was there subject to taxation.⁵

³ *Empire etc. Co. v. Rio Grande County*, 21 Colo. 244, 40 Pac. Rep. 449; reversing 1 Colo. App. 205, 28 Pac. Rep. 482.

See, also, *Haiku Sugar Co. v. Fornander*, 6 Haw. 532; *Alexander v. Fornander*, 6 Haw. 322; *In re Assessment of Taxes*, C. W. Booth, 15 Haw. 516.

For mutual unincorporated companies, see Secs. 1453-1463.

For mutual incorporated companies, see Secs. 1479-1489.

For irrigation districts, see Secs. 1386-1432.

⁴ *Murray v. Montrose County*, 28 Colo. 427, 65 Pac. Rep. 26.

⁵ *San Joaquin etc. Co. v. Merced County*, 2 Cal. App. 593, 84 Pac. Rep. 285.

CHAPTER 75.

MUTUAL WATER CORPORATIONS.

- § 1479. Scope of chapter.
- § 1480. Definition and objects.
- § 1481. Title to water rights.
- § 1482. Relation between corporation or its officers and the shareholders.
- § 1483. Shares of stock in mutual corporations represent water rights.
- § 1484. Rights represented by shares of stock as appurtenances.
- § 1485. The sale and transfer of shares in mutual corporations.
- § 1486. Duties and liabilities of such a company.
- § 1487. Rights of stockholders.
- § 1488. Power of corporations to make rules and regulations.
- § 1489. Power of mutual water corporations to levy and enforce assessments.

§ 1479. **Scope of chapter.**—Having discussed the organization of private water corporations,¹ and the general powers with which they are all endowed by their articles of incorporation, or charter, and under the constitution and laws of the State under which they are organized, and where their operations are carried on, regardless of any classification, we will now take up the particular kinds of these corporations, as classified by us in a previous section,² and the first of which we have designated as “mutual water corporations.” In this chapter we will discuss the subject as particularly relating to this class of corporations.

§ 1480. **Definition and objects.**—Mutual water corporations may be defined as those private corporations which are organized for the express purpose of furnishing water only to the shareholders thereof, and not for profit, or hire.¹ Their main purpose is the same as that for the organization of mutual, or voluntary associations, discussed in a previous section of this chapter.² Such cor-

¹ See Secs. 1464-1478.

² See Sec. 1452.

¹ “By the phrase, ‘mutual ditch companies,’ I mean associations formed by consumers for the purpose of conveying water solely to irrigate their own lands, and not for hire.

These associations may or may not be incorporated.” Helm, C. J., in *Combs v. Agricultural D. Co.*, 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275.

² See Sec. 1453.

porations can not be deemed "public service," or "quasi-public" corporations, as they are not organized for the purpose of either furnishing, or carrying water to all whose lands are so situated that they may be irrigated from the system of works of the corporation.³ In fact, it has many times happened that the co-owners, as tenants in common, or as owners, in those voluntary associations, or "community associations," who together own the ditches, canals, and other works, and the water rights used in connection therewith, have duly incorporated their company under the law of some State, or Territory, and have conveyed their respective rights to the corporation, in order to more effectively manage and control the distribution of the water between themselves, and for the self-protection of the invasion of others against those others. Oftentimes

³ See distinction between "public use" and "public service," Sec. 1451.

See, also, for public service or quasi-public corporations, Sec. 1493.

A corporation organized as a mutual company is held to be under the duty to furnish others than its shareholders with water when it has a surplus amount of water. *Baker City Mut. Irr. Co. v. Baker City*, 58 Ore. 306, 110 Pac. Rep. 392, 113 Pac. Rep. 9.

A corporation organized for the purpose of supplying water for the use of the owners and occupants of the land within a certain particular district may adopt by-laws limiting the right to the use of the water of the corporation exclusively to its own stockholders, and as such the board of supervisors of a county have no power to fix the rate at which water shall be sold, rented, or distributed. *McFadden v. Board of Suprs. of Los Angeles Co.*, 74 Cal. 571, 16 Pac. Rep. 397.

For the fixing of water rates, see Secs. 1368-1385.

See, also, *Cache La Poudre Irr. Co. v. Larimer & Weld etc. Co.*, 25 Colo. 144, 53 Pac. Rep. 318, 71 Am. St.

Rep. 123; affirming *Id.*, 8 Colo. App. 237, 45 Pac. Rep. 525, where such a corporation, organized by tenants in common, is called a "mutual ditch company."

There is no presumption of law that a corporation organized to furnish water is one organized for profit. "It would be entirely legal for an irrigating canal and ditch company to be incorporated to distribute water gratuitously." *Applegarth v. McQuiddy*, 77 Cal. 408, 19 Pac. Rep. 692.

See, also, *Barton v. Riverside etc. Co.*, 155 Cal. 509, 101 Pac. Rep. 790, 23 L. R. A., N. S., 331; *Hildreth v. Montecito etc. Co.*, 139 Cal. 22, 70 Pac. Rep. 672, 72 Pac. Rep. 395; *Arroyo Ditch Co. v. Baldwin*, 155 Cal. 280, 100 Pac. Rep. 874; *Shorb v. Beaudry*, 56 Cal. 446; *McDermont v. Anaheim etc. Co.*, 124 Cal. 114, 56 Pac. Rep. 779; *Swanger v. Porter*, 87 Neb. 764, 128 N. W. Rep. 516, in which mutual irrigation companies are defined.

See, also, *Garrison v. North Pasadena etc. Co.*, — Cal. —, 124 Pac. Rep. 1009.

See, also, cases cited in the following sections.

the scope of the corporation is limited to the owners of rights taken from the stream through a single ditch or canal. Again, it has often happened that the rights of all parties who take the water from a certain stream, or other source of water supply, are incorporated into one company.⁴ Of course, one can not be compelled to go into one of these corporations, and merge his vested rights, either to the water, or to the diverting and conveying works, unless he sees fit. Therefore, many of these corporations only include the rights of a part of the co-owners of the same ditch or the common source of supply, leaving the other co-owners, whose rights are in nowise changed by the action of the others, to fight it out alone.⁵ However, owing to the many advantages of having the operation and distribution of the water controlled by one organization having authority, and the many disadvantages to each of the co-owners in endeavoring to run their affairs either alone, or by the means of voluntary associations, the tendency has been, during the recent years, toward the merging of interests into corporations. As was well stated in an Arizona case: "The difficulties arising from the ownership and control of such means of diversion by one or more individuals as tenants in common are such as to make it necessary, almost, that corporations be organized for this purpose."⁶

§ 1481. **Title to water rights.**—In the formation of mutual water or irrigation corporations it is the usual mode of procedure for the owners of the original rights to deed to the corporation their water rights and rights in the works, and then to take shares of stock for the same in the exact proportion as the value of the individual rights granted bears to the whole value of the property granted by all. It therefore follows that, where this is done, the

⁴ See, for water users' associations, Secs. 1281-1286.

⁵ Where a corporation is formed by a combination of some of the land owners or private appropriators, it has no right to control or regulate the use of the owners who did not come in the corporation, although those in the corporation are a majority of all the water users from the stream. *Bartholomew v. Fayette Irr. Co.*, 31 Utah

1, 86 Pac. Rep. 481, 120 Am. St. Rep. 912; affirmed in 31 Utah 220, 87 Pac. Rep. 707; *Fisher v. Bountiful City*, 21 Utah 29, 59 Pac. Rep. 520; *Arroyo D. Co. v. Dorman*, 137 Cal. 611, 70 Pac. Rep. 737; *Fuller v. Azusa Irr. Co.*, 138 Cal. 204, 71 Pac. Rep. 98.

⁶ *Slosser v. Salt River Valley etc. Co.*, 7 Ariz. 376, 65 Pac. Rep. 332.

See, also, *McFadden v. Los Angeles County*, 74 Cal. 571, 16 Pac. Rep. 397.

legal title to these rights is in the corporation, while the equitable title remains in the original owners, or their grantees. In other words, the company holds the legal title to the property in trust for its respective shareholders, the terms of the trust to be governed by the articles of incorporation, or the by-laws of the same.¹

A mutual irrigation corporation may dissolve, in which case the water rights revert to the shareholders in proportion to their holdings in the corporation. Upon this subject the California code provides: "Nothing herein prohibits a division and distribution of the capital stock of any corporation which remains after the payment of all its debts upon its dissolution, or the expiration of its terms of existence."²

§ 1482. Relation between corporation, or its officers, and the shareholders.—The relations between private incorporated water companies, whether organized as mutual corporations,¹ or as corporations for profit or hire,² is that of contract, and the rights and duties of both parties grow out of the contract implied in a subscription for stock, and construed by the provisions of their charters, or articles of incorporation.³ From this contract springs a trust relation between the company and its stockholders or shareholders, with which the corporation is charged to conduct the common business in the interests of the stockholders,⁴ and, furthermore, the corporation being a trustee for its stockholders, it is bound to protect their interests.⁵ It therefore follows that, not only may

¹ Fuller v. Azusa etc. Co., 138 Cal. 204, 71 Pac. Rep. 98; Richey v. East Redlands etc. Co., 141 Cal. 221, 74 Pac. Rep. 754; Ruhnke v. Aubert, 58 Ore. 6, 113 Pac. Rep. 38; Rocky Ford etc. Co. v. Sampson, 5 Colo. App. 30, 36 Pac. Rep. 638; Caviness v. La Grande Irr. Co., — Ore. —, 119 Pac. Rep. 731.

² 2 Kerr's Cyc. Codes, Sec. 309; see, also, *Id.*, Sec. 361a.

See, also, South Pasadena v. Pasadena etc. Co., 152 Cal. 590, 93 Pac. Rep. 490.

See, also, the next section, No. 1482, and authorities cited.

¹ For mutual corporations, see Sec. 1480.

² For corporations for profit, see Secs. 1490-1508.

³ Supply Ditch Co. v. Elliott, 10 Colo. 327, 15 Pac. Rep. 691, 3 Am. St. Rep. 586.

⁴ Rocky Ford Canal Co. v. Sampson, 5 Colo. App. 30, 36 Pac. Rep. 638; Miller v. Imperial etc. Co. No. 8, 159 Cal. 27, 103 Pac. Rep. 227, 24 L. B. A., N. S., 372.

⁵ "The corporation is a trustee for its stockholders, and is bound to protect their interests." Supply Ditch

such a corporation, but the law imposes the duty upon a corporation to maintain an action, in its corporate name, to secure or protect its water rights, or other property, as representing its stockholders, without joining them as parties in the action.⁶

The officers, managers, or governing board, also hold trust relations, both to the corporation, and to its stockholders. And, therefore, the validity of a contract illegally entered into by the board of directors, who were personally interested in the same, may be challenged by the stockholders.⁷ Neither can the officers of a corporation, on account of this trust relation, acquire rights or property, by adverse user amounting to prescription, during their terms of office.⁸ However, where the interests do not conflict, officers and directors of a corporation taking water from a certain stream, may make separate and distinct appropriations from the same stream.⁹

§ 1483. Shares of stock in mutual corporations represent water rights.—As in the case with other corporations, mutual water corporations issue to their shareholders shares of stock, which shares represent the proportionate ownership of each in the corporate property. And, while these corporations may, or may not, have a capital stock, as is the case where the corporation is organized for profit,¹ the basis for the division of the total property of the cor-

Co. v. Elliott, 10 Colo. 327, 15 Pac. Rep. 691, 3 Am. St. Rep. 586.

"A corporation owning and operating a ditch becomes a trustee for its stockholders and is bound to protect their interests." Farmers' Ind. D. Co. v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149, reversing *Id.*, 3 Colo. App. Cas. 255, 32 Pac. Rep. 722.

⁶ Montrose Canal Co. v. Loutsenhizer D. Co., 23 Colo. 233, 48 Pac. Rep. 532, wherein it is said: "The ditch company is the proper party to maintain the action, it being trustee for its stockholders and consumers."

See, also, Farmers' Ind. D. Co. v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149; reversing *Id.*, 3 Colo. App. Cas. 255,

32 Pac. Rep. 722; Riverside Water Co. v. Sargent, 112 Cal. 230, 44 Pac. Rep. 560; Supply Ditch Co. v. Elliott, 10 Colo. 327, 15 Pac. Rep. 691, 3 Am. St. Rep. 586; Thorpe v. Tenem Ditch Co., 1 Wash. 566, 20 Pac. Rep. 588.

⁷ Goodell v. Verdugo etc. Co., 138 Cal. 308, 71 Pac. Rep. 354; Butterfield v. O'Neill, 19 Colo. App. 7, 72 Pac. Rep. 807.

⁸ Center Creek v. Lindsay, 21 Utah 192, 60 Pac. Rep. 559.

⁹ Farm Inv. Co. v. Alta etc. Co., 28 Colo. 408, 65 Pac. Rep. 22.

For the relation between corporations for profit and the consumers, see Secs. 1475-1477.

¹ For corporations for profit, see Secs. 1490-1508.

See Wannamaker v. Pendleton, —

poration and the issuance of the shares of stock to those entitled thereto, is usually different. The total number of the shares of stock issued by these mutual companies is usually based upon the total quantity of the water which the corporation owns or controls. This is stated in a number of different ways. It may be based upon the total number of cubic feet per second of time which the corporation owns or controls; and, therefore, each shareholder owns such an interest in the corporation, as the number of cubic feet which his shares represent bear to the total number of cubic feet owned by the corporation.² It may also be based upon some other standard of measurement, as the acre-foot,³ or upon the flow as represented by the "miner's inch."⁴ Again, it may be based upon the total number of acres irrigated by the water furnished by the company, and each shareholder owning such an interest in the corporation as the number of acres irrigated by him bears to the total number of acres irrigated by the water furnished by the corporation. Where this is the case, each share usually represents the water which will irrigate one acre of land, the shares being oftentimes referred to as so many "acres of water."⁵

Colo. App. —, 121 Pac. Rep. 108, where the capital stock of a corporation was \$30,000, divided into 100 shares of \$300 each.

² In *La Junta etc. Co. v. Hess*, 6 Colo. App. 497, 42 Pac. Rep. 50, as to what was a water right was defined as follows: "That is to say, the right to the use of water flowing through the canal of said first party, each water right representing 1.44 cubic feet of water flowing under a weir per second."

³ For standard of acre-foot, see Sec. 894.

⁴ For the miner's inch, see Secs. 889-891.

See *O'Connor v. North Truckee D. Co.*, 17 Nev. 245, 30 Pac. Rep. 882, where the basis was made one inch of water to each share of stock; *Hall v. Eagle Rock etc. Co.*, 5 Idaho 551, 51 Pac. Rep. 110, where the basis was

made five inches of water to each share of stock; *Supply D. Co. v. Elliott*, 10 Colo. 327, 15 Pac. Rep. 391, 3 Am. St. Rep. 586, where it was made ten inches of water for each share of stock; *Richey v. East Redlands etc. Co.*, 141 Cal. 221, 74 Pac. Rep. 754.

⁵ "In some instances such companies have issued what are termed 'water rights' to land owners, which give to the latter, on certain terms and conditions, a permanent right to the service of such companies through their canals of water for the irrigation of their lands. In other instances the practice has been to recognize the right of a stockholder to this service by virtue of his holding shares of stock." *Slosser v. Salt River Valley C. Co.*, 7 Ariz. 376, 65 Pac. Rep. 332.

Where each share of stock represents so much water, the delivery of such water to the shareholder is analogous to the payment of a cash dividend in corporations organized for profit, discussed in a future chapter of this part.⁶ Again, before incorporation, where, by agreement, all the owners of the waters of the creek were each entitled to receive in his regular turn all the water from the creek for a "run" of a certain number of hours, according to the area of land irrigated by him, until all of the owners had had one turn, when the course of delivery was repeated in the same order, for convenience the stock of the corporation was issued upon the same basis. It was divided into a number of shares equal to the aggregate number of hours' use of the water necessary to give one turn to each of the shareholders, and each share of stock was made to represent one hour's run of water.⁷ In one case which has come to the writer's notice, that of the Brown & Sanford Ditch Company, incorporated at an early day, the stockholders of which, prior to incorporation, owned a certain amount of the flow of Big Cottonwood Creek, in Salt Lake County, Utah, the basis of incorporation was made the total number of rods that the main ditch was in length; each shareholder owning the proportion of the water carried therein as the number of rods, which he himself constructed, bears to the total number of rods that the ditch was long; the shares being referred to as so many "rods of water."⁸

But whatever may be the basis of incorporation of these mutual companies, in the absence of anything to the contrary in the articles of incorporation or by-laws, each share of stock is made the exact equivalent to any other share; and each shareholder in such company is entitled to that proportion of the water carried through its ditch or canal, that the amount of his shares or stock bears to the whole amount of the shares or stock of the corporation.⁹

But, in order to have the stock of value, the water represented

⁶ For corporations organized for profit, see Chap. 76.

⁷ *In re Thomas Estate*, 147 Cal. 236, 81 Pac. Rep. 539.

⁸ See Rept. of State Engineer of Utah for year 1899.

⁹ "Each share of stock, in respect to the benefits to which it entitles its holder, is equal to every other share.

The defendant company having been organized to supply water for irrigating purposes to its stockholders, the interest of each stockholder in the water carried was in exact proportion to the amount of his stock." *Rocky Ford etc. Co. v. Sampson*, 5 Colo. App. 30, 36 Pac. Rep. 638.

"The stock is mere evidence of the

thereby must be applied to a beneficial use or purpose. The mere holding of shares or stock in such a corporation, representing certain water rights, without use, can not prevent later comers from making a valid appropriation of the water represented thereby. As was said in a Colorado case: "But neither the company, nor any stockholder of the company, can thus withhold the water from beneficial use, nor reserve it for future use of junior appropriators to the prejudice of prior appropriators, nor to the exclusion of those who in the meantime may undertake, in good faith, to make a valid appropriation thereof." ¹⁰

An action for an injunction will lie against a mutual water corporation, brought by stockholders thereof, to enjoin the issuance of additional stock, upon the showing that all of the water owned, or controlled by the corporation is needed by the original stockholders thereof. ¹¹

§ 1484. Rights represented by shares of stock as appurtenances.

—We have discussed the subject of water rights as appurtenances to land in another chapter of this work. ¹ We there held that, although under certain conditions, water rights might be deemed to be appurtenant to certain tracts of land, and would pass to the grantee with a sale and transfer of the land, they could not be made an inseparable appurtenance, so that they could not be sold and transferred separate and apart from the land, for the reason that water rights are but a species of property, and a person has the right to

holder's title to a certain amount of water." *George v. Robinson*, 23 Utah 79, 63 Pac. Rep. 819.

See, also, *Richey v. East Redlands etc. Co.*, 141 Cal. 221, 74 Pac. Rep. 754; *Rocky Ford etc. Co. v. Sampson*, 5 Colo. App. 30, 36 Pac. Rep. 638; *O'Connor v. North Truckee D. Co.*, 17 Nev. 245, 30 Pac. Rep. 882; *Oppenlander v. Left Hand D. Co.*, 18 Colo. 142, 31 Pac. Rep. 854.

¹⁰ *Combs v. Agricultural D. Co.*, 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; *Crescent Canal Co. v. Montgomery*, 143 Cal. 248, 76 Pac. Rep. 1032, 65 L. R. A. 940; *Strickler*

v. Colorado Springs, 16 Colo. 61, 26 Pac. Rep. 313, 25 Am. St. Rep. 245.

¹¹ In a suit by stockholders of a mutual water company to enjoin the issue of additional shares of stock, it is error to strike from the complaint allegations that plaintiffs' land required all the water to which they were entitled, and that at all times all of the water controlled by the company was necessary to supply the original stockholders. *McDermont v. Anaheim Union W. Co.*, 124 Cal. 112, 56 Pac. Rep. 779.

¹ See Chap. 53, Secs. 1005-1016.

sell all, or any portion, of the property with which he may be vested.²

The question as to whether or not water rights represented by shares of stock in mutual corporations were appurtenant to certain tracts of land, and, therefore, whether or not the title to the same passed with a sale of the land, without there being a formal transfer of the stock on the books of the company has arisen in a number of cases. The general rule of law in this regard is that such water rights represented by shares of stock are not appurtenant to the land of the owner of the shares, and a conveyance of the land only, does not carry with it such shares of stock.³ The corporation laws of all the States provide that the title to stock in a corporation can only pass by a transfer of the same on the books of the company. It therefore follows that, when the land is sold, together with the water right represented by stock in such a corporation, that the stock should also be transferred to the grantee.⁴

Many attempts have been made by corporations, either in their articles or by-laws, to make the water rights represented by shares therein inseparable appurtenances to certain specific tracts of land.⁵ But these attempts are sometimes frustrated by the operations of the corporations under their powers. So, where the by-laws of a corporation provided that: "Shares of stock in this company shall not be transferable except with the land for which it is issued, and a conveyance of the land shall legalize a transfer of the stock to the purchaser," and the company assessed the stock, and sold some of the same for delinquent assessment, to others than to the owners of

² That water rights can not be made an inseparable appurtenance to land, see Secs. 1015, 1016.

³ Shares of stock owned by an execution defendant in an irrigation corporation are not appurtenant to the lands owned by him, although he irrigates such lands with water from a canal owned by such corporation. *Wells v. Price*, 6 Idaho 490, 56 Pac. Rep. 266.

See, also, *Struby-Estabrook etc. Co. v. Davis*, 18 Colo. 93, 31 Pac. Rep. 495; *Snyder v. Murdock*, 20 Utah 419, 59 Pac. Rep. 91; *Combs v. Agricul-*

tural D. Co., 17 Utah 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; *Strickler v. Colorado Springs*, 16 Colo. 61, 26 Pac. Rep. 313; *Eaton v. Larimer & Weld Irr. Co.*, 35 Colo. 16, 83 Pac. Rep. 627; *Oppenlander v. Left Hand D. Co.*, 18 Colo. 142, 31 Pac. Rep. 854; *George v. Robinson*, 23 Utah 79, 63 Pac. Rep. 819.

⁴ See *Supply D. Co. v. Elliott*, 10 Colo. 237, 15 Pac. Rep. 961, 3 Am. St. Rep. 586.

⁵ See water users' associations under the National Reclamation Act, Secs. 1281-1286.

the land for which the stock was issued, it was held that a purchaser of the stock was entitled to certificates, without special indorsement, as to the lands upon which the water must be used, and in such form as to admit of their free assignment; and that the by-law related only to voluntary transfers by shareholders, and had no application to a transfer effected by the corporation itself.⁶

However, it was held in a California case that the conveyance by the original owner of a water right, which was appurtenant to a certain tract of land,⁷ to a mutual water corporation, for the better management and distribution of the water, did not segregate the water from the land as such appurtenance, but merely changed its form; and, hence, under the Civil Code, Section 1311, providing that every devise of land conveys all the estate of the devisor, and, therefore, that a devise of land carried with it the shares of stock in the company, as appurtenant to the land; and, therefore, it was entirely proper for the trial court to direct a transfer of the certificates of stock to the devisee.⁸ So, again, where a tract of land is conveyed, "with the water right appurtenant thereto," or a similar expression used in the deed, and the shares of stock representing the water right were not assigned to the purchaser, such a conveyance must be deemed in law an assignment, and the purchaser can compel a transfer of the stock and delivery to him of all water which was actually appurtenant to the land at the time of the transfer.⁹

It was held in a late case in California that the contract as embodied in the articles of incorporation may restrict the use of water in a mutual irrigation company to land devoted exclusively to the use of each stockholder.¹⁰

The Civil Code of California also provides: "Any incorporation organized for or engaged in the business of selling, distributing, supplying, or delivering water for irrigation purposes, or for domestic use, may in its by-laws provide that water shall only be so sold, distributed, supplied, or delivered to owners of its capital stock,

⁶ *Spurgeon v. Santa Ana Valley Irr. Co.*, 120 Cal. 71, 52 Pac. Rep. 140, 39 L. R. A. 701.

⁷ For what are in fact appurtenances, see Secs. 1011, 1012.

⁸ *In re Thomas Estate*, 147 Cal. 236, 81 Pac. Rep. 539.

⁹ *Booth v. Chapman*, 59 Cal. 149.

¹⁰ *Miller v. Imperial W. Co.*, 156 Cal. 27, 103 Pac. Rep. 227, 24 L. R. A., N. S., 372.

and that such stock shall be appurtenant to certain lands when the same are described in the certificate issued therefor; and when such certificate shall be so issued, and a certified copy of such by-law recorded in the office of the county recorder in the county where such lands are situated, the shares of stock so located on any land shall only be transferred with such lands, and shall pass as an appurtenance thereto." ¹¹

§ 1485. **The sale and transfer of shares in mutual corporations.**—As we have seen in the preceding sections, shares of stock in these mutual water corporations represent some definite and specific water right, and usually also represent a corresponding interest in the ditch, canal, or other works, used in utilizing such water right. Where this is the case, a different rule appertains when it comes to the sale and transfer of these water rights so represented by shares of stock in a corporation, than that which usually governs the sale and transfer of independent water rights. The general rule for the sale and transfer of independent water rights, not represented by shares of stock in some corporation, is that it must be made by deed executed and delivered with all the formalities required by the laws of the State where the same is made, for the sale and transfer of the title to other real property.¹ But, where the title to water rights, and the ditch, canal, and other works, is in one of these mutual corporations, which issues shares of stock representing both the water rights and the works by the means of which the water rights are used, such shares are considered in law personal property, and a sale and transfer of these shares operate as a sale and transfer of both the water rights and the interest in the works. In other words, the right to the use of the water follows the shares of stock.²

¹¹ 2 Kerr's Cyc. Code, Sec. 324.

¹ For the sale and transfer of water rights, see Chap. 53, Secs. 994-1032.

² Where water rights, and the ditch through which they are enjoyed, are owned by tenants in common, who form a corporation, which issues shares of stock representing both the water rights and the ditch, a transfer of its shares operates as a transfer of both the water rights and the

ditch. *Cache La Poudre Irr. Co. v. Larimer & Weld Res. Co.*, 25 Colo. 144, 53 Pac. Rep. 318, 71 Am. St. Rep. 123.

"The stock of such a corporation is mere personal property, and may be sold and transferred independent of any land; and the sale carries with it the right to the use of water on any land or for any purpose the new owner may choose. The stock is

And in such cases a transfer upon the books of the corporation is sufficient to pass the title to the water right.³ But the transferee has no right to take the water until the proper transfer of the stock is made on the books of the corporation.⁴ But where a transfer has not been properly made, a suit in equity may be maintained to quiet title to stock and to the water right.⁵ A sale and proper transfer of certificate may be made without a sale of the land upon which the water was formerly applied.⁶ So, where stock in an

merely evidence of the holder's title to a certain amount of water." *George v. Robinson*, 23 Utah 79, 63 Pac. Rep. 819.

See, also, *Oppenlander v. Left Hand D. Co.*, 18 Colo. 142, 31 Pac. Rep. 854; *Combs v. Agricultural D. Co.*, 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; *Snyder v. Murdock*, 20 Utah 419, 59 Pac. Rep. 91; *Brockman v. Grand Canal Co.*, 8 Ariz. 541, 76 Pac. Rep. 602; *Struby etc. Co. v. Davis*, 18 Colo. 93, 31 Pac. Rep. 495, 36 Am. St. Rep. 266; *Oligarchy etc. Co. v. Farm Inv. Co.*, 40 Colo. 291, 88 Pac. Rep. 443; *Grand Valley etc. Co. v. Leshner*, 28 Colo. 273, 65 Pac. Rep. 44; *Owen v. Pomona etc. Co.*, 131 Cal. 530, 64 Pac. Rep. 253; *McFadden v. Board of Supervisors of Los Angeles County*, 74 Cal. 571, 16 Pac. Rep. 397; *Eaton v. Larimer etc. Co.*, 35 Colo. 16, 83 Pac. Rep. 627; *Thomas Estate*, 147 Cal. 236, 81 Pac. Rep. 539; *True v. Rocky Ford etc. Co.*, 36 Colo. 43, 85 Pac. Rep. 842; *Farmers' etc. Co. v. White*, 32 Colo. 114, 75 Pac. Rep. 416; *Richey v. East Redland etc. Co.*, 141 Cal. 221, 74 Pac. Rep. 754; *Fuller v. Azusa etc. Co.*, 138 Cal. 204, 71 Pac. Rep. 98; *Swanger v. Porter*, 87 Neb. 764, 128 N. W. Rep. 516; *Wannamaker v. Pendleton*, — Colo. App. —, 121 Pac. Rep. 108.

Where the land of an owner of stock in a mutual irrigation company

was sold under a deed of trust, but the stock was not transferred, the grantor in the deed of trust and the present owner of the stock are necessary parties to an action by the purchaser under the deed of trust to enforce the rights formerly held by the grantor as a stockholder in the irrigation company. *Oligarchy Ditch Co. v. Farm Inv. Co.*, 40 Colo. 291, 88 Pac. Rep. 443.

Shares of stock in a water corporation can only be subjected to debt by seizure under attachment or execution in the manner prescribed by the statute. *Wells v. Price*, 6 Idaho 490, 56 Pac. Rep. 266.

³ *Talcott v. Mastin*, 20 Colo. App. 488, 78 Pac. Rep. 973; *Cache La Poudre Irr. Co. v. Larimer & Weld Res. Co.*, 25 Colo. 144, 53 Pac. Rep. 318, 71 Am. St. Rep. 123; *George v. Robinson*, 23 Utah 79, 63 Pac. Rep. 819; *Spurgeon v. Santa Ana etc. Co.*, 120 Cal. 71, 52 Pac. Rep. 140, 39 L. R. A. 701.

See, also, cases cited *supra*.

⁴ *Supply Co. v. Elliott*, 10 Colo. 327, 15 Pac. Rep. 691, 3 Am. St. Rep. 586.

⁵ *Wannamaker v. Pendleton*, — Colo. App. —, 121 Pac. Rep. 108.

⁶ *Oppenlander v. Left Hand D. Co.*, 18 Colo. 142, 31 Pac. Rep. 854; *Cache La Poudre etc. Co. v. Larimer etc. Co.*, 25 Colo. 144, 53 Pac. Rep. 318, 71 Am. St. Rep. 123; *Oligarchy etc. Co. v. Farm Investment Co.*, 40 Colo.

irrigation company was transferred on the books of the company to a trustee under a deed of trust, no further transfer was necessary.⁷ Again, the certificates of stock evidencing the water right may be pledged to secure the payment of a debt; and, upon a default in the payment of the debt the stock may be sold in accordance with the law governing such sales, and the purchaser thereof may thereby secure a good title to the water right.⁸ And the assignment of a certificate of stock estops the transferer from claiming any further title in the stock as against subsequent *bona fide* transferees, although such assignment be not registered.⁹ But where stock is pledged, the pledgee has no right to enforce the payment of the debt secured thereby by withholding the water from the pledger's land, until the lien on the stock has been foreclosed according to law, although the stock stands in the name of the pledgee upon the books of the company.¹⁰ And, where the pledgee of water stock is compelled to pay assessments to the company in order to save the stock and water right from sale, he has the right to demand repayment thereof from the pledger and equitable owner.¹¹ And, again, where an assessment by the corporation is invalid, a pledgee of corporate stock may maintain an action to have it so declared.¹²

§ 1486. Duties and liabilities of such a company.—The relation between a mutual water corporation and its members is one of contract. The members convey their property interests, which they formerly held as individuals, tenants in common, or copartners, to the corporation for the express purposes which are defined in their

291, 88 Pac. Rep. 443; Grand Valley etc. Co. v. Leshner, 28 Colo. 273, 65 Pac. Rep. 44.

⁷ Oligarchy D. Co. v. Farm Inv. Co., 40 Colo. 291, 88 Pac. Rep. 443; Richardson v. Longmont etc. Co., 19 Colo. App. 483, 76 Pac. Rep. 546.

⁸ Where certain stock certificates were issued by a corporation to a trustee to secure a debt of a certain stockholder, and on foreclosure of the pledge the stock was purchased by the creditor, a transfer of the stock by the trustee by deed was effectual to pass the equitable title in the shares to the

grantee. Richardson v. Longmont etc. Co., 19 Colo. App. 483, 76 Pac. Rep. 546.

⁹ Richardson v. Longmont etc. Co., *supra*; Snyder v. Murdock, 20 Utah 419, 59 Pac. Rep. 91; Oligarchy D. Co. v. Farm Inv. Co., 40 Colo. 291, 88 Pac. Rep. 443.

¹⁰ Mabb v. Stewart, 133 Cal. 556, 81 Pac. Rep. 1073, 65 Pac. Rep. 1085.

¹¹ Mabb v. Stewart, *supra*.

¹² Farmers' Pawnee Canal Co. v. Henderson, 46 Colo. 37, 102 Pac. Rep. 1063.

articles of incorporation, or charter, and the corporation undertakes to faithfully carry out these purposes. This is a contract which the law implies; and from it arises the trust with which the corporation is charged to conduct the common business in the interests of the shareholders. And as each share of stock is equal to every other share, the owners thereof are entitled to such benefit therefrom, by way of water dividends, as the holding of each bears to the whole amount of stock of the corporation. It therefore follows that it is the duty of a mutual water corporation organized to furnish water exclusively to its stockholders to furnish such a proportion of water to each of its shareholders as the number of shares of each bear to the whole number of shares of the stock of the company. As was well said in a late California case:¹ "In the case at bar the stockholder's rights to have water furnished on his land is not based on any special contract entered into by him with the corporation, but is an inseparable adjunct of his membership, and it is a plain duty resting on the corporation in the exercise of its corporate functions to furnish him such water." And where such a corporation fails to so furnish the proper proportion of water to one of its shareholders, it is liable for the damages resulting from such failure.² There is no duty imposed by the law on corporations, organized strictly for the purpose only of furnishing water to its own shareholders, to furnish water to others than its shareholders.³

¹ *Miller v. Imperial W. Co.*, 156 Cal. 27, 103 Pac. Rep. 227, 24 L. R. A., N. S., 327.

² *Rocky Ford etc. Co. v. Sampson*, 5 Colo. App. 30, 36 Pac. Rep. 638.

"It must necessarily follow that, from any neglect or failure to properly discharge its duty in this respect, it would be liable to the stockholder who is injured thereby to the extent of the damages suffered by him." *O'Connor v. North Truckee D. Co.*, 17 Nev. 245, 30 Pac. Rep. 882.

In an action to recover for wrongfully diverting water from plaintiff's land, defendant requested a charge that if, prior to the diversion of the

water, plaintiff knew that there were assessments due and unpaid, and refused to pay them, and disclaimed the ownership of the stock, and that the defendant, acting on such disclaimer of ownership, directed the company to divert the water, then plaintiff can not recover. Held erroneously refused. *Mabb v. Stewart*, 133 Cal. 556, 65 Pac. Rep. 1085.

³ "Had the defendant company confined its diversion and carriage of water to the extent of supplying its shareholders who are the owners or possessors of arable and irrigable land, to the extent of their needs, as mere agent of such appropriators, it

It is also made the duty of these corporations of keeping its ditch, canal, or other works in repair, although necessarily involving expense, which may be covered by the levying of the necessary assessments upon the stock of the shareholders. This is so not only that the property may be utilized as far as present needs are concerned, but in order to preserve the property and prevent its future destruction.⁴ A corporation which is organized merely to facilitate distribution of water among individual appropriators, though they do not surrender their rights to it, is yet in such a privity of estate with them as to enable it to defend in behalf of the stockholders any litigation affecting their rights to the use of water.⁵

§ 1487. **Rights of stockholders.**—The stockholders in mutual water corporations have certain individual rights which are not released by the conveyance of their water interests to such a corporation, and which they may exercise, provided that the rights of the other shareholders, or of the corporation, are not injured thereby. It therefore follows that a shareholder has the right to change the point of diversion if others are not injured.¹ So a stockholder

would have remained a mere private ditch company, and would have owed no duty to others than its shareholders." *Slosser v. Salt River etc. Co.*, 7 Ariz. 376, 65 Pac. Rep. 332; *Gould v. Maricopa etc. Co.*, 8 Ariz. 429, 76 Pac. Rep. 598; *McFadden v. Board of Supra. Los Angeles Co.*, 74 Cal. 571, 16 Pac. Rep. 397; *Combs v. Agricultural D. Co.*, 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275.

It is held in a late case in California that whether or not the acts of a mutual corporation in distributing the water are *ultra vires*, the question can not be raised by a stranger diverting water above on the same stream. *Arroyo D. & W. Co. v. Baldwin*, 155 Cal. 280, 100 Pac. Rep. 874.

See, also, Secs. 1482, 1483.

For the duty of public service corporations to furnish water, see Secs. 1497-1502.

See *State v. Twin Falls Canal Co.*, 168—Kin. on Irr.

— Idaho —, 121 Pac. Rep. 1039, where a corporation was organized by the stockholders to take over the water rights, works, etc., of the old corporation, and to operate and hold the same in trust for the settlers and land owners within said project, and where it is held that, although such corporation was not organized for profit, but was organized for the purpose of carrying out the provisions of the contract, and to perform a public duty, and in case of refusal to perform such duty, mandamus would lie to compel it to do so.

⁴ *Hall v. Eagle Rock etc. Co.*, 5 Idaho 551, 51 Pac. Rep. 110; *Iowa etc. Co. v. Temescal Water Co.*, 95 Fed. Rep. 320.

See, also, for assessments, Sec. —.

⁵ *Caviness v. La Grande Irr. Co.*, — Ore. —, 119 Pac. Rep. 731.

¹ A stockholder in a mutual ditch company has the right to change the

has the right, under the same conditions, that others are not injured thereby, to either himself change the place of the use of the water furnished by such a company or to sell the shares to others who may make such a change.² So, also, the shareholders in a mutual ditch company may enjoin the company from disposing of any of the water diverted to any other persons than to *bona fide* shareholders in the corporation, where the effect of this would be to deprive such shareholders of some of the water to which they were entitled.³

A stockholder has the right of mandamus to restore his rights in a mutual water company of which he has been wrongfully deprived. As was said in a late California case:⁴ "Nothing is more thoroughly established than the rule that mandamus will lie to restore to his corporate rights a member of a corporation who has been improperly disfranchised or irregularly removed from his connection with the corporation, and yet his right in this regard generally rests wholly on his contract of membership. The same rule appears to us to be applicable where the member is being excluded from participation in the benefits afforded by the corporation to its members, and there is no other adequate remedy."

§ 1488. Power of corporations to make rules and regulations.—

As is the case with other water corporations, mutual corporations may also adopt such rules and regulations not in violation of law governing the distribution and use of the water furnished among

point of diversion of his water, so long as the rights of others are not injuriously affected thereby. *Wadsworth Ditch Co. v. Brown*, 39 Colo. 57, 88 Pac. Rep. 1060, and where the Court said: "We know of no reason why discrimination should be made against the right claimed, when the one who asserts it is under a mutual ditch."

See, also, *Knowles v. Clear Creek Co.*, 18 Colo. 209, 32 Pac. Rep. 279; *Wadsworth D. Co. v. Brown*, 39 Colo. 57, 88 Pac. Rep. 1060.

For right to change point of diversion, see Secs. 857-859.

² *Cache La Poudre Irr. Co. v. Larimer & Weld Res. Co.*, 25 Colo. 144, 53 Pac. Rep. 318, 71 Am. St. Rep. 123.

For the right to change the place of use, see Secs. 867, 868.

³ *McDermont v. Anaheim etc. Co.*, 124 Cal. 112, 56 Pac. Rep. 779.

See, also, *La Junta etc. Co. v. Hess*, 6 Colo. App. 497, 42 Pac. Rep. 50; *Blakely v. Ft. Lyon etc. Co.*, 31 Colo. 224, 73 Pac. Rep. 249.

⁴ *Miller v. Imperial W. Co.*, 156 Cal. 27, 103 Pac. Rep. 227, 24 L. R. A., N. S., 372.

their shareholders as are equitable and reasonable under the circumstances of the case.¹ In fact, a strictly mutual corporation may go even to a greater extent than corporations organized for profit or hire in limiting its duties to furnish water only to its own shareholders by rules and regulations. Such a corporation owes no duty in this respect to others than its shareholders.² And, therefore, it may legally adopt a by-law limiting the furnishing of the water owned or controlled by it to its own shareholders only.³ But a by-law of such a corporation limiting the right of its shareholders as provided by law to change their point of diversion has no effect, unless authorized by the charter or articles of incorporation or assented to by the stockholders whose rights are affected.⁴

The statutes of California provide that the by-laws of a water company may restrict the use of the water to the lands of the shareholders so that the stock and right to the use of the water shall only be transferred with the lands upon which the water was used, provided the by-law is recorded in the office of the county recorder.⁵

§ 1489. Power of mutual water corporations to levy and enforce assessments.—One of the main objects of the incorporation of these mutual companies is to obviate the difficulties arising in enforcing the *pro rata* contributions of the co-owners of the water rights for the maintenance of the works and other necessary expenses, as is usually the case where the owners are tenants in common, or voluntary unincorporated associations.¹ In every community there are always some who refuse or fail from some reason or

¹ For rules and regulations of corporations for profit, see Sec. 1505.

"But these mutual rights to the use of water were subject to rules and regulations and to assessments to cover expenses, which, by common consent, seem to have been enforced through a *zanjero* or superintendent." Fuller v. Azusa Irr. Co., 138 Cal. 204, 71 Pac. Rep. 98.

See, also, McFadden v. Board of Suprs. of Los Angeles Co., 74 Cal. 571, 16 Pac. Rep. 397.

² Slosser v. Salt River Valley etc. Co., 7 Ariz. 376, 65 Pac. Rep. 332;

Gould v. Maricopa Canal Co., 8 Ariz. 429, 76 Pac. Rep. 598; Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275.

³ McFadden v. Board of Suprs. of Los Angeles Co., 74 Cal. 571, 16 Pac. Rep. 397.

⁴ Knowles v. Clear Creek etc. Co., 18 Colo. 209, 32 Pac. Rep. 279.

⁵ Laws Cal., 1907, p. 854.

See, also, 2 Kerr's Cyc. Codes, p. 348, Sec. 324.

¹ For the contribution of necessary expenses, see Sec. 1457.

are slow in paying their proportion of the necessary expenses for the running of their own affairs. The truth of this statement appears oftener where the burden can be shifted upon others who are joined with them in a common enterprise, as is the case where parties are associated together under the loose methods of a tenancy in common, or voluntary unincorporated associations.² By merging the rights into a corporation this difficulty is almost entirely obviated, and each shareholder may be compelled to contribute his proportion of all necessary expenses or forfeit his right to the use of the water. The corporate laws of all the States provide for the levying of assessments necessary for carrying on the affairs of the company, and of paying the expenses of maintenance and repairs, which are a continual cause of expenditure of all water companies. Therefore, by becoming a stockholder in one of these mutual water corporations, one by implication enters into a contract with the company to pay all assessments upon his stock, levied pursuant to the governing statute of the State, articles of incorporation, and by-laws of the company of which such person will be presumed to have had notice.³ And, furthermore, it makes no difference in this regard whether the stock is fully paid or not. For it often happens that "unless the paid-up stock of the corporation can be assessed to meet the expenses of keeping its property in repair the utility of the property is lost, the purposes for which the corporation was organized is defeated, and the destruction of its property is only a question of a very short time."⁴ Of course, in order to render such assessment valid, the purpose for which it is levied must come within the purposes of the corporation as set

² See Secs. 1453-1463.

³ Callahan v. Chilcott Ditch Co., 37 Colo. 331, 86 Pac. Rep. 123.

⁴ Hall v. Eagle Rock etc. Co., 5 Idaho 551, 51 Pac. Rep. 110, where it was held that, where a corporation organized for the purpose of constructing a canal to be used for the distribution of water for irrigation purposes upon the lands of the stockholders in such corporation, whose articles of incorporation provide for the assessment of paid up stock, when au-

thorized by three-fourths vote of all the stockholders, it is proper and legal for such an assessment to be made, and the collection thereof enforced under the provisions of the statute.

See, also, Mabb v. Stewart, 133 Cal. 556, 65 Pac. Rep. 1085; *Id.*, 147 Cal. 413, 81 Pac. Rep. 1073; Spurgeon v. Santa Ana Val. Irr. Co., 120 Cal. 71, 52 Pac. Rep. 140, 39 L. R. A. 701; Curtin v. Arroyo etc. Co., 147 Cal. 337, 81 Pac. Rep. 982.

forth in the articles of incorporation, or charter; and, also, the procedure as prescribed by the statute of the State governing the same, and as set forth in the articles or by-laws of the corporation, must be strictly followed. So, where the articles prescribed that the purposes of the corporation were "to construct, manage, and control" the ditches described, "for the purpose of diverting the waters of said creek," and "to control, regulate and distribute the said waters for the purposes mentioned herein," it was held in a Utah case that such a corporation had no power to build reservoirs for the purpose of storing water, and that an assessment levied for that purpose was "unauthorized, and, therefore, null and void."⁵ In Nebraska it is held that in the absence of statutory authority or power given by the articles of incorporation there can be no assessment against or on paid-up stock of a corporation.⁶ Again, it is held that upon the consideration of the transfer of certain rights to a corporation, where a written contract required the corporation to convey certain water rights, free from all assessments, until the grantee should use the rights, or should sell them to other parties, and in lieu of such conveyance the corporation issued shares of stock representing the water rights, a pledgee of the stock did not thereby become a purchaser in the sense that the stock became subject to assessment, and such an assessment was held to be void, and that the Court could also grant further relief by ordering the corporation to transfer the stock on the books of the company so as to effectuate its decree.⁷

In ordinary corporations for profit assessments levied are liens only upon the shares of stock of the owner, which shares may be

⁵ Seeley v. Huntington etc. Assn., 27 Utah 179, 75 Pac. Rep. 367.

⁶ Enterprise D. Co. v. Moffit, 58 Neb. 642, 79 N. W. Rep. 560, 45 L. R. A. 647, 76 Am. St. Rep. 122.

⁷ Farmers' Pawnee Canal Co. v. Henderson, 46 Colo. 37, 102 Pac. Rep. 1063.

Where a corporation sold some of its stock for non-payment of assessments, and bid the same in, in which the stockholder acquiesced, it can not on its own motion treat the sale as invalid, and reinstate the stockholder,

so as to render him liable for the assessment. Patterson v. Brown & Champion D. Co., 3 Colo. App. 511, 34 Pac. Rep. 769.

The enforcement of an assessment will not be enjoined until the defendant's claim for unliquidated damages on account of the company's alleged failure to furnish the water can be judicially determined and applied to the assessment as a counter claim thereto. Iowa etc. Co. v. Temescal Water Co., 95 Fed. Rep. 320.

sold in accordance with law to pay such lien. In mutual corporations an assessment is a lien, both upon the shares of stock and the water rights represented thereby. In the Water Users' Associations organized under the respective States, for operation in connection with the Government under the National Reclamation Act, the by-laws provide that assessments are a lien upon the shares of the stockholders, the water represented thereby, and upon the lands where the water is used.⁸ It may be stated in this connection that in such associations the assessments are levied not only to pay for the maintenance of the works and other necessary expenses, but also to pay for the water rights furnished by the Government under the National Reclamation Act, and according to law and to the rules and regulations prescribed by the Secretary of the Interior.⁹

⁸ For water users' associations, see Secs. 1281-1286.

⁹ For the National Reclamation Act, see Chap. 65, Secs. 1235-1286.

CHAPTER 76.

CORPORATIONS FOR PROFIT.

- § 1490. Scope of chapter.
- § 1491. Corporations organized for profit—In general.
- § 1492. Right to organize for the purpose of profit.
- § 1493. Corporations for profit—Public service or quasi public corporations.
- § 1494. Public service—Charges which may be made.
- § 1495. Power of state to regulate—At common law.
- § 1496. Power of state to regulate—By constitutional provisions—By legislative enactment.
- § 1497. State regulations—Duty to furnish water.
- § 1498. Duty to furnish water without unreasonable conditions.
- § 1499. Duty to furnish water—Without discrimination or preference.
- § 1500. Duty to furnish water—Order of priority.
- § 1501. Duty to have adequate works and to keep them in repair.
- § 1502. Duty to furnish water—Order of priority—Rule as to prorating in times of scarcity.
- § 1503. Power to make rules and regulations for furnishing water.
- § 1504. Rules governing the collection of water rates.
- § 1505. Rules for the regulation of use of water by consumers.
- § 1506. Duty to furnish water—Compulsory service.
- § 1507. Duty to furnish water—Damages for failure.
- § 1508. State regulations—For protection of rights of company.

§ 1490. Scope of chapter.—In this chapter we will discuss the law relative to the powers of water corporations organized for profit, the power of the State to regulate, and their duty, as public service, or quasi-public corporations, to furnish water to consumers; how such duty may be enforced, and the liabilities of a company for violating such duty.

Under the chapter relating to water rights we have discussed how the State may control the rates to be charged by irrigation and water companies.¹

§ 1491. Corporations organized for profit—In general.—The second class of incorporated water companies under our classification¹ are those organized for the construction of the necessary ditches, canals, and other diverting, and carrying works, and for

¹ See Chap. 69, Secs. 1368-1385.

¹ See Sec. 1452.
(2879)

✓ the purpose of furnishing water to others than to its stockholders, either by selling the rights to use the water, or by renting the same, and for the further express purpose of making a profit thereby for the stockholders of the corporation. There are no material differences between corporations organized for this purpose and other ordinary business corporations. Strictly speaking, they are private corporations,² as distinguished from public,³ or municipal corporations,⁴ although as far as their duties are concerned, and their regulation and control by the State, they are sometimes termed "public service," or "quasi-public" corporations.⁵ They are organized under the laws of some State,⁶ and, in order to operate in some other State, they must comply with the laws of the latter, relative to the filing of their articles, and comply with the other general provisions required to enable a corporation of one State to do business in another.⁷ They are given such powers as may be prescribed by their articles of incorporation, and the laws of the State where organized, and they are subject to all the limitations and restrictions of those laws, and also of the laws of the State where their operations are carried on.⁸ They may appropriate water,⁹ construct the necessary works for the diversion, and for conducting the water to the place of use. And, for this purpose, they may acquire rights of way over the public lands of the United States, or those of a State;¹⁰ and they may also acquire rights of way over the private lands of others, either by purchase, prescription, or condemnation proceedings.¹¹ They may sell, rent, or otherwise dispose of the water rights acquired under the restrictions imposed by the law of the State relative to the rates which may be charged,¹² and they may make contracts, not in violation of such laws, regulating the sale and distribution of the water.¹³

² San Diego Flume Co. v. Souther, 90 Fed. Rep. 164, 32 C. C. A. 548, 61 U. S. App. 134; *Id.*, 104 Fed. Rep. 706, 44 C. C. A. 143.

³ See irrigation districts, Chap. 70, Secs. 1386-1432.

⁴ See Chap. 71, Secs. 1433-1448.

⁵ See Secs. 1492, 1493.

⁶ For the organization of corporations, see Secs. 1466, 1467.

⁷ See Secs. 1466, 1467.

⁸ For the powers of corporations, see Secs. 1470-1473.

⁹ See Secs. 684, 1470.

¹⁰ For rights of way over public lands, see Chap. 51, Secs. 927-971.

¹¹ For the acquisition of rights of way over private lands, see Chap. 52, Secs. 972, 973.

¹² For water rates, see Chap. 69, Secs. 1368-1385.

¹³ For contracts, see Secs. 1500-1529.

In those States, however, where the water company is regarded merely as the carrier of the water for hire, it is held that the terms "selling" and "renting" water are a misapplication of those terms, and that the company has no water which it can "sell," or "rent," and that the only remuneration which the company can collect is a reasonable compensation for its services for diverting and carrying the water to the place of use.¹⁴ They may protect their rights acquired by suits at law and in equity in the corporate name.¹⁵ There is also one material difference between these corporations and mutual water companies discussed in the previous chapter,¹⁶ and that is, they may declare dividends in cash upon their capital stock, and pay the same to their stockholders, while mutual corporations pay their dividends in water to the shareholders, who use the same upon their lands.¹⁷

§ 1492. **Right to organize for the purpose of profit.**—It is well settled by the laws of all the States that private water corporations may be lawfully organized for the appropriation of water from the natural streams, or other sources of water supply, for the express purpose of selling of water rights to consumers, or for the purpose of conveying water for hire; and, that too, for the sole purpose of making a profit for their stockholders. Not only has this right been recognized and protected, but the organization and operation of such corporations has been encouraged, both by the statutory laws of all the States and Territories included within the arid and semi-arid

¹⁴ *Wheeler v. Northern Colo. Irr. Co.*, 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603, where it is said: "A cursory reading of the statute might convey the impression that the legislature regarded the carrier as possessing a salable interest in this water, and the constitutional phrase (Art. 16, Sec. 8), 'to be charged for the use of water,' relating to the carrier's compensation, might at first glance seem to recognize a like ownership in such use. But construing all the provisions of that instrument bearing upon the subject *in pari materia*, the correctness of both these inferences must be denied. . . . It requires

no citation of authority to show that the words 'purchase' and 'sale,' together with other words of like import, used in this connection by the legislature, must receive a corresponding interpretation."

See, also, *Wyatt v. Larimer etc. Co.*, 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; reversing *Id.*, 1 Colo. App. 480, 29 Pac. Rep. 906.

See, also, for relation of company to consumer, Secs. 1475-1477.

¹⁵ For parties to actions, see *Chaps.* 78-83.

¹⁶ See Chap. 75, Sec. 1479.

¹⁷ See Sec. 1483.

West, but also by Congressional laws. As was said by the Supreme Court of the United States, upon this subject: "Irrigation corporations are recognized in the legislation of Congress, and the rights conferred are not limited to such corporations as are mere combinations of owners of irrigable land."¹

It was held by the Supreme Court of the United States that a corporation organized under a Territory has the same right to make appropriations of water as one organized under a State.²

A very common method of the organization of these corporations for profit is through the efforts of promoters. Generally speaking, promoters of corporations are regarded as trustees, and the utmost good faith required of them. As was said in a late case in Washington:³ "The courts generally deal with promoters as trustees, and require them to act with the utmost good faith. They can not be permitted to reap a harvest of secret profits for themselves at the expense of existing stockholders whose funds have provided financial support for the corporate enterprise. If, without the knowledge or consent of such stockholders, the promoters cause funds of the corporation to be so disbursed as to secure undisclosed profits for themselves, they may be called to account."

§ 1493. Corporations for profit—Public service, or quasi-public corporations.—All water corporations organized for the purpose of furnishing or carrying water to consumers, either for sale or hire, in order to make a profit for the stockholders, come strictly within the class of corporations known as "public service," or

¹ *Gutierrez v. Albuquerque Land & Irr. Co.*, 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338; affirming *Id.*, 10 N. M. 177, 61 Pac. Rep. 357.

See *Slosser v. Salt River Valley Canal Co.*, 7 Ariz. 367, 65 Pac. Rep. 332; *Wheeler v. Northern Colo. Irr. Co.*, 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; *Golden Canal Co. v. Bright*, 8 Colo. 144, 6 Pac. Rep. 142; *Combs v. Agricultural D. Co.*, 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275.

In New Mexico it is held that a corporation has the right to make an

appropriation of water from a natural stream and distribute it to those who may require it for purposes of irrigation, and that, too, whether such corporation has land connected with such irrigation system or not. *Hagerman Irr. Co. v. McMurry*, 16 N. M. 172, 113 Pac. Rep. 823.

See, also, for corporations operating under the Carey Act, Secs. 1312-1336.

² *Gutierrez v. Albuquerque etc. Co.*, 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338.

³ *Mangold v. Adrian Irr. Co.*, 60 Wash. 286, 111 Pac. Rep. 173.

"quasi-public" corporations, which we have defined as those companies engaged in the business of furnishing or carrying water for hire, to all consumers who can be provided with water under its system, and who apply for the same, up to the full capacity of such system.¹ And, regardless of the question, as to whether such corporation is considered the appropriator, and therefore the owner of the water rights, or is regarded simply as the carrier of the water for the consumers, who are deemed the appropriators and the owners of the rights,² such corporation is charged with a public duty, or trust, and is subject to all the general rules of law regulating and controlling these and other public service, or quasi-public corporations.³

Under the constitution and laws of all the States, such corporations are at least quasi-public servants, or agents. They do not stand in the attitude of private individuals contracting for the sale or use of their own private property. Neither do they stand in the same position before the law as groups of individuals who have associated themselves together, either as voluntary associations,⁴ or even as mutual corporations, for the purpose of better managing and controlling the property of all, and of distributing the water only to their own shareholders, who are also the consumers of the

¹ For the distinction of "public use" and "public service," see Sec. 1451.

² For the distinction as to the ownership of the water rights, see Secs. 1475-1477.

³ For the police powers of a State to regulate and control public service corporations, see Secs. 1495, 1496.

For the regulation of water rates, see Secs. 1368-1385, 1494.

That such a corporation is a public service or quasi-public corporation, and therefore a public agency, see *Price v. Riverside etc. Co.*, 56 Cal. 431; *McCreary v. Beaudry*, 67 Cal. 120, 7 Pac. Rep. 264; *Fellows v. Los Angeles*, 151 Cal. 52, 90 Pac. Rep. 137; *South Pasadena v. Pasadena etc. Co.*, 152 Cal. 590, 93 Pac. Rep. 490;

Mahoney v. American etc. Co., 2 Cal. App. 186, 83 Pac. Rep. 267; *Hanes v. Idaho Irr. Co.*, — Idaho —, 122 Pac. Rep. 859.

A mutual corporation furnishing water generally for irrigation only, when there is a surplus in its ditch over and above the requirements of its shareholders, is impressed with a public character and holds its property subject to an exercise of the police power of the State to a greater degree than does a private person. *Baker City Mut. Irr. Co. v. Baker City*, 58 Ore. 306, 110 Pac. Rep. 392, 113 Pac. Rep. 9.

See, also, *Garrison v. North Pasadena etc. Co.*, — Cal. —, 124 Pac. Rep. 1009.

⁴ See Secs. 1453-1463.

water.⁵ These corporations, organized primarily for profit to their stockholders, exist largely for the benefit of others. They are permitted to acquire water rights, which, in order to hold, must be applied by others to a beneficial use or purpose and which, when so applied, the law protects as against others subsequently diverting waters from the same natural stream, or other source of water supply.⁶ They may exercise the power of eminent domain, both for the condemnation of rights of way,⁷ and, in certain instances, water rights.⁸ Their business is affirmatively sanctioned by the constitutions and laws of the respective States and the laws of Congress; and they are granted charters by the States, enabling them, in their corporate right, to transact such business. Reasonable profits, or emoluments, are permitted to their stockholders, but they have other duties to perform than to declare excessive dividends upon their stock, or to charge such rates for the use of water as will be too great a burden to the consumers.⁹ Therefore, as well stated by the Colorado Court, in an early case, such a corporation, "in consideration of this express recognition, together with the privileges and protection thus given, it is, for the public good, charged with certain duties and subjected to a reasonable control."¹⁰

⁵ See Secs. 1479-1489.

⁶ For rights of corporations to appropriate water, see Secs. 684, 1470.

⁷ See Secs. 1059-1098.

⁸ See Secs. 1087, 1088.

⁹ For the regulation of water rates, see Secs. 1368-1385.

¹⁰ Mr. Justice Helm, in *Wheeler v. Northern Colo. Irr. Co.*, 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603.

"As all owners of land within the service capacity of appellee's canal will possess the right to use the water which may be diverted into such canal, the use is clearly public, and appellee is therefore a public agency, whose right to divert the water and whose continued existence is dependent upon the application by it within a reasonable time to a beneficial use." *Gutierrez v. Albuquerque Land & Irr. Co.*, 188 U. S. 545, 47 L. Ed. 588,

23 Sup. Ct. Rep. 338; affirming *Id.*, 10 N. M. 177, 61 Pac. Rep. 357.

"One of the obligations the company assumed was to sell water at reasonable prices." *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 28 L. Ed. 173, 4 Sup. Ct. Rep. 48.

See, also, for the regulation of water rates, Chap. 69, Secs. 1368-1385.

"It was, therefore, the duty of the defendant under the law, as established in this State, to furnish the plaintiff water upon tender of established rates." *Crow v. San Joaquin etc. Co.*, 130 Cal. 309, 62 Pac. Rep. 562, 1058.

For the duty of a corporation to furnish water, see Secs. 1497-1502.

The power of a corporation to contract with consumers for the delivery of water is limited by the ability of the company to supply and deliver the water. *Wyatt v. Larimer & Weld*

As to whether or not a corporation organized for the furnishing and distribution of water is one organized for profit, and thus a public service, or quasi-public corporation, is a question of fact, and depends upon the facts and circumstances of each particular case. There is no presumption of law that a corporation organized

Irr. Co., 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; reversing *Id.*, 1 Colo. App. 480, 29 Pac. Rep. 906.

For limitation of power to contract, see Secs. 1500-1529.

That canal corporations are quasi-public servants, charged with certain duties and subject to reasonable control, see, also, Lanning v. Osborne, 76 Fed. Rep. 319; Atlantic Trust Co. v. Woodbridge etc. Co., 79 Fed. Rep. 39; *Id.*, 79 Fed. Rep. 501; *Id.*, 86 Fed. Rep. 975; San Joaquin etc. Co. v. Stanislaus County, 90 Fed. Rep. 516; Boise etc. Co. v. Boise City, 123 Fed. Rep. 232, 59 C. C. A. 236; Junction Creek etc. Co. v. City of Durango, 21 Colo. 194, 40 Pac. Rep. 356; Farmers' Ind. D. Co. v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149; reversing *Id.*, 3 Colo. App. 255, 32 Pac. Rep. 722; Prescott Irr. Co. v. Flathers, 20 Wash. 454, 55 Pac. Rep. 635; Candelaria v. Vallejos, 13 N. M. 140, 81 Pac. Rep. 589; Farmers' Irr. Dist. v. Frank, 72 Neb. 136, 100 N. W. Rep. 286; Sammons v. Kearney Pr. & Irr. Co., 77 Neb. 580, 110 N. W. Rep. 308, 8 L. R. A., N. S., 404; Gould v. Maricopa Canal Co., 8 Ariz. 429, 76 Pac. Rep. 598; dismissed, 195 U. S. 639, 49 L. Ed. 356, 25 Sup. Ct. Rep. 792; Slosser v. Salt River etc. Co., 7 Ariz. 376, 65 Pac. Rep. 332; Hayois v. Salt River etc. Co., 8 Ariz. 285, 71 Pac. Rep. 944; Colorado Canal Co. v. McFarland & Southwell, 50 Tex. Civ. App. 92, 94 S. W. Rep.

400, 109 S. W. Rep. 435; Souther v. San Diego etc. Co., 112 Fed. Rep. 228, 121 Fed. Rep. 347, 57 C. C. A. 561; Price v. Riverside etc. Co., 56 Cal. 431; Cozzens v. North Fork D. Co., 2 Cal. App. 404, 84 Pac. Rep. 342; People v. Stephens, 62 Cal. 209; Hildreth v. Montecito W. Co., 139 Cal. 22, 70 Pac. Rep. 672, 72 Pac. Rep. 395; Merrill v. South Side Irr. Co., 112 Cal. 433, 44 Pac. Rep. 720; McCrary v. Beaudry, 67 Cal. 120, 7 Pac. Rep. 264; Colorado Canal Co. v. McFarland, 50 Tex. Civ. App. 92, 94 S. W. Rep. 400, 109 S. W. Rep. 435; Orcutt v. Pasadena etc. Co., 152 Cal. 599, 93 Pac. Rep. 497; Graham v. Pasadena etc. Co., 152 Cal. 596, 93 Pac. Rep. 498; Wilterding v. Green, 4 Idaho 773, 45 Pac. Rep. 134; Hard v. Boise etc. Co., 9 Idaho 589, 76 Pac. Rep. 331, 65 L. R. A. 407; Bardsly v. Boise etc. Co., 8 Idaho 155, 67 Pac. Rep. 428; Lowe v. Yolo County etc. Co., 157 Cal. 503, 108 Pac. Rep. 207; affirming *Id.*, 8 Cal. App. 167, 96 Pac. Rep. 397; Western Irr. Co. v. Chapman, 8 Kan. App. 778, 59 Pac. Rep. 1098; State *ex rel.* Crawford v. Minnesota etc. Co., 20 Mont. 198, 50 Pac. Rep. 420; Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. Rep. 404; Hatch v. Consumers' etc. Co., 17 Idaho 204, 104 Pac. Rep. 670; Green v. Byers, 16 Idaho 178, 101 Pac. Rep. 79, citing 9 Cyc., p. 450; Western Irr. Co. v. Chapman, 8 Kan. App. 778, 59 Pac. Rep. 1098; Farmers' etc. Co. v. Brambaugh, 81 Neb. 641, 116 N. W. Rep. 512.

for this purpose is one organized for profit.¹¹ The same may be said as to what constitutes a public use.¹² As was said in a late California case: ¹³ "The term 'public use,' is a term of indefinite signification. The statute authorizes the right of eminent domain in behalf of certain public uses, among which are included 'electric power lines.' While what is a public use is a judicial question, yet in a doubtful case, the legislative declaration is of great persuasive force." ¹⁴

§ 1494. Public service—Charges which may be made.—A sale and transfer of all property rights may be made by one public service corporation to another corporation, but the title to the use of the water sold consumers by the vendor can not be affected by such transfer. Even the foreclosure and sale under a mortgage can not affect their rights.¹ The purchaser under any sale must assume the obligations of the vendor, and is under the same public duties.²

A change may also be made in the nature of a corporation. It may change from a mutual corporation, or one organized for the express purposes of distributing water to its own shareholders only, to a public service corporation, by offering water to the general public for sale, rental, or distribution.³

¹¹ *Applegarth v. McQuiddy*, 77 Cal. 408, 19 Pac. Rep. 692.

See, also, for mutual corporations, Secs. 1479-1489.

¹² For public use, see the chapters upon eminent domain, Secs. 1065-1074, and irrigation districts, Secs. 1405-1407.

¹³ *Tuolumne W. Co. v. Frederick*, 13 Cal. App. 498, 110 Pac. Rep. 134.

¹⁴ Citing *Lindsay I. Co. v. Mehrrens*, 97 Cal. 676, 32 Pac. Rep. 802; *Walker v. Shasta Pr. Co.*, 160 Fed. Rep. 856, 87 C. C. A. 660, 19 L. R. A., N. S., 725.

See, also, *Leavitt v. Lassen Irr. Co.*, 157 Cal. 82, 106 Pac. Rep. 404; *Northern Lt. & Pr. Co. v. Stacher*, 13 Cal. App. 404, 109 Pac. Rep. 896.

¹ *Hewitt v. Great Western Beet Sugar Co.*, 20 Idaho 235, 118 Pac.

Rep. 296, holding that the title to the use of water can never be affected in any way by any subsequent transfer of the canal or ditch company, or by any subsequent foreclosure of any bond, mortgage, or other lien.

² *South Pasadena v. Pasadena Land & Water Co.*, 152 Cal. 590, 93 Pac. Rep. 490; *Stanislaus W. Co. v. Bachman*, 152 Cal. 716, 93 Pac. Rep. 858, 15 L. R. A., N. S., 359; *Graham v. Pasadena Land & Water Co.*, 152 Cal. 596, 93 Pac. Rep. 498; *Orcutt v. Pasadena Land & Water Co.*, 152 Cal. 599, 93 Pac. Rep. 497; *Farmers' etc. Co. v. Henderson*, 46 Colo. 37, 102 Pac. Rep. 1063; *Clague v. Tri-State etc. Co.*, 84 Neb. 499, 121 N. W. Rep. 570, 133 Am. St. Rep. 637.

³ *Combs v. Agricultural Ditch Co.*, 17 Colo. 146, 28 Pac. Rep. 966, 31

But a corporation can not change its nature from a public service corporation to a mutual, or exclusive corporation, having once entered the class of public service corporations for profit. Such a corporation must furnish the water to all applicants who may legally apply therefor, without discrimination.⁴

The question never seems to have arisen as to whether a public service corporation could voluntarily abandon all service and cease to do business as such corporation, although in a recent case decided in California, the Court intimates that such might be done. But the Court held that such a corporation must either comply with the law of public service, or permit the use of its property and plant in previous use and necessary for the service of the consumers.⁵

The usual changes, relative to point of diversion, place of use, and the use of the water itself, by the consumers furnished with the

Pac. Rep. 275; *Leavitt v. Lassen Irr. Co.*, 157 Cal. 82, 106 Pac. Rep. 404; *Slosser v. Salt River etc. Co.*, 7 Ariz. 376, 65 Pac. Rep. 332.

⁴ *Leavitt v. Lassen Irr. Co.*, 157 Cal. 82, 106 Pac. Rep. 404.

See, however, *Jackson v. Indian etc. Co.*, 18 Idaho 513, 110 Pac. Rep. 251.

⁵ *Fellows v. Los Angeles*, 151 Cal. 52, 90 Cal. 137, in which it is said: "We do not mean to say that a corporation engaged in the distribution of water to public uses may not abandon its property and quit the business, without being subject to mandatory proceedings to compel it to continue to carry it on. It may find it impossible to go on. Its supply may become exhausted, or be insufficient for paramount needs; the rates fixed by law may be too small to enable it to operate at a profit, or without substantial loss; or, it may conclude, without reason which the law would consider sufficient, that it will not continue. In case of a natural person it might become physically impossible. We do not intend to declare that in any such case mandatory proc-

ess would be issued to compel the personal performance of the duty. These questions are not now involved, and we express no opinion concerning them. But in such a case it can not continue in absolute control of the water and waterworks appropriated to the public service. If a proper demand, by a person entitled, is made upon it for the continuance of the service, it must either comply or permit the use of the property and plant in previous use and necessary for the service by the demandant, or by the persons beneficially interested, to the end that he, or they, may continue to devote the property to the public service to which it is dedicated."

See *Spring Valley Water Co. v. San Francisco*, 165 Fed. Rep. 667, in which it is said: "But once enlisted in the public service the company can not withdraw."

See, also, *Gould v. Maricopa etc. Co.*, 8 Ariz. 429, 76 Pac. Rep. 598; *Farmers' Canal Co. v. Frank*, 72 Neb. 136, 100 N. W. Rep. 286; *Laighton v. City of Carthage*, 175 Fed. Rep. 145.

water from public service corporations, may also be made, provided that the rights of others are not injured by such change.⁶

✓ § 1495. **Power of State to regulate—At common law.**—The classification of incorporated water corporations as public service, or quasi-public corporations, is not dependent upon any new principle of law; neither is it peculiar to corporations organized for the purpose of appropriating, carrying, and distributing water to consumers; nor is it peculiar to those States wherein the Arid Region Doctrine of appropriation is in vogue. This classification is applied to all corporations organized for profit and which depend upon the general public for their subsistence, and for the accumulation of that profit; it is applied in every State of the Union, both by their statutory laws and the decisions of their courts. It probably has been applied to railroad corporations oftener than to any others; and more often to the subject matter of the charges which these companies may make for their services to the public.¹ But it has also been applied to public warehouses,² to water companies engaged in furnishing water to municipalities and the inhabitants thereof,³ to companies engaged in the furnishing of gas,⁴ to telephone companies,⁵ and to all other private corporations rendering services to the general public, thus making them quasi-public in their nature, and which depend upon the public for their continued operations, and from the payment of whose services to the public they derive the profits for their stockholders. Neither does this depend upon the na-

⁶ For changes which may be made, see Secs. 856-873.

See, also, *Knowles v. Clear Creek etc. Co.*, 18 Colo. 209, 32 Pac. Rep. 279; *Hard v. Boise etc. Co.*, 9 Idaho 589, 76 Pac. Rep. 331, 65 L. R. A. 407; *Gould v. Maricopa etc. Co.*, 8 Ariz. 429, 76 Pac. Rep. 598.

But see *Redwater Land & Canal Co. v. Jones*, — S. D. —, 130 N. W. Rep. 85, where the Court held that where the defendant was entitled to take water from the plaintiff corporation's ditch for irrigation purposes, it was immaterial at what point upon the ditch defendant chose to divert the water, though, if he selected one

point for diverting it, he could not thereafter select another point.

¹ *Chicago & N. W. R. Co. v. People*, 56 Ill. 365, 8 Am. St. Rep. 690; *Vincent v. Chicago etc. R. Co.*, 49 Ill. 33.

² *Munn v. People of Illinois*, 94 U. S. 113, 24 L. Ed. 77.

³ *City of Danville v. Danville W. Co.*, 178 Ill. 299, 53 N. E. Rep. 118, 69 Am. St. Rep. 304; *Wood v. City of Auburn*, 87 Me. 287, 32 Atl. Rep. 906, 29 L. R. A. 376.

⁴ *Shepard v. Milwaukee Gas Co.*, 6 Wis. 539, 70 Am. Dec. 479.

⁵ *State v. Kinloch*, 93 Mo. App. 349, 67 S. W. Rep. 684.

ture of the title with which such a corporation holds to the property. This title may be in absolute fee simple, or it may be held only upon sufferance, as is the case with water rights, which can be held only so long as the water is applied to some beneficial use, or purpose. Neither does this classification depend upon any statutory law fixing the status of such corporations, but their status may be fixed by decisions of the courts of a State, under the common law, and their operations and charges, in a measure, may be thus regulated. At least the courts, without specific statute, may determine what acts of such a corporation are illegal, and what charges for services are illegal and extortionate.⁶

This power to govern and regulate these quasi-public corporations rests in the general police powers granted to a sovereign State, which powers are defined by the Supreme Court of the United States, as "nothing more, or less, than the powers of government inherent in every sovereignty, that is to say, the power to govern men and things."⁷ This power of a State to govern and regulate such companies is not based upon the right of ownership, but upon the right of sovereignty.⁸ Nor does such right of the State depend upon the contract.⁹

§ 1496. Power of State to regulate—By constitutional provisions—By legislative enactment.—In many of the States there are to be found constitutional provisions and legislative enactments providing for the regulation and control of public service corpora-

⁶ "In the absence of legislation on the subject, it would, for these reasons, be held at common law, to have submitted itself to a reasonable judicial control, invoked and exercised for the common good, in the matter of regulations and charges." *Wheeler v. Northern Colo. Irr. Co.*, 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603.

See, also, *Price v. Riverside W. Co.*, 56 Cal. 431; *People v. Stephens*, 62 Cal. 209; *Merrill v. South Side Irr. Co.*, 112 Cal. 433, 44 Pac. Rep. 720; *Spring Valley etc. Co. v. San Francisco*, 165 Fed. Rep. 667; *Leavitt v. Lassen Irr. Co.*, 157 Cal. 82, 106 Pac.

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Rep. 404; *State ex rel. Shropshire v. Superior Court of Pacific County*, 51 Wash. 386, 99 Pac. Rep. 3.

⁷ *License Cases*, 46 U. S. 5 How. 583, 12 L. Ed. 504; *Munn v. People of Illinois*, 94 U. S. 113, 24 L. Ed. 77.

⁸ See *Moore v. Smaw*, 17 Cal. 199, 79 Am. Dec. 123, 12 Morr. Min. Rep. 418, a leading case upon the question, distinguishing between the rights of the Government as a proprietor and as a sovereign.

⁹ "These things are not of contract; they appertain to the sovereignty of the State and can not be bargained away." *Spring Valley W. Co. v. San Francisco*, 61 Cal. 3.

tions, and especially those appropriating, or carrying water for distribution to consumers. These provisions have been discussed to a great extent in our chapter upon the subject of the dedication of water rights by a State,¹ and also in the chapter upon the subject of the right of a State to control water rights.² They will also be further discussed in Part XIV, in which we abstract the laws of the various States, and therefore no further extended discussion of these provisions need be made here. These powers have been and may be exercised by the States, by the means of legislative enactments, which is the more usual method, or they may be exercised by the courts even without any constitutional provisions, or legislative enactments. As was said in an early case upon the subject:³ "The duty exists without any express statutory words imposing it, wherever the public use appears"; and as was also said in an Indiana case,⁴ and quoted with approval in a late California case:⁵ "No statute has been deemed necessary to aid the courts in holding that, when a person, or company, undertakes to supply a demand which is affected by a public interest, it must supply all alike who are like situated, and not discriminate in favor of, nor against any." It therefore follows that, although the constitutional provisions and statutory laws must be strictly followed, relative to the regulation and control of these companies, the courts without such provisions and laws have full power to make such regulations upon their own responsibility."⁶

§ 1497. State regulations—Duty to furnish water.—Private water corporations, organized for the purpose of profit or hire, whether they are deemed the appropriators of the water and, therefore, the owners of the water rights, or whether they are considered merely the carriers of the water,¹ are required, as public service, or quasi-public, corporations,² to treat the general public, or such a portion of the public as wish to take advantage of the water service of the company, as nearly on equal terms, and without discrimi-

¹ See Chap. 18, Secs. 372-389.

² See Chap. 69, Secs. 1368-1385.

³ Price v. Riverside W. Co., 56 Cal. 443.

⁴ State ex rel. Wood v. Consumers' Gas Trust Co., 157 Ind. 345, 61 N. E. Rep. 674, 55 L. R. A. 245.

⁵ Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. Rep. 404.

⁶ See power to regulate corporations at common law, Sec. 1495.

¹ For the relation of company to consumers, see Secs. 1475-1477.

² See Secs. 1493-1495.

nation, having due regard to priorities,³ as it is possible, up to the full extent of the capacity of their respective systems, and to the full amount of the water appropriated or controlled by such a company. This is one of the regulations required in every State of the West, where such corporations are in operation, both as regards the furnishing or carrying of the water to the consumers, and also as to the rates which may be charged for such services, which subject has been discussed in a previous chapter of this work.⁴ As was said by the United States Supreme Court: "As all owners of land within the service capacity of appellee's canal will possess the right to use the water which may be diverted into such canal, the use is clearly a public use."⁵ Without such regulations by the State, one of the principal natural resources thereof would be controlled and monopolized by these corporations, in total disregard of the rights of the consumers, who are necessary by their actual use of the water to perfect the appropriation;⁶ and, such corporations, instead of being "the intermediate agency existing for the purpose of aiding consumers,"⁷ might become, and likely would become, engines of oppression, both of the consumers and against the general welfare of the State. Therefore, under the constitutions of some of the States,⁸ and under the statutes and decisions of all, it is made the duty of such a corporation to sell, rent, or distribute the water upon the demand of any consumer, and the tender by him of the established rates. In other words, whenever water is appropriated for distribution, or sale, the public has a right to use it. Water appropriated for distribution and sale by a private corporation to others is, *ipso*

³ For the priority of rights of consumers taking their water from public service corporations, see Sec. 1500.

⁴ For water rates, see Chap. 69, Sec. 1368.

⁵ *Gutierrez v. Albuquerque etc. Co.*, 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338; affirming *Id.*, 10 N. M. 177, 61 Pac. Rep. 357.

⁶ "The appropriation and diversion of water by a ditch company that is not prepared to use the water itself is practically valueless without the water consumers." *Farmers' Co-op. D.*

Co. v. Riverside Irr. Dist., 14 Idaho 450, 94 Pac. Rep. 761.

See, also, *Hard v. Boise City Irr. Co.*, 9 Idaho 589, 76 Pac. Rep. 331, 65 L. R. A. 407.

See, also, for the relation of the company to the consumers, Secs. 1475-1477.

⁷ *Wyatt v. Larimer etc. Co.*, 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280.

⁸ For the State constitutions, see Part XIV.

facto, devoted to a public use.⁹ And, although the relations between the corporation and consumer may depend somewhat upon contract,¹⁰ the statutory right of the consumer to have the water furnished is not modified, or destroyed, by the fact that he has maintained contract relations with the company.¹¹ Therefore, each member of the community who desires to become an actual and *bona fide* consumer, upon making application to the company therefor, and by paying or tendering the rate fixed for supplying it, has a right to the use of a reasonable quantity of the water in a reasonable manner sufficient for the beneficial use or purpose to which he wishes to apply it;¹² provided, of course, that the company still has water under its control which has not theretofore been disposed of to others.¹³ As was said in a leading Colorado case upon the subject: "A refusal to supply water by the carrier, to be justifiable, must rest upon something more substantial than the mere will of the carrier."¹⁴ And the duty of the company is the same, whether that duty is to furnish water as proprietor of the water rights, or the mere carrier of the water for the consumers, who are the owners of the water rights.¹⁵ And the fact that consumers of water have

⁹ *McCrary v. Beaudry*, 67 Cal. 120, 7 Pac. Rep. 264.

See, also, *People v. Stephens*, 62 Cal. 209; *Merrill v. South Side Irr. Co.*, 112 Cal. 433, 44 Pac. Rep. 720; *Fresno etc. Co. v. Park*, 129 Cal. 437, 62 Pac. Rep. 87; *Price v. Riverside W. Co.*, 56 Cal. 433; *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77.

¹⁰ For contracts with water companies, see Secs. 1500-1529.

¹¹ *San Diego etc. Co. v. Sharp*, 97 Fed. Rep. 394, 38 C. C. A. 220; affirming *Id.*, 89 Fed. Rep. 295.

¹² For the economical use of water, see Secs. 875-885.

¹³ That a company can not contract in excess of its capacity, see Sec. 1511.

¹⁴ *Combs v. Agricultural D. Co.*, 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275.

¹⁵ *Wyatt v. Larimer & Weld Irr. Co.*, 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; reversing 1 Colo. App. 480, 29 Pac. Rep. 906.

A corporation which is incorporated for various purposes, among which is that of furnishing water to consumers, can not escape the public duty assumed by it as such corporation under a statute authorizing the organization of water companies, of furnishing water to all those who come within the class or community for whose benefit it was created, by the assertion of a right as another sort of a corporation to apply all the water to its own use or to that of its grantees. *Price v. Riverside etc. Co.*, 56 Cal. 433.

See, also, the case of *Combs v. Agricultural D. Co.*, 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275, where the contention was that the cor-

poration was a mutual corporation and organized to supply only its own stockholders.

It is the well settled doctrine of this State that a water company engaged in the administration of the public use of distributing water to the inhabitants of a community or neighborhood, whether inside or outside of a city or town, is under the duty and obligation to supply the water in proper proportion to the persons composing the class for which the use was created. *Fellows v. City of Los Angeles*, 151 Cal. 52, 90 Pac. Rep. 137.

The mere failure of the owner of a water right to go to the company each year and pay the stipulated price for carrying his water does not entitle the company to enter into a contract with another person for the carrying of such water. *Cooper v. Shannon*, 36 Colo. 98, 85 Pac. Rep. 175, 118 Am. St. Rep. 95.

That it is the duty of such companies to furnish water, see, also, *Golden Canal Co. v. Bright*, 8 Colo. 144, 6 Pac. Rep. 142; *Wheeler v. Northern Colo. Irr. Co.*, 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; *South Boulder D. Co. v. Marfell*, 15 Colo. 302, 25 Pac. Rep. 504; *People ex rel. Standard v. Farmers' etc. Co.*, 25 Colo. 202, 54 Pac. Rep. 626; reversing *Id.*, 8 Colo. App. 246, 45 Pac. Rep. 543; *Mahoney v. American etc. Co.*, 2 Cal. App. 186, 83 Pac. Rep. 267; *Crow v. San Joaquin etc. Co.*, 130 Cal. 309, 62 Pac. Rep. 562, 1058; *Lanning v. Osborne*, 76 Fed. Rep. 319; *Western etc. Co. v. Chapman*, 8 Kan. App. 778, 59 Pac. Rep. 1098; *Cozzens v. North Fork D. Co.*, 2 Cal. App. 404, 84 Pac. Rep. 342; *South Pasadena v. Pasadena etc. Co.*, 152 Cal. 590, 93 Pac. Rep. 490; *Niday v. Barker*, 16 Idaho 703, 101 Pac. Rep. 254; *Colorado Canal Co. v. McFarland*, 50

Tex. Civ. App. 92, 109 S. W. Rep. 435; *Lowe v. Yolo County etc. Co.*, 157 Cal. 503, 108 Pac. Rep. 207; affirming *Id.*, 8 Cal. App. 167, 96 Pac. Rep. 379; *Downey v. Twin Lakes etc. Co.*, 41 Colo. 385, 92 Pac. Rep. 946; *Hayois v. Salt River etc. Co.*, 8 Ariz. 285, 71 Pac. Rep. 944; *Salt River etc. Co. v. Nelssen*, 10 Ariz. 9, 85 Pac. Rep. 117, 12 L. R. A., N. S., 711, 16 Am. & Eng. Ann. Cas. 796; *Gould v. Maricopa etc. Co.*, 8 Ariz. 429, 76 Pac. Rep. 598; *People v. Stephens*, 62 Cal. 209; *Merrill v. South Side Irr. Co.*, 112 Cal. 433, 44 Pac. Rep. 720; *Leavitt v. Lassen Irr. Co.*, 157 Cal. 82, 106 Pac. Rep. 404; *Lassen Irr. Co. v. Long*, 157 Cal. 94, 106 Pac. Rep. 409; *Junction Creek etc. Co. v. Durango*, 21 Colo. 194, 40 Pac. Rep. 356; *Farmers' Independent D. Co. v. Agricultural Ditch Co.*, 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149; *Schneider v. People*, 30 Colo. 493, 71 Pac. Rep. 369; *Northern Colo. Irr. Co. v. Poupprit*, 47 Colo. 490, 108 Pac. Rep. 23; *Wilterding v. Green*, 4 Idaho 773, 45 Pac. Rep. 134; *Hard v. Boise etc. Co.*, 9 Idaho 589, 76 Pac. Rep. 331, 65 L. R. A. 407; *Bardsly v. Boise etc. Co.*, 8 Idaho 155, 67 Pac. Rep. 428; *Boise etc. Co. v. Boise City*, 19 Idaho 717, 115 Pac. Rep. 505; *Gerber v. Nampa Irr. Co.*, 16 Idaho 1, 100 Pac. Rep. 80; *Id.*, 19 Idaho 765, 116 Pac. Rep. 104; *Shelby v. Farmers' etc. Co.*, 10 Idaho 723, 80 Pac. Rep. 222; *Hatch v. Consumers' etc. Co.*, 17 Idaho 204, 104 Pac. Rep. 670; *Knowles v. New Sweden Irr. Co.*, 16 Idaho 217, 101 Pac. Rep. 81; *Western Irr. Co. v. Chapman*, 8 Kan. App. 778, 59 Pac. Rep. 1098; *Farmers' Irr. Dis. v. Frank*, 72 Neb. 136, 100 N. W. Rep. 286; *Sammons v. Kearney Pr. & Irr. Co.*, 77 Neb. 580, 110 N. W. Rep. 308, 8 L. R. A., N. S., 404; *Gutierrez*

abused, or exceeded, their right by taking more water than they were entitled to, does not deprive them of the right to insist on receiving the amount of water which they are entitled to take.¹⁶

A distinction, however, must be made between the duty of corporations organized for profit to furnish water upon application therefor, and purely mutual corporations organized for the express purpose of furnishing water to their own shareholders, discussed in previous sections of this part.¹⁷ No such duty devolves upon mutual corporations; and a corporation which confines its services to acting as the private agent of its shareholders can not be compelled to render its services to others.¹⁸ But where a company is organized ostensibly for the purpose of furnishing water only to its own shareholders, but under its articles of incorporation the power is given to furnish water to others, and it has the water to spare such a company may be compelled to furnish water to others.¹⁹ The mere change of the ownership of the irrigating system does not divest the applicant of such right.²⁰ But the purchasing company is under the same duty to furnish the water as the company selling.

§ 1498. Duty to furnish water without unreasonable conditions. —Although a corporation has the right to make all reasonable rules and regulations relative to furnishing the consumers under its system with water,¹ it can not, as a condition precedent to the furnishing of the water, require the applicant for water to comply with

v. Albuquerque etc. Co., 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338; affirming *Id.*, 10 N. M. 177, 61 Pac. Rep. 357; Candelaria v. Vallejos, 13 N. M. 140, 81 Pac. Rep. 589; Miller v. Mount Nebo etc. Co., 37 Utah 1, 106 Pac. Rep. 504; Prescott Irr. Co. v. Flathers, 20 Wash. 454, 55 Pac. Rep. 635; Hewitt v. Great Western Beet Sugar Irr. Co., 20 Idaho 235, 118 Pac. Rep. 296.

¹⁶ Larimer etc. Co. v. Wyatt, 23 Colo. 480, 48 Pac. Rep. 528.

¹⁷ See Secs. 1479-1489.

¹⁸ Slosser v. Salt River Valley etc. Co., 7 Ariz. 376, 65 Pac. Rep. 332;

McFadden v. Los Angeles County, 74 Cal. 571, 16 Pac. Rep. 397.

¹⁹ Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275.

²⁰ Western etc. Co. v. Chapman, 8 Kan. App. 778, 59 Pac. Rep. 1098; Hildreth v. Montecito etc. Co., 139 Cal. 22, 70 Pac. Rep. 672, 72 Pac. Rep. 395; Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. Rep. 858; South Pasadena W. Co. v. Pasadena, 152 Cal. 590, 93 Pac. Rep. 490.

¹ For rules and regulations by companies, see Secs. 1503-1505.

unreasonable regulations,² or demand an extra fee, or bonus, over and above the established rates, or what would be a reasonable rate under the circumstances.³ In many of the States it is made a criminal offense for a corporation to demand or accept a bonus or royalty, over and above the legal rate fixed for the supply of water.⁴ Neither can the corporation compel the applicant to comply with any other unreasonable condition precedent to its furnishing the water.⁵ Therefore, the company can not compel the applicant to

² The prior purchaser of water, who has complied with the provisions of the statute relative to the continuance of the right, can not be required, as a condition precedent to the exercise of his right, to acknowledge the equity of all rules adopted by the company. *Golden Canal Co. v. Bright*, 8 Colo. 144, 6 Pac. Rep. 142.

A company has no right to insist upon the repayment of the damages the plaintiff received in condemnation proceedings for a right of way over plaintiff's land as a condition precedent to the furnishing of the plaintiff with water, where a legal demand was made, and at the same time a tender of the water rates. *Lowe v. Yolo etc. Co.*, 157 Cal. 503, 108 Pac. Rep. 207; affirming *Id.*, 8 Cal. App. 167, 96 Pac. Rep. 379.

³ For the regulation of water rates, see Secs. 1368-1385; *Wheeler v. Northern Colo. Irr. Co.*, 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; *Schneider v. People*, 30 Colo. 493, 71 Pac. Rep. 369; *People v. Palermo W. Co.*, 4 Cal. App. 717, 89 Pac. Rep. 723; *Northern Colo. Irr. Co. v. Richards*, 22 Colo. 450, 45 Pac. Rep. 423; *Lanning v. Osborne*, 76 Fed. Rep. 319; *San Diego etc. Co. v. National City*, 74 Fed. Rep. 79; affirming 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. Rep. 804.

⁴ For these statutes, see Part XIV, under criminal statutes.

See, also, *Northern Colo. Irr. Co. v. Richards*, 22 Colo. 450, 45 Pac. Rep. 423; *Schneider v. People*, 30 Colo. 493, 71 Pac. Rep. 369; *People v. Palermo W. Co.*, 4 Cal. App. 717, 89 Pac. Rep. 723; *Crow v. San Joaquin Irr. Co.*, 130 Cal. 309, 62 Pac. Rep. 562, 1058; *Lowe v. Yolo W. Co.*, 157 Cal. 503, 108 Pac. Rep. 297; affirming *Id.*, 8 Cal. App. 167, 96 Pac. Rep. 279; *Combs v. Agricultural Ditch Co.*, 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; *Wilterding v. Green*, 4 Idaho 773, 45 Pac. Rep. 134; *Green v. Byers*, 16 Idaho 178, 101 Pac. Rep. 79, citing 9 Cyc., p. 450; *Mandell v. San Diego etc. Co.*, 89 Fed. Rep. 295; *Souther v. San Diego etc. Co.*, 112 Fed. Rep. 228.

See, also, for the right of a State to control water rates, Chap. 69, Secs. 1368-1385.

⁵ So, where it was required by the company that the applicant must either purchase another half water right, or have some other person who owned at least a half water right draw his water from the same headgate, before the company would permit the water to be taken through a certain headgate, and the applicant was unable to purchase the additional water right, and was likewise unable to find any person who was willing to draw his water through the same headgate, it was held to be the duty of the company to furnish the water, and to put

sign a contract containing unreasonable terms as a condition precedent to his receiving the water.⁶ It can not demand that the consumer pay all back dues and arrears for water previously received by him.⁷ Neither can a company demand that before the consumer receive the water that he buy a certain number of shares of the company's stock.⁸ Neither can the company demand an advance payment for a perpetual water right,⁹ nor can a company require a user to sign a contract at the beginning of each irrigation season to the effect that his use of the water from the company's canal for the season should give him no claim to the use of the water in the future, and that he thereby waives any right which he might have by virtue of any statute, custom, or law, to the use of the water, after the expiration of the period limited by the contract, for the reason that the user was entitled by law to such water and to compulsory service of the same by the company in case they failed to furnish it.¹⁰ As was said in a recent Idaho case:¹¹ "When one enters into a contract by reason of compulsion, or threats, there is nothing but the form of a contract, without its substance. When a party is entitled to water from a ditch company and does all that the laws of the State require him to do in order to get that water, the company is bound to deliver the water, and can not legally require the party making the application to sign a special contract binding him to do things which the law does not require him to do. And a contract like the one in question, executed under the circumstances alleged in the answer, is in contravention of the laws of this State, and is voidable, if not void."

in the headgate at the expense of the company. *Downey v. Twin Lakes etc. Co.*, 41 Colo. 385, 92 Pac. Rep. 946.

⁶ *Green v. Byers*, 16 Idaho 178, 101 Pac. Rep. 79, citing 9 Cyc., p. 450.

⁷ The remedy of the company in such a case is a suit to recover the arrears. *Crow v. San Joaquin etc. Co.*, 130 Cal. 309, 62 Pac. Rep. 562, 1058; *Kimball v. Northern Colorado Irr. Co.*, 42 Colo. 412, 94 Pac. Rep. 333; *Hatch v. Consumers' etc. Co.*, 17 Idaho 204, 104 Pac. Rep. 670; *Shelby v. Farmers' etc. Co.*, 10 Idaho 723, 80 Pac. Rep. 222.

⁸ *Combs v. Agricultural D. Co.*, 17

Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; *Gould v. Maricopa etc. Co.*, 8 Ariz. 429, 76 Pac. Rep. 598; *Baker etc. Co. v. Baker City*, 58 Ore. 306, 110 Pac. Rep. 392, 113 Pac. Rep. 9.

⁹ *Wheeler v. Northern Colorado Irr. Co.*, 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603.

¹⁰ *Gould v. Maricopa etc. Co.*, 8 Ariz. 429, 76 Pac. Rep. 598; *San Diego Co. v. Sharp*, 97 Fed. Rep. 394, 38 C. C. A. 220.

¹¹ *Green v. Byers*, 16 Idaho 178, 101 Pac. Rep. 79, citing 9 Cyc., p. 450.

§ 1499. **Duty to furnish water—Without discrimination or preference.**—Water corporations organized for profit, being public service, or quasi-public corporations,¹ to the full extent of their capacity are bound to furnish water from their system of works to all persons desiring to use it, on equal terms and without discrimination. In this respect they stand upon the same footing as railroad companies. Neither have the right nor power to place themselves in a position where they can not serve every person on equal terms with every other person.² A corporation has no more right to discriminate as to the personnel of its consumers, than it has to discriminate as to the rates for which it will furnish them the water. Therefore, it must follow that such a corporation must, in the first instance, furnish the water to its consumers, without discrimination, in the order of the legal applications for the same and the tender of the established rates, until the full capacity of its system and the water supply which it owns, or controls, is exhausted. And any attempted discrimination in this respect will be looked upon with disfavor by the courts, and any clause in a contract which, if enforced, would render the company unable to serve the public on those terms, or to carry out its main purpose for which such public service corporation was organized, is illegal and void.³

¹ See Sec. 1493.

² *Sammons v. Kearney etc. Co.*, 77 Neb. 580, 110 N. W. Rep. 308, 8 L. R. A., N. S., 404.

³ Where there was an attempt upon the part of a company to give a single party an exclusive right for a term of years to use its entire supply of water, which, under the law, the irrigation company was bound to furnish to the public on equal terms, such a contract is contrary to public policy and illegal. *Sammons v. Kearney etc. Co.*, 77 Neb. 580, 110 N. W. Rep. 308, 8 L. R. A., N. S., 404; *Souther v. San Diego etc. Co.*, 112 Fed. Rep. 228, 121 Fed. Rep. 347, 57 C. C. A. 561; *Leavitt v. Lassen Irr. Co.*, 157 Cal. 82, 106 Pac. Rep. 404.

That the service must be without

discrimination, see *Lassen Irr. Co. v. Long*, 157 Cal. 94, 106 Pac. Rep. 409; *Crow v. San Joaquin etc. Co.*, 130 Cal. 309, 62 Pac. Rep. 562, 1058; *Sammons v. Kearney Irr. Co.*, 77 Neb. 580, 110 N. W. Rep. 308, 8 L. R. A., N. S., 404; *Hatch v. Consumers' etc. Co.*, 17 Idaho 204, 104 Pac. Rep. 670; *Gould v. Maricopa etc. Co.*, 8 Ariz. 429, 76 Pac. Rep. 598; *Lanning v. Osborne*, 76 Fed. Rep. 319; *San Diego Co. v. Sharp*, 97 Fed. Rep. 394, 38 C. C. A. 220; *Niday v. Barker*, 16 Idaho 703, 101 Pac. Rep. 254; *Gould v. Maricopa Canal Co.*, 8 Ariz. 429, 76 Pac. Rep. 598; *Erp v. Raywood Canal & Mill Co.*, — Tex. Civ. App. —, 130 S. W. Rep. 897.

See, also, for State control of water rates, Chap. 69, Secs. 1368-1385.

§ 1500. **Duty to furnish water—Order of priority.**—Although the rule is that a public service corporation must furnish the water in the first instance without discrimination between its customers,¹ where a consumer has once established a right to the use of the water for one year, it is made the duty of the company, in the succeeding years to continue to furnish him the water in preference to the later applicants, provided, of course, he still desires the water and has in no way forfeited his right to the use of the same. It must be remembered that in cases of this nature the capacity of the works of these public service corporations is limited; then, again, the water which it owns or controls is of a limited quantity. And, under these conditions, it may be impossible for the company to furnish it to all persons who may desire it; and, therefore, the company has the right, and it is made the duty to discriminate between the applicants to this extent only, that it may give the preference right to its old customers rather than to new, or later ones. Under the conditions existing, this is the only just and equitable rule which can be adopted. A settler who has been induced by one of these companies to settle upon a tract of land under its system, upon the representations that the company will furnish him the water, should have reasonable assurance that the water will be furnished subsequently to the first year of his settlement. This the law provides by declaring in those States where the consumer is the appropriator, that he has a priority of appropriation to the extent of his use; and, therefore, he has the right to require the company to furnish him the water in preference to later applicants.² And, in those States

¹ See previous section, No. 1499.

² For the relation of company to consumers, see Secs. 1475-1477.

"If applications for water be made during any season in excess of the capacity of the canal to furnish it, the canal company would have the right, and, indeed, it would be the duty, to limit the contracts for the season to its capacity and to those appropriators possessing the older rights of appropriation." *Gould v. Maricopa Canal Co.*, 8 Ariz. 429, 76 Pac. Rep. 598.

"It is clear that the water had been

applied to respondent's lands during at least a part of one previous year, and a part, if not a whole, of another year, under rental rate, and the use thereof resulted in a dedication of the waters under the provisions of Section 4 of Article 16 of the constitution, and the canal company could no longer deny him the right for such waters as had been supplied so long as he continued to pay the rental charges." *Niday v. Barker*, 16 Idaho 703, 101 Pac. Rep. 254.

Indians having assisted in the construction of a canal, and used the

which hold that the company is the appropriator and the owner of the water rights, it is governed by special statutes, regulating such distribution of the water by such corporations.³

Where a company has but a limited supply of water, new consumers taking water from its works can insist only on the use of such surplus as there may be, and only at such times as there is such a surplus.⁴

§ 1501. Duty to have adequate works and to keep them in repair.—The law also makes it the duty of all water corporations organized for profit, and therefore public service, or quasi-public corporations, to have adequate works for the delivery of water to all

water therefrom for a number of years, are entitled to a continuation of the use upon their bearing their proportion of the maintenance of the ditch. *Biggs v. Utah etc. Co.*, 7 Ariz. 331, 64 Pac. Rep. 494; *Atlantic Trust Co. v. Woodbridge etc. Co.*, 79 Pac. Rep. 39; *Id.*, 79 Fed. Rep. 501, 86 Fed. Rep. 975; *Hard v. Boise City etc. Co.*, 9 Idaho 598, 76 Pac. Rep. 331, 65 L. R. A. 407; *Northern Colo. Irr. Co. v. Richards*, 22 Colo. 450, 45 Pac. Rep. 423; *Golden Canal Co. v. Bright*, 8 Colo. 144, 6 Pac. Rep. 142; *Wheeler v. Northern Colo. Irr. Co.*, 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; *Hargrave v. Hall*, 3 Ariz. 252, 73 Pac. Rep. 400; *Farmers' High Line etc. Co. v. Southworth*, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767; *Wyatt v. Larimer etc. Co.*, 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; *Brown v. Farmers' etc. Co.*, 26 Colo. 66, 56 Pac. Rep. 183; *Combs v. Agricultural D. Co.*, 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; *Wilterding v. Green*, 4 Idaho 773, 45 Pac. Rep. 134; *San Diego etc. Co. v. Sharp*, 97 Fed. Rep. 394, 38 C. C. A. 220; affirming *Id.*, 89 Fed. Rep. 295; *Mandell v. San Diego etc. Co.*, 89 Fed. Rep. 295;

Western etc. Co. v. Chapman, 8 Kan. App. 778, 59 Pac. Rep. 1098; *Gerber v. Nampa etc. Dist.*, 16 Idaho 1, 100 Pac. Rep. 80; *Id.*, 19 Idaho 765, 116 Pac. Rep. 104.

³ *Wilterding v. Green*, 4 Idaho 773, 45 Pac. Rep. 134, where it is held that when such waters are used for one year, or a term of years, the right to such use becomes perpetual, unless limited by contract.

See, also, *Hard v. Boise City etc. Co.*, 9 Idaho 589, 76 Pac. Rep. 331, 65 L. R. A. 407; *Merrill v. South Side Irr. Co.*, 112 Cal. 433, 44 Pac. Rep. 720; *San Diego etc. Co. v. Sharp*, 97 Fed. Rep. 394, 38 C. C. A. 220; affirming *Id.*, 89 Fed. Rep. 295; *Mandell v. San Diego etc. Co.*, 89 Fed. Rep. 295.

For the rule as to prorating in times of scarcity of water, see Sec. 1502.

⁴ *Gerber v. Nampa Irr. Co.*, 16 Idaho 1, 100 Pac. Rep. 80; *Id.*, 19 Idaho 765, 116 Pac. Rep. 104; *Niday v. Barker*, 16 Idaho 703, 101 Pac. Rep. 254, wherein it is held that under the constitutional provisions of the State of Idaho, priority of appropriation gives the better right as between those using water furnished by an irrigation company.

consumers whose lands lie under the system, and which, with reasonable effort upon the part of the corporation, might be furnished with water therefrom. It is, therefore, made the duty of such a company to turn the water for the consumer out of its main canal, or lateral, at such a place as will be most convenient for the consumer, and will cause less waste of the water by seepage and evaporation. And, for this purpose, it is the duty of the corporation to construct such headgates, laterals, or other works, as will best meet the reasonable requirements of the consumers and of the law.¹ And, furthermore, it is made the duty of such water companies to keep their ditches, canals, and other works in such repair as to be able to carry the water to the several consumers along the lines thereof, even if in certain instances the cost of such repairs exceeds the rental charges paid by the consumers.²

§ 1502. Duty to furnish water—Order of priority—Rule as to prorating in times of scarcity.—But there is another phase of this question which has presented itself a number of times to the courts upon the subject of priority of rights between consumers furnished water by the same corporation, and that is as to what amount of

¹ That it is the duty of the company to construct the necessary headgates, at points where the water can be best used by the consumer, see *Downey v. Twin Lakes etc. Co.*, 41 Colo. 385, 92 Pac. Rep. 946; *Niday v. Barker*, 16 Idaho 703, 101 Pac. Rep. 254; *International etc. Co. v. City of El Paso*, 51 Tex. Civ. App. 321, 112 S. W. Rep. 816; *Sisk v. Gravity Canal Co.*, — Tex. Civ. App. —, 113 S. W. Rep. 195; *Bean v. Stoneman*, 104 Cal. 49, 37 Pac. Rep. 777, 38 Pac. Rep. 39; *Hatch v. Consumers' etc. Co.*, 17 Idaho 204, 104 Pac. Rep. 670; *Tarpey v. Lynch*, 155 Cal. 407, 101 Pac. Rep. 10; *Crow v. San Joaquin etc. Co.*, 130 Cal. 309, 62 Pac. Rep. 562, 1058; *Gerber v. Nampa Irr. Dist.*, 16 Idaho 1, 100 Pac. Rep. 80; *Id.*, 19 Idaho 765, 116 Pac. Rep. 104; *Green v. Byers*, 16 Idaho 178, 101 Pac. Rep. 79, citing 9 Cyc. p. 450.

² "The further contention is made in this connection that to keep this lateral in sufficient repair to deliver water to respondent's lands will entail such an enormous cost as will greatly exceed the rental charges paid by the respondent. This is not a sufficient reason for refusing to deliver the water. We do not apprehend that rental charges for the use of water from irrigating canals are based upon the actual expenses of carriage and delivery to each individual customer. . . . This is not the theory on which water rates are established." *Niday v. Barker*, 16 Idaho 703, 101 Pac. Rep. 254.

See, also, *Bothwell v. Consumers' Co.*, 13 Idaho 568, 92 Pac. Rep. 533, 24 L. R. A., N. S., 425; *Pocatello Water Co. v. Standley*, 7 Idaho 155, 61 Pac. Rep. 518.

water consumers are entitled to in times of great scarcity, and when, on that account, the corporation is not able to furnish all the water which the old consumers need, and which they had used in previous years. The rule of law upon this subject differs in the different States, according as to whether the corporation is considered the mere carrier of the water, and "as an intermediate agency existing for the purpose of aiding consumers in the exercise of their rights,"¹ or whether it is regarded as the appropriator of the water and the owner of the water rights.² In the States holding to the former rule, led off by Colorado, the consumers are held to be the appropriators in the order of their respective priorities; and, therefore, they must be furnished the water by the company in the order of their respective priorities, and the last comers must bear the burden of the shortage alone. It is also held that they can not be compelled to prorate with those having later priorities, either by the by-laws of the corporation, or by a statute enacted for that purpose.³ But in these jurisdictions contracts between the consumers and the company, or between the consumers themselves, to prorate the water in times of scarcity will be enforced by the courts.⁴

But in those States which hold that the water corporation is the appropriator of the water and the owner of the water rights, the consumers taking the water from the same system are considered on an equality, regardless of the time that each began the use. And, therefore, in times of scarcity, it is the duty of the company to prorate the water, according to the respective rights of each, and the

¹ *Wyatt v. Larimer etc. Co.*, 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; reversing 1 Colo. App. 480, 29 Pac. Rep. 906; *Combs v. Agricultural D. Co.*, 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275.

² For relation of company to consumers, see Secs. 1475-1477.

³ "It therefore may be considered as *stare decisis* in this jurisdiction that there may be circumstances in which water consumers from the same ditch may not be compelled to prorate with each other." *Farmers' etc. Co. v. White*, 32 Colo. 114, 75 Pac. Rep. 415.

See, also, *Farmers' etc. Co. v. Southworth*, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767; *Combs v. Agricultural D. Co.*, 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; *Farmers' Ind. D. Co. v. Agricultural D. Co.*, 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149; *Brown v. Farmers' etc. Co.*, 26 Colo. 66, 56 Pac. Rep. 183.

⁴ *O'Neil v. Ft. Lyon Canal Co.*, 39 Colo. 487, 90 Pac. Rep. 849.

See, also, *Jackson v. Indian Creek etc. Co.*, 16 Idaho 430, 101 Pac. Rep. 814.

For duty to furnish water under contract, see Sec. 1498.

burden of the shortage rests upon all of the consumers, and not upon those who took the water last.⁵

§ 1503. **Power to make rules and regulations for furnishing water.**—As is the case with mutual corporations organized for the purpose of furnishing water only to their own shareholders,¹ so it is with all water corporations organized for the purpose of furnishing water to others for profit, they are empowered to make such reasonable rules and regulations to govern their own operations, and their dealings with the consumers of the water furnished by them as they see fit.² A company may limit the amount of water that it will furnish to so much as may be necessary for the purposes for which it is used.³ These rules and regulations may be embodied in the articles of incorporation, or they may be in the form of by-laws or resolutions formally adopted by the stockholders or directors of the corporation; or, again, they may be contained in contracts between the company and its consumers.⁴ Such rules and

⁵ *Souther v. San Diego etc. Co.*, 112 Fed. Rep. 228, 121 Fed. Rep. 347, 57 C. C. A. 561; *Richey v. East Redlands etc. Co.*, 141 Cal. 221, 74 Pac. Rep. 754, where it is held that in the absence of a provision to the contrary in the certificates of stock, or in the resolutions, by-laws, or charter authorizing their issue, or other writing, the consumers must be regarded as being equal in right.

See, also, *Leavitt v. Lassen Irr. Co.*, 157 Cal. 82, 106 Pac. Rep. 404.

¹ Power of mutual corporations to make rules and regulations, see Sec. 1488.

² *Shelby v. Farmers' Co-op. D. Co.*, 10 Idaho 723, 80 Pac. Rep. 222; *Golden Canal Co. v. Bright*, 8 Colo. 144, 6 Pac. Rep. 142, where it is said: "It is conceded by counsel in argument that the ditch owner may make reasonable rules, to be observed both by himself and the consumer, in the sale and distribution of water from his ditch."

The company may make reasonable rules as to the apportionment of the water in times of scarcity, in States where the company is considered the appropriator and the owner of the water rights. *Souther v. San Diego Flume Co.*, 121 Fed. Rep. 347, 57 C. C. A. 561; affirming 112 Fed. Rep. 228.

See, also, *Wright v. Platte etc. Co.*, 27 Colo. 322, 61 Pac. Rep. 603; *Highland D. Co. v. Mumford*, 5 Colo. 325; *Cozzens v. North Fork Ditch Co.*, 2 Cal. App. 404, 84 Pac. Rep. 342.

³ *Wright v. Platte Val. Irr. Co.*, 27 Colo. 322, 61 Pac. Rep. 603.

⁴ For contracts with water companies, see Secs. 1509-1529.

The law regulating water rights, being in the exercise of the police powers of the State, is paramount to a private contract, though such contract antedates the passage of the law, and the rights given by the contract must yield where they are in contravention of the provisions of the

regulations, however, must not conflict with the constitutional rights of the consumers to receive the water.⁵ The company can not require, as a condition precedent to its furnishing the water, that consumers comply with rules which are clearly unreasonable in their nature. So, whether there is any express constitutional or legislative declaration on the subject or not, all unreasonable rules, regulations, or demands upon the part of the company which operate to withhold or prevent the exercise of the constitutional or statutory right of the consumers to receive the water, must be held illegal and void.⁶ And, as to whether rules and regulations adopted by a company are reasonable, or unreasonable, in their nature, outside of the question as to whether they conflict with some constitutional, or statutory provision, depends upon the facts of each particular case. But a corporation can not by a rule require a prior purchaser, who has complied with all the provisions of the law and is entitled to the water, as a condition precedent to the furnishing

statute. *White v. Farmers' etc. Co.*, 22 Colo. 191, 43 Pac. Rep. 1028, 31 L. R. A. 828; affirming 5 Colo. App. 1, 31 Pac. Rep. 345.

Since the obligations of a private corporation organized to sell arid lands and to furnish water for their irrigation are quasi-public, such company can not impose arbitrary restrictions upon the supply of water under the guise of regulations. *Shafford v. White Bluffs Land & Irr. Co.*, 63 Wash. 10, 114 Pac. Rep. 883.

“A ditch company diverting water from a natural stream for general purposes of irrigation can not, by provision or declaration of its by-laws, exempt itself or its stockholders from the operation of the State constitution.” *Combs v. Agricultural D. Co.*, 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275.

So, where the carrier demanded \$10 per acre, in advance, in addition to the yearly rental fixed by it, it was said by the Court: “But the legislature itself can not establish the

unreasonable rule which we have been considering, which enables the carrier to accomplish a wholesale discrimination between consumers, and deny, if it chooses, to a majority of them, the right secured to them by the constitution. A regulation or rule entailing such results, whether established by the legislature or carrier, must be regarded as within a constitutional inhibition.” *Wheeler v. Northern Colo. Irr. Co.*, 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603.

See, also, *Crow v. San Joaquin etc. Co.*, 130 Cal. 309, 62 Pac. Rep. 562, 1058; *Slosser v. Salt River etc. Co.*, 7 Ariz. 376, 56 Pac. Rep. 332; *Gould v. Maricopa Canal Co.*, 8 Ariz. 429, 76 Pac. Rep. 598; *Downey v. Twin Lakes etc. Co.*, 41 Colo. 385, 92 Pac. Rep. 946; *Combs v. Agricultural D. Co.*, 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; *Wilterding v. Green*, 4 Idaho 773, 45 Pac. Rep. 134; *Colorado Canal Co. v. Mayes*, 38 Tex. Civ. App. 271, 85 S. W. Rep. 448.

of the water, to acknowledge the equity of all rules adopted by the company.⁷ A public service corporation can not, by rules and regulations, refuse to furnish water to consumers to whom it has previously furnished the water, and, at will, change the water to other consumers. If this were so, the owners of irrigated lands would be "at the mercy of the corporation, who may ruthlessly destroy the crops of the season, or, in the case of orchards and vineyards, the result of many seasons' industry by refusing to continue the supply of water."⁸ So, a by-law of a company which provides that "any person who shall for two successive years fail to pay for water . . . shall be deemed to have forfeited his right thereto," can not have the effect of vesting title to the water right in the company, or of vesting title thereto in another, if the company delivers the same amount of water to the other consumer.⁹ So, where such a corporation has by rule fixed a time limit within which applications for water must be filed with it, it is held that notwithstanding an application was not made within the time set, nevertheless, if the company has any water undisposed of, the statutory right to such water is not forfeited by such rule.¹⁰ In fact, no water corporation which is organized for the purpose of furnishing water to others for profit, or which, by a reasonable construction of their articles of incorporation may be permitted to do so, can adopt such rules or regulations as will exempt itself from the duty of furnishing water to all applicants who have complied with the statutory requirements and are entitled to the use of the water, or to discriminate against, or give any preference to any applicant, or class of applicants, other than in regard to the priority of rights of consumers to the use of the water, so long as the company owns or controls water which it might furnish.¹¹ As to the corporation or-

⁷ *Golden Canal Co. v. Bright*, 8 Colo. 144, 6 Pac. Rep. 142.

⁸ *Merrill v. South Side Irr. Co.*, 112 Cal. 433, 44 Pac. Rep. 720.

See, also, for the priority of rights of applicants, Sec. 1502.

Plaintiff, the first to buy and the first to use water of an irrigation company, under a contract by which it agrees to sell him, for all time, water sufficient to irrigate 160 acres, may not be subjected to the same

rules of distribution as those who subsequently purchase rights. *Hargrave v. Hall*, 3 Ariz. 252, 73 Pac. Rep. 400.

⁹ *Cooper v. Shannon*, 36 Colo. 98, 85 Pac. Rep. 175, 118 Am. St. Rep. 95.

¹⁰ *Golden Canal Co. v. Bright*, 8 Colo. 144, 6 Pac. Rep. 142; *Cooper v. Shannon*, 36 Colo. 98, 85 Pac. Rep. 175, 118 Am. St. Rep. 95.

¹¹ That prior applicants are entitled to the water first, see Sec. 1502.

ganized only to furnish water to its own shareholders, or strictly mutual corporations, the rule is different.¹²

§ 1504. Rules governing the collection of water rates.—A water corporation engaged in the business of furnishing water to others may, by rules and regulations, require the claimants of water from it to pay, or secure to be paid, in advance before such company can be required to furnish any water to the applicants for the same.¹ But the right of a company to enforce such a rule for payment in advance applies only to the current year for which the water is required, and that, too, even though the applicant be in arrears for previous years. Where the company has waived its right in this respect to collect the legal rates in advance, and has furnished the water which was not paid for, any rule, or regulation of the company which requires the payment of arrearages, as a condition precedent to the company furnishing the water for the current year is void. And, under this condition of affairs, the consumer may compel the company by an action in mandamus to furnish the water.²

That a company must give preference to old customers, see Sec. 1502.

Where the by-laws of a company provided, "No water shall be sold from the company's ditch except to stockholders," the Court held that in spite of the by-law, the articles of incorporation provided that water might be furnished to others, and that it was the duty of the company to so furnish it. *Combs v. Agricultural D. Co.*, 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; *Eaton v. Larimer & Weld Irr. Co.*, 35 Colo. 16, 83 Pac. Rep. 627.

¹² For rules and regulations of mutual corporations, see Sec. 1488.

For the distinction between the rights of mutual corporations and public service corporations as to the adoption of rules limiting the right to furnish water, see *Slosser v. Salt River etc. Co.*, 7 Ariz. 376, 56 Pac. Rep. 332; *Gould v. Maricopa Canal Co.*, 8 Ariz. 429, 76 Pac. Rep. 598; 170—Kin. on Irr.

Salt River etc. Co. v. Nelssen, 10 Ariz. 9, 85 Pac. Rep. 117, 12 L. R. A., N. S., 711.

¹ *Shelby v. Farmers etc. Co.*, 10 Idaho 723, 80 Pac. Rep. 222; *Wheeler v. Northern Colo. Irr. Co.*, 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603.

"The right of a party, therefore, to water for each year, depends upon the users complying with the statute as to payment of compensation, or tender of security therefor; and until such compensation, or security therefor, is actually tendered to the owner of such irrigation canal or works, no action has accrued (mandamus) of which the courts will take cognizance." *Bardaly v. Boise etc. Co.*, 8 Idaho 155, 67 Pac. Rep. 428.

² So where the rule was, "No land will be supplied with water unless all dues and claims for previous supply on that land shall have been paid," it was said by the Court: "If this

The remedy of the company is by a suit at law to enforce such payments of arrearages, and not by rule or regulation refusing to furnish water until such arrearages are paid.³ And, again, the company can not enforce a rule requiring the payment for the water for years in advance.⁴

§ 1505. Rules for the regulation of use of water by consumers.

—As to how far a water corporation organized for profit can go by rules and regulations to regulate the actual use of the water by the consumers after the water has been delivered to them by the company involves a number of questions, some of which have been discussed under other heads. As a general proposition, however, where water has been once delivered to a consumer, or to a ditch from which a number of consumers take their water, he or they may apply the water in any manner that they see fit. In California it is provided by statute that: "No person, company, or corporation selling water for irrigation shall be permitted to exercise any control as to the use of water after the delivery to the purchaser."¹ It is also held, in a recent case in Idaho, that the times and order of use and the application of the water by several land owners under

could be considered as a contract binding upon the user of the water for all future time, it would be without consideration; for it was the duty of the defendant company to furnish the plaintiff with the water, whether he agreed to the regulations or not." *Crow v. San Joaquin etc. Co.*, 130 Cal. 309, 62 Pac. Rep. 562, 1058.

³ *Shelby v. Farmers' etc. Co.*, 10 Idaho 723, 80 Pac. Rep. 222; *Kimball v. Northern etc. Co.*, 42 Colo. 412, 94 Pac. Rep. 333; *Equitable Securities Co. v. Montrose etc. Co.*, 20 Colo. App. 465, 79 Pac. Rep. 747; *Crow v. San Joaquin etc. Co.*, 130 Cal. 309, 62 Pac. Rep. 562, 1058; *Sheward v. Citizens' W. Co.*, 90 Cal. 635, 27 Pac. Rep. 439; *Bardsly v. Boise etc. Co.*, 8 Idaho 155, 67 Pac. Rep. 428; *Leavitt v. Lassen Irr. Co.*, 157 Cal. 82, 106 Pac. Rep. 404; *Hatch v. Con-*

sumers' Co., 17 Idaho 204, 104 Pac. Rep. 670.

⁴ "A further consideration worthy of mention in passing, bearing, at least, upon the unreasonableness of the view urged upon us, is the position of the consumer who pays the charges for 20 years in advance. What assurance has he that the carrier can or will keep his engagement during that period? Its business is attended with considerable hazard, and requires large and continuing expenditures of money. The consumer may find himself without water, and dependent for the recovery of his large advancement upon the doubtful experiment of suit against an insolvent company." *Wheeler v. Northern Colo. Irr. Co.*, 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603.

¹ See laws Cal., 1880, p. 16; 2 Deering's Code 271.

the same lateral are matters of no concern to the company furnishing the water, and that where several land owners under the same lateral by agreement among themselves distribute and use the water at the times and in the manner agreeable to themselves, the company has no duty, but that the requisite quantity of water for all flows through the headgate into the lateral. And, therefore, any rule of the company limiting the rights of such consumers to the rotation of the use between the consumers would be void.² In those States where the company is deemed the appropriator of the water and the owner of the water rights,³ the company may adopt reasonable rules, whereby, in times of scarcity of water, the water may be prorated among the consumers during these periods, so that all may receive a portion of the water.⁴ But in those States where the consumer is considered the appropriator and the owner of the water rights, a corporation can not, by the adoption of by-laws, rules, or regulations, force their consumers to prorate the water in times of scarcity.⁵ However, a contract between the consumers and the company in this respect will be enforced by the courts.⁶ A company may also by contract, or rule, limit the amount of the water which it will furnish consumers to that reasonably necessary for the use to which it is applied.⁷ It is also held that a company can not by rule prevent a consumer from changing his place of use, or restrict the use to a specific tract of land, or prevent him from reselling the water.⁸

² *Helphery v. Perault*, 12 Idaho 451, 86 Pac. Rep. 417.

³ For the relation of the corporation to consumers, see Secs. 1475-1477.

⁴ *Souther v. San Diego etc. Co.*, 112 Fed. Rep. 228, 121 Fed. Rep. 347, 57 C. C. A. 561, holding that in times of scarcity, consumers must share ratably, and that the company has no right to prefer some consumers over others.

See, also, *Richey v. East Redlands etc. Co.*, 141 Cal. 221, 74 Pac. Rep. 754.

For right to priority among consumers, see Secs. 1500, 1502.

⁵ *Farmers' etc. Co. v. White*, 32 Colo. 114, 75 Pac. Rep. 416.

⁶ *O'Neil v. Fort Lyon etc. Co.*, 39 Colo. 487, 90 Pac. Rep. 849.

⁷ *Wright v. Platte Val. Irr. Co.*, 27 Colo. 322, 61 Pac. Rep. 603.

For the economical use of water and the suppression of waste, see Chap. 49, Secs. 874-916.

⁸ *Calkins v. Sorosis etc. Co.*, 150 Cal. 426, 88 Pac. Rep. 1094; *Hard v. Boise etc. Co.*, 9 Idaho 589, 76 Pac. Rep. 331, 65 L. R. A. 407; *Stanislaus W. Co. v. Bachman*, 152 Cal. 716, 93 Pac. Rep. 858; *Johnson v. Little Horse Creek etc. Co.*, 13 Wyo. 208, 79 Pac. Rep. 22, 70 L. R. A. 341, 110 Am. St. Rep. 986.

See, also, that a water right can not be made an inseparable appurtenance to land, Secs. 1015, 1016.

§ 1506. **Duty to furnish water—Compulsory service.**—The State regulations of all the Western States not only make it the duty of all public service, or quasi-public water corporations¹ to furnish water to all *bona fide* consumers and applicants therefor, up to the full extent of their capacity, but also provide that, upon a failure of such a company to so furnish the water, such service may be compelled. This may be done by mandamus, or injunction proceedings. And the law may be considered as well settled that, if such a company, upon proper demand by a *bona fide* consumer, and the payment or tender of the established rates for such service, and the compliance by the applicant of all reasonable conditions and regulations made by the company, refuses to furnish the water, a proceeding in mandamus may be maintained to compel the service, provided, of course, that the company has the water under its control which it might furnish to the applicant.² And, again, where

¹ For public service corporations, see Sec. 1493.

² For actions for mandamus, see Secs. 1506, 1649.

"Every person, company, or corporation engaged in the sale, rental, or distribution of water may be compelled to furnish water to all who require it, to the full extent of the supply of water under the control of such person, company, or corporation. This is a duty specially enjoined by law, and mandate will lie to enforce it." *Cozzens v. North Fork Ditch Co.*, 2 Cal. App. 404, 84 Pac. Rep. 342; *Combs v. Agricultural D. Co.*, 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; *Bardsly v. Boise etc. Co.*, 8 Idaho 155, 67 Pac. Rep. 428; *Fellows v. Los Angeles*, 151 Cal. 52, 90 Pac. Rep. 137; *McCrary v. Beaudry*, 67 Cal. 120, 7 Pac. Rep. 264; *South Boulder D. Co. v. Marfell*, 15 Colo. 302, 25 Pac. Rep. 504; *Wheeler v. Northern Colo. Irr. Co.*, 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; *State ex rel. Crawford v. Minnesota etc. Co.*, 20 Mont. 198, 50 Pac. Rep. 420; *People ex rel.*

Standart v. Farmers' etc. Co., 25 Colo. 202, 54 Pac. Rep. 626; reversing *Id.*, 8 Colo. App. 246, 45 Pac. Rep. 543; *Wilterding v. Green*, 4 Idaho 773, 45 Pac. Rep. 134; *Slosser v. Salt River etc. Co.*, 7 Ariz. 376, 65 Pac. Rep. 332; *Gould v. Maricopa etc. Co.*, 8 Ariz. 429, 76 Pac. Rep. 598; *Hayois v. Salt River etc. Co.*, 8 Ariz. 285, 71 Pac. Rep. 944; *Mahoney v. American etc. Co.*, 2 Cal. App. 186, 83 Pac. Rep. 267; *South Pasadena v. Pasadena etc. Co.*, 152 Cal. 579, 93 Pac. Rep. 490; *Merrill v. South Side Irr. Co.*, 112 Cal. 433, 44 Pac. Rep. 720; *Helphery v. Perault*, 12 Idaho 451, 86 Pac. Rep. 417; *State ex rel. Krutz v. Washington Irr. Co.*, 41 Wash. 283, 83 Pac. Rep. 308, 111 Am. St. Rep. 1019; *Perrin v. San Jacinto etc. Co.*, 4 Cal. App. 376, 88 Pac. Rep. 293; *Hatch v. Consumers' etc. Co.*, 17 Idaho 204, 104 Pac. Rep. 670; *Bardsly v. Boise Irr. Co.*, 8 Idaho 155, 67 Pac. Rep. 428; *Niday v. Barker*, 16 Idaho 703, 101 Pac. Rep. 254; *Miller v. Imperial W. Co.*, 156 Cal. 27, 103 Pac. Rep. 227, 24 L. B. A., N. S., 372.

the company had previously furnished the water to a *bona fide* consumer, and might still continue to do so, but refuses to further furnish it and cuts off the supply, an action for an injunction will lie against the company by the consumer to prevent him from being deprived of the water.³

But an action in ejectment will not lie for frequently cutting off plaintiff's water by the placing of a pressure board therein.⁴

Upon the one hand as the company can not require, as a condition precedent to the furnishing of water, the compliance by the applicant with an unreasonable rule or demand,⁵ so upon the other hand, the State can not compel such companies to furnish the water to consumers without a reasonable compensation; "neither can it do that which in law amounts to the taking of private property for public use without just compensation, or without due process of law."⁶ Nor will the Court compel the company to furnish water by mandamus, in the absence of a specific preliminary demand there-

³ For actions for injunction, see Sec. 1506.

It is the settled doctrine of this State, that "if such a company, upon proper demand and tender of the established rates, refuses to furnish the water, or threatens to cut off the supply, a proceeding in mandamus may be maintained or an injunction issued, to compel the service, or prevent the deprivation thereof." *Fellows v. Los Angeles*, 151 Cal. 52, 90 Pac. Rep. 137.

"In case of the establishment of a water system of this character, all persons to whose use the water is appropriated or dedicated are vested with a right to have the supply continued by whomsoever may be in control thereof." *South Pasadena v. Pasadena etc. Co.*, 152 Cal. 590, 93 Pac. Rep. 490.

See, also, *Crow v. San Joaquin etc. Co.*, 130 Cal. 309, 62 Pac. Rep. 562, 1098; *McCrary v. Beaudry*, 67 Cal. 120, 7 Pac. Rep. 264; *Price v. Riverside etc. Co.*, 56 Cal. 431; *Mahoney v. American etc. Co.*, 2 Cal. App. 186, 83 Pac. Rep. 267; *Atlantic Trust Co.*

v. Woodbridge etc. Co., 79 Fed. Rep. 39; *Id.*, 79 Fed. Rep. 501; *Id.*, 86 Fed. Rep. 975; *Downing v. Agricultural D. Co.*, 20 Colo. 546, 39 Pac. Rep. 336.

But a perpetual mandatory injunction requiring a company to supply water to a consumer for the irrigation of his land will not be granted where such consumer had no right to the water other than that which existed by virtue of a contract for a single season. *Fulton Irr. Co. v. Twombly etc. Co.*, 6 Colo. App. 554, 42 Pac. Rep. 253.

See, also, *Townsend v. Fulton etc. Co.*, 17 Colo. 142, 29 Pac. Rep. 453; *Wheeler v. Northern Colo. Irr. Co.*, 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; *Orcutt v. Pasadena etc. Co.*, 152 Cal. 599, 93 Pac. Rep. 497.

⁴ *Tibbitts v. Bakewell*, — Cal. —, 35 Pac. Rep. 1007.

⁵ See for rules and regulations by a company, Sec. 1505.

⁶ *Wilson v. Perrault*, 6 Idaho 178, 54 Pac. Rep. 617.

for by the person claiming the right to be so supplied,⁷ and payment or a tender of the fixed rate, or a reasonable rate.⁸ Nor would the Court require the company to furnish water against impossible conditions;⁹ nor when the water already furnished to consumers is up to the full maximum capacity of the works of the company, or the water rights which it owns or controls.¹⁰

It is therefore held that by its articles or by-laws, a corporation has the right to limit its service to particular tracts of land, especially where its supply of water is sufficient only to irrigate such lands. It is the universal complaint of all these corporations that their supply of water is not sufficient to irrigate all of the lands under the project. Therefore, such a corporation has not only the power, but it is its duty to furnish water only to those entitled

⁷ Price v. Riverside etc. Co., 56 Cal. 431.

⁸ For State control of water rates, see Chap. 69, Secs. 1368-1385.

See, also, Lassen Irr. Co. v. Long, 157 Cal. 94, 106 Pac. Rep. 409; Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. Rep. 404; Wheeler v. Northern Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; San Diego etc. Co. v. San Diego, 118 Cal. 556, 50 Pac. Rep. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261; Salt River etc. Co. v. Nalssen, 10 Ariz. 9, 85 Pac. Rep. 117, 12 L. R. A., N. S., 711, 16 Am. & Eng. Ann. Cas. 796; Wilson v. Perrault, 6 Idaho 178, 54 Pac. Rep. 617; Hoover v. Deffenbaugh, 83 Neb. 476, 119 N. W. Rep. 1130; San Joaquin etc. Co. v. Stanislaus County, 155 Cal. 21, 99 Pac. Rep. 365; Lanning v. Osborne, 76 Fed. Rep. 319; City of Pocatello v. Murray, 173 Fed. Rep. 382.

⁹ "We do not mean to say that a corporation engaged in the distribution of water to public uses may not abandon its property and quit the business, without being subject to mandatory proceedings to compel it to continue to carry it on. It may find

it impossible to go on. Its supply may become exhausted or be insufficient for paramount needs; the rates fixed by law may be too small to enable it to operate at a profit, or without substantial loss; or, it may conclude, without reason which the law would consider sufficient, that it will not continue. In cases of a natural person it might become physically impossible. We do not declare that in any such case mandatory process would be issued to compel the personal performance of the duty. . . . But in such a case, *it can not continue in absolute control of the water and waterworks appropriated to the public service.*" Fellows v. Los Angeles, 151 Cal. 52, 90 Pac. Rep. 137.

¹⁰ A petition for mandamus to compel a company to furnish water which fails to allege that the company had water in sufficient quantity not only to supply the plaintiff, but to supply all of the water takers, in compliance with the legal duty imposed upon it, is demurrable. Cozzens v. North Fork D. Co., 2 Cal. App. 404, 84 Pac. Rep. 342.

See, also, Price v. Riverside etc. Co., 56 Cal. 431.

thereto within its capacity and water supply. As was held in a late California case,¹¹ it is not in derogation of Section 1 of Article 14 of the constitution for a water company in possession of a limited amount of water to fix the limits of the territory to the irrigation of which it shall be devoted and agree to supply the water first to such lands, and then to supply the surplus only to outsiders. But, upon the other hand, it is held that should such a company undertake to supply parties beyond their capacity, or more water than the company owns or controls, any consumer whose rights might be injured thereby, may secure an injunction against such action upon the part of the company.¹²

§ 1507. Duty to furnish water—Damages for failure.—But not only may a consumer of water bring an action in equity to compel a corporation for profit having or controlling unsold water,¹ to furnish the water, upon proper demand and the tender of established rates, but also, under the statutory duty of the corporation to furnish the water,² in an action for damages brought by the consumer against the corporation, such damages may be recovered as are the direct result of the failure to furnish the water.³ However, as the

¹¹ *Leavitt v. Lassen Irr. Co.*, 157 Cal. 82, 106 Pac. Rep. 404.

¹² *Farmers' etc. Co. v. Southworth*, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767; *Wyatt v. Larimer & Weld Irr. Co.*, 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; *Brown v. Farmers' etc. Co.*, 26 Colo. 66, 56 Pac. Rep. 183; *Gould v. Maricopa etc. Co.*, 8 Ariz. 429, 76 Pac. Rep. 598; *Broadmoor etc. Co. v. Brookside etc. Co.*, 24 Colo. 541, 52 Pac. Rep. 792; *Souther v. San Diego Co.*, 112 Fed. Rep. 228; *Water Supply etc. Co. v. Larimer etc. Co.*, 24 Colo. 322, 51 Pac. Rep. 496, 46 L. R. A. 322; *Gerber v. Nampa Irr. Dist.*, 16 Idaho 1, 100 Pac. Rep. 80; *Id.*, 19 Idaho 765, 116 Pac. Rep. 104; *McDermont v. Anaheim etc. Co.*, 124 Cal. 112, 56 Pac. Rep. 779; *Lanning v. Osborne*, 76 Fed. Rep. 319; *Blakely v. Ft. Lyon etc. Co.*, 31 Colo. 224, 73

Pac. Rep. 249; *La Junta etc. Co. v. Hess*, 6 Colo. App. 497, 42 Pac. Rep. 50; *New La Junta etc. Co. v. Kreybill*, 17 Colo. App. 26, 67 Pac. Rep. 1026.

¹ See Sec. 1506.

² For duty to furnish water, see Secs. 1498-1502.

³ For actions for damages, see Secs. 1560 *et seq.*; *Northern Colo. Irr. Co. v. Richards*, 22 Colo. 450, 45 Pac. Rep. 423; *Pawnee etc. Co. v. Jenkins*, 1 Colo. App. 425, 29 Pac. Rep. 381; *Crow v. San Joaquin etc. Co.*, 130 Cal. 309, 62 Pac. Rep. 562, 1098; *Golden Canal Co. v. Bright*, 8 Colo. 144, 6 Pac. Rep. 142; *Lowe v. Yolo County etc. Co.*, 8 Cal. App. 167, 96 Pac. Rep. 379; affirmed, 157 Cal. 503, 108 Pac. Rep. 297.

See, also, *Dalton v. Kelsey*, 58 Ore. 244, 114 Pac. Rep. 464.

Where a buyer of an irrigation

consumer's right dates only from the time of the lawful demand and the tender of the rate, in an action for damages for the failure to furnish the water, the defendant company is liable only for the loss sustained after such demand and tender.⁴ Not only may actual damages be recovered for the failure of a company to furnish water, but where the company has been guilty of oppression, fraud, or malice, exemplary or punitive damages may be recovered.⁵ The company is not liable, however, in the absence of contract where, without fault, the supply of water ran short and for that reason it was unable to deliver the water.⁶

The burden of proof is upon the corporation where it has failed to supply consumers with water, to show good cause for not doing so.⁷

§ 1508. **State regulations—For protection of rights of company.**—Not only may a State provide laws for the protection of the rights of the consumers of the water furnished by public service or quasi-public corporations,¹ and prescribe the various duties of such corporations organized for profit, as discussed in the previous sections,² but it may also provide laws for the protection of the various rights acquired by those corporations. These private water corporations,

plant accepted the plant when completed, and stated in writing that it was erected according to the contract, and he procured an extension of the note for the price, based on his waiver of all damages, he could not recover damages for the sellers' failure to deliver the plant in time. *Fairbanks etc. Co. v. Stites*, — Tex. Civ. App. —, 125 S. W. Rep. 636.

For actions for damages for failure to furnish water, see Chap. 83.

See, also, for damages for the failure to furnish water under contract, Sec. 1507.

⁴ *Western etc. Co. v. Chapman*, 8 Kan. App. 778, 59 Pac. Rep. 1098.

⁵ *Lowe v. Yolo County etc. Co.*, 8 Cal. App. 167, 96 Pac. Rep. 379; affirmed, 157 Cal. 503, 108 Pac. Rep. 297.

But see *Mabb v. Stewart*, 133 Cal.

556, 65 Pac. Rep. 1085, where, under the facts, it was held error to not instruct that punitive damages could not be allowed.

⁶ *Lassen Irr. Co. v. Long*, 157 Cal. 54, 106 Pac. Rep. 409; *Niehaus Bros. v. Contra Costa W. Co.*, 159 Cal. 305, 113 Pac. Rep. 375.

⁷ *Gerber v. Nampa Irr. Dist.*, 16 Idaho 1, 100 Pac. Rep. 80; *Id.*, 19 Idaho 765, 116 Pac. Rep. 104; *Miller v. Mount Nebo etc. Co.*, 37 Utah 1, 106 Pac. Rep. 504.

See, also, for actions for damages, Chap. 83.

¹ That they are public service corporations, see Sec. 1493.

² For the State regulation of the duties of corporations, see Secs. 1495-1497.

organized for the express purpose of profit by furnishing or carrying water for others, are expressly recognized by the constitutions, statutes, and decisions, not only as legitimate, but as necessary organizations.³ And, as it takes the joint actions of the corporation and the consumers to make or maintain a valid appropriation—the one to divert and carry the water to the place of use, and the others to actually apply the water to some beneficial use or purpose—for the successful cultivation of the arid region, both the company and the consumers are therefore equally indispensable. It therefore follows that such corporations are entitled to an equal protection under the law, as are those who are the actual consumers of the water furnished by them.⁴ Therefore, not only will the law protect such corporations in their right to acquire property necessary for their successful operations, such as water rights, rights of way, and other real and personal property,⁵ but it will also protect them in such rights and property after they have been once acquired. Therefore, such a corporation may maintain in its corporate name an action to protect its rights and those of its consumers, without making either its stockholders or consumers parties, and that, too, regardless of the question whether the status of the corporation is regarded as the appropriator of the water, and, therefore, the owner of the water rights, or whether it is regarded as the mere carrier of the water for the consumers, who are regarded as the appropriators

³ For the right to organize water corporations for the purpose of profit, see Sec. 1491.

⁴ "To the successful cultivation of that region, the carrier and consumer are therefore equally indispensable. Hence a wise legislative policy, and an intelligent judicial construction require a careful consideration of the privileges, powers, and duties of the carrier, as well as the rights and obligations of the consumer. The courts should protect the consumer in the full enjoyment of his constitutional and statutory rights; but they should also jealously guard the rights of the carrier, and so deal with it (the consti-

tution and statutes permitting) as to encourage the investment of capital in the construction of reservoirs and canals for the storage and transportation of water." *Wheeler v. Northern Colo. Irr. Co.*, 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603.

See, also, *Wyatt v. Larimer etc. Co.*, 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; reversing *Id.*, 1 Colo. App. 480, 29 Pac. Rep. 906.

⁵ For the appropriation of water by corporations, see Secs. 684, 1470.

For rights of way over public lands, see Chap. 51, Secs. 927-971.

For rights of way over private lands, see Chap. 52, Secs. 972-993.

and the owners of the water rights.⁶ So, too, regardless of this status, such corporations are also entitled to a reasonable compensation for the furnishing of the water from the consumers of the same, whether they are considered as the owners of the water rights and such furnishing is by way of the sale or rental of the same, or merely have a right to compensation for their services for carrying the water to the place of use by its consumers. The State authorities can not fix such a low rate for the water or for the services of the company that it may not be able to realize for its stockholders a reasonable profit for their investment, or which would be confiscatory in its nature.⁷ So, again, the law protects such corporations in the right to make all reasonable contracts with the consumers of the water furnished through their system of works, and the validity of all such legal contracts can not be impaired by subsequent legislation, or by decisions of the courts.⁸ Again, they are protected in the right to make all reasonable rules and regulations governing the distribution of the water to the respective consumers, and the use made thereof by such consumers.⁹ In fact, as to all phases of the subject and as to all questions which may be involved, the rights of such corporations are equally protected by the constitutions, statutes, and the decisions of the courts, as are the rights of the actual consumers of the water.

⁶ For the relation of such corporations to their consumers, see Secs. 1475-1477.

Therefore, a corporation may itself maintain an action to protect the rights of its stockholders and consumers against another company, without making either its stockholders and consumers or those of the other company parties, or setting out the individual rights of its consumers. *Farmers' Ind. D. Co. v. Agricultural D.*

Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149; reversing 3 Colo. App. 255, 32 Pac. Rep. 722.

⁷ For the regulation of water rates, see Chap. 69, Secs. 1368-1385.

⁸ For contracts with corporations, see Secs. 1509-1529.

For the impairment of contracts affecting water rates, see Secs. 1381-1383.

⁹ For rules and regulations by corporations, see Secs. 1488, 1505.

CHAPTER 77.

CONTRACTS WITH COMPANIES.

- § 1509. Scope of chapter.
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- § 1511. Contracts bad as against statute or public policy.
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- § 1527. Breach of contracts—Act of God as excuse for failure to perform.
- § 1528. Breach of contracts—Forfeiture of rights.
- § 1529. Breach of contracts—Damages.

§ 1509. Scope of chapter.—We have discussed the subject of contracts relating to water rights between individuals in another chapter.¹ In this chapter, we will confine our discussion, in the main, to the subject of contracts between corporations, organized for the purpose of furnishing water to others, and individual consumers of the water so furnished.

§ 1510. Corporations for profit—Power to contract.—One of the general powers granted to water corporations organized for the purpose of profit is the power to make contracts with their consumers for the furnishing of water, and for other purposes, and the condi-

¹ See Chap. 50, Secs. 917-926.

tions upon which the water will be furnished. The time has practically passed in this country when a person can settle upon a tract of land, and, by his independent action, or even associated with his neighbors, appropriate and divert water for the irrigation of his land from some natural stream, or other natural source of water supply. Practically all of the water of the smaller sources of supply has already been appropriated; and, in order to obtain water for new lands, it is necessary to take it from the larger streams, and to convey it to a considerable distance. All of this requires large amounts of capital in order to construct the necessary diverting and conveying works. This work of construction has been, and is now being performed by large companies, oftentimes before there is a single settler upon the land. After these companies are ready to furnish the water, and sometimes before, they induce settlers to take up the lands under their systems of works, and agree to furnish them with water sufficient for the proper irrigation of their lands.¹ And, therefore, the most common method is for these water companies to furnish the water to consumers under written contracts. And, although these corporations are regarded as public service or quasi-public corporations,² therefore subject to the regulation and control of the legislature and the courts of the State where their operations are carried on, and are duty bound to furnish the water to all applicants to the full extent of their capacity, such contracts, where not in violation of law,³ or against public policy, are regarded as "ordinary contracts between private individuals," and, without regard to the question of public use, are enforceable as such.⁴ But, as all its powers come from the State,

¹ See, also, Secs. 1498-1503.

For contracts under the Carey Act, see Secs. 1330, 1333.

For power to fix water rates by contract, see Secs. 1381-1385.

² See Sec. 1493.

³ See Secs. 1513, 1514.

⁴ In a leading case in California, it is held that where the board of supervisors had not fixed the water rates, a contract whereby a water company undertook to furnish water for irrigation purposes was not forbidden by the provisions of the constitution, and

could be enforced against the defendants. And the Court said: "It is left to the legislature the power and discretion of regulating the sale of water outside of municipalities if the time should come when, in its wisdom, it thought such regulation was called for, or to allow the people to continue to freely contract on the subject as they had been accustomed continuously to do since before the State was organized as a government. . . . Our conclusion is that the contract involved in the case at bar is not made

such a corporation can only contract in the way allowed by law. And, therefore, its powers and obligations, except those which grow out of contracts lawfully made, depend alone upon the statute, and such alterations and amendments thereof as may, from time to time, be made by the proper authority.⁵ But contracts between such a corporation and its consumers are not annulled or rendered invalid merely by constitutional provisions or statutory enactments looking merely to the public supervision or the State control of water companies, or to the regulation and control of the water supply within the jurisdiction of a certain State.⁶ And, so, until there has been some definite law passed relating to a particular subject, or some definite action by the authority in power regulating the subject, contracts which would not otherwise be invalid will be enforced.⁷

invalid by the provisions of the constitution invoked by appellants." *Fresno Canal & Irr. Co. v. Park*, 129 Cal. 437, 62 Pac. Rep. 87.

See, also, *Leavitt v. Lassen Irr. Co.*, 157 Cal. 82, 106 Pac. Rep. 404; *Souther v. San Diego Flume Co.*, 112 Fed. Rep. 228; *aff'd*, 121 Fed. Rep. 347, 57 C. C. A. 561, holding that a contract with the company to prorate the water in times of scarcity could be enforced. So, where the plaintiff company had contracted with various parties to supply them with water, it was held that this would not destroy the public use. "It would rather tend to show use by many, and thus establish the use for the public benefit." *Pontantico Waterworks Co. v. Bird*, 130 N. Y. 259, 29 N. E. Rep. 246.

"None of the rights to the waters of a running stream, under the constitution and statutes of the State, which may be acquired by user, can in any manner affect the obligations or relations of the contracting parties. The company was the owner of the fee in the land on which the lake was situated and had an absolute title to the water, with the right and privilege

of sale, according to their own pleasure." *Rockwell v. Highland D. Co.*, 1 Colo. App. 396, 29 Pac. Rep. 285.

⁵ *Spring Valley Water Works v. Schottler*, 110 U. S. 347, 28 L. Ed. 173, 4 Sup. Ct. Rep. 48.

⁶ For the laws of State control, see Chap. 68, Secs. 1337-1367.

For State control of water rates, see Chap. 69, Secs. 1368-1385.

⁷ So, neither the provision of the California constitution that water appropriated for irrigation is for a public use, nor the statutory enactment that the county commissioners may fix the water rates which may be charged consumers by a company, affects the right of the company to contract upon this subject, until such rates are actually fixed in pursuance to the law. *San Diego Flume Co. v. Souther*, 90 Fed. Rep. 164, 32 C. C. A. 548, 61 U. S. App. 134; *Id.*, 104 Fed. Rep. 706, 44 C. C. A. 143.

See, also, *Fresno Canal Co. v. Park*, 129 Cal. 437, 62 Pac. Rep. 87; *Stanislaus W. Co. v. Bachman*, 152 Cal. 716, 93 Pac. Rep. 858, 15 L. R. A., N. S., 359.

§ 1511. **Contracts bad as against statute or public policy.**—But, as we have discussed in previous sections, a corporation formed for the purpose of supplying water to consumers is a public service or quasi-public corporation, and as such is bound to serve the public without unjust discrimination. It therefore follows that such a corporation has no right or power to bind itself by a contract which, if enforced, would render it unable to serve the public on those terms, and, therefore, to render it unable to carry out its main purpose for which it was organized. In other words, such a corporation, owing a duty to the public, can not make a valid contract to exempt itself from the performance of such duty.¹

A contract requiring a consumer, in advance of being furnished water, to surrender his public right to the delivery of water is illegal *per se* and void.²

Although water companies have the power to make all reasonable contracts with the consumers furnished with water which are not in conflict with the constitution and statutes of the State where their operations are carried on, they have no power to make contracts which do conflict with the constitutions or statutes, or those which are so unreasonable in their terms as to be against public pol-

¹ *Sammons v. Kearney Irr. Co.*, 77 Neb. 580, 110 N. W. Rep. 308, 8 L. R. A., N. S., 404, where it was held that it can not bind itself to serve one person to the exclusion of all others. *Chicago Gaslight Co. v. People's Gaslight Co.*, 121 Ill. 530, 13 N. E. Rep. 169, 2 Am. St. Rep. 124; *Barstow Irr. Co. v. Cleghon*, 41 Tex. Civ. App. 531, 93 S. W. Rep. 1020; *Colorado etc. Co. v. McFarland*, 50 Tex. Civ. App. 92, 94 S. W. Rep. 400, 109 S. W. Rep. 435; *Green v. Byers*, 16 Idaho 178, 101 Pac. Rep. 79, citing 9 Cyc. p. 450; *Wilterding v. Green*, 4 Idaho 773, 45 Pac. Rep. 134; *Gould v. Maricopa etc. Co.*, 8 Ariz. 429, 76 Pac. Rep. 598; *Salt River etc. Co. v. Nelssen*, 10 Ariz. 9, 85 Pac. Rep. 117, 12 L. R. A., N. S., 711, 16 Am. & Eng. Ann. Cas. 796; *Combs v. Agricultural Ditch Co.*, 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; *Wheeler v. Northern Colo-*

rado Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603; *Lowe v. Yolo etc. Co.*, 157 Cal. 503, 108 Pac. Rep. 207; *aff'g Id.*, 8 Cal. App. 167, 96 Pac. Rep. 397.

Irrigation companies authorized to exercise the power of eminent domain are quasi-public corporations and can not limit their liability to the public by contract. *Colorado etc. Co. v. McFarland*, 50 Tex. Civ. App. 92, 94 S. W. Rep. 400, 109 S. W. Rep. 435.

² *San Diego etc. Co. v. Sharp*, 97 Fed. Rep. 394, 38 C. C. A. 220; *Green v. Byers*, 16 Idaho 178, 101 Pac. Rep. 79, citing 9 Cyc. p. 450.

One maintaining an irrigation canal under the statute can not impose unjust or unreasonable terms by contract upon water users; any such terms being void. *Granger v. Kishi*, — Tex. Civ. App. —, 139 S. W. Rep. 1002.

icy, and such contracts will not be enforced by the courts. There is nothing in this principle peculiar to contracts with water companies, but it applies to all contracts. We will, however, cite some instances where such contracts have been held void, where made between a water company and its consumers.

Where in a contract it was provided that: "If the said ditch company . . . shall at any time wilfully or malignantly fail or refuse to comply with the terms of the indenture as to the furnishing of said water, . . . it shall be lawful for the party so entitled to such water to draw from and take all such water as he may be entitled to," the clause was held void by the Supreme Court of Colorado, upon the ground that "the right claimed by the consumer is a right, the exercise of which is positively prohibited by the statute of this State," as being in contravention to the provisions thereof, regulating the taking and distribution of water from natural streams.³ In this case the Supreme Court affirmed the ruling of the Court of Appeals, which also held the contract void, but upon different ground: First, "It is a right incompatible with the right of control incident to the ownership of property"; and, second, "It is against public policy, as tending to confusion and a breach of the peace in allowing parties to take whatever water they required, regardless of the rights of others having the same right." The Supreme Court termed its ruling "a safer and better reason."⁴

Any contract providing for the payment of a bonus, or an initiation fee, as a condition precedent to the company furnishing the water, and over and above the legal rates which the company might charge for the water, is void as against the statute, if there is one,⁵ and as against public policy, if there is no such statute.⁶

³ *White v. Farmers' etc. Co.*, 22 Colo. 191, 43 Pac. Rep. 1028, 31 L. R. A. 828.

⁴ *Farmers' etc. Co. v. White*, 5 Colo. App. 1, 31 Pac. Rep. 345, 348.

⁵ *Schneider v. People*, 30 Colo. 493, 71 Pac. Rep. 369. But see *Fresno Canal Co. v. Park*, 129 Cal. 437, 62 Pac. Rep. 87, where, construing the contract involved in the case, the Court said: "Our conclusion is that the contract involved in the case is not made invalid by the provision of the constitution invoked by appellants."

See, also, the case of *Souther v. San Diego etc. Co.*, 112 Fed. Rep. 228; *aff'd* 121 Fed. Rep. 347, 57 C. C. A. 561, wherein Mr. Justice Ross criticized the ruling in the *Park* case for the reason that the language therein used did not inhibit contracts which were discriminatory or were unreasonable to the consumers.

⁶ Where a lawful demand was made for the water and the manager of the company showed and read to the applicant the contract and said that the company could not furnish the water

So, also, a contract requiring as a condition precedent to the company furnishing the water, that all dues and charges for the water previously furnished to the land, or to the individual, should be paid, is void, both as against the statutory duty of the company to furnish water, and also void for the want of consideration.⁷

A parol contract to furnish water "at all times" is void under the statute of frauds, as a contract not to be performed within one year.⁸ Contracts whereby the water company agrees to furnish more water than it owns or controls, or more than the capacity of its works will furnish, are void, and the company will be enjoined from furnishing the water to the parties contracting after its rights or capacity has been exhausted, at the instance of the consumers who had acquired prior rights within the capacity of the company to furnish the water.⁹

at that rate unless the applicant paid a bonus, it was held that the refusal of the water was unwarranted, and the Court said: "That the exaction by the company of a royalty or bonus as a condition precedent to furnishing water to consumers under its ditch is unlawful, is too well settled to admit of discussion." *Northern Colo. Irr. Co. v. Richards*, 22 Colo. 450, 45 Pac. Rep. 423; *Crow v. San Joaquin etc. Co.* 130 Cal. 309, 62 Pac. Rep. 562, 1058; *Wheeler v. Northern Colo. Irr. Co.*, 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603.

See, also, *Leavitt v. Lassen Irr. Co.*, 157 Cal. 82, 106 Pac. Rep. 404.

See, also, Sec. 1384.

⁷ *Crow v. San Joaquin etc. Co.*, 130 Cal. 309, 62 Pac. Rep. 562, 1058.

See, also, for the duty of companies to furnish water, Secs. 1498-1502.

A corporation is not bound by an agreement of one of its stockholders with third parties. *Lanham v. Wematchee etc. Co.*, 48 Wash. 337, 93 Pac. Rep. 522.

⁸ *Metropolitan etc. Co. v. Topeka etc. Co. (Kan.)*, 132 Fed. Rep. 702.

⁹ So, a contract whereby certain

stockholders in a ditch company sold their stock to a reservoir company, the vendors to continue in possession of their certificates, and to divert water for the use of their land to the same extent theretofore enjoyed, and the reservoir company to have the right to divert for storage and direct irrigation the difference between the quantity of water actually needed by the vendors and the maximum represented by the certificates in the priorities of the ditch, was held invalid as requiring the water rights evidenced by the shares of stock to do double duty. *Cache La Poudre etc. Co. v. Hawley*, 43 Colo. 32, 95 Pac. Rep. 317; *Farmers' Highline etc. Co. v. Southworth*, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. B. A. 767; *Lanning v. Osborne*, 76 Fed. Rep. 319; *Wyatt v. Larimer etc. Co.*, 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; *rev'g* 1 Colo. App. 480, 29 Pac. Rep. 906; *McDermont v. Anaheim etc. Co.*, 124 Cal. 112, 56 Pac. Rep. 779; *Brown v. Farmers' etc. Co.*, 26 Colo. 66, 56 Pac. Rep. 183.

See, also, for duty to furnish water-compulsory service, Sec. 1506.

As is the case with other contracts, these contracts must be freely and voluntarily entered into. Therefore, a contract entered into under duress is voidable. So, where a party is entitled to water from a ditch company, and does everything that the constitution and laws of the State require of him to do in order to get it, the water company is bound to deliver him the water, and can not require him to sign a special contract, binding him to do certain things, which the law does not require him to do. Such a contract "is voidable, if not void."¹⁰ A contract by which a director obtains from a corporation its property or an advantage to himself is voidable only at the instance of the corporation, or its stockholders.¹¹

It may be stated as a general rule of law upon this subject that a contract made by a public service corporation with a consumer in and of itself is not in violation of State law or the provisions of the constitution of the State where it is to be enforced. The validity of each and every contract depends upon its special terms as to whether or not, in effect, it comes within the question of being reasonable or otherwise, as to all of its provisions, and whether or not such a contract is reasonable is a question of fact, and depends upon each particular case.

§ 1512. Contracts—Form and execution.—The usual and better form of water contracts is to have them in writing. However, an oral contract for the perpetual use of water sufficient to irrigate 160 acres of land, based upon the consideration of the consumer aiding in the construction of the canal of the company, which was performed by both parties, and followed by the possession and use of the water for several years, is held sufficient to maintain an action for specific performance and to enforce the right thus acquired, and not within the statute of frauds.¹ But where there is no such consideration

¹⁰ "Where one enters into a contract by reason of compulsion or threats, there is nothing but the form of a contract without its substance." *Green v. Byers*, 16 Idaho 178, 101 Pac. Rep. 79, citing 9 Cyc. p. 450.

A contract signed under duress, oppression, or compulsion is void. See Sec. 920.

See *Combs v. Agricultural Ditch Co.*, 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. 171—Kin. on Irr.

St. Rep. 275; *San Diego v. City of National City*, 74 Fed. Rep. 79; *Wilterding v. Green*, 4 Idaho 773, 45 Pac. Rep. 134; *Lowe v. Yolo etc. Co.*, 8 Cal. App. 204, 96 Pac. Rep. 379.

¹¹ *Fudickar v. East Riverside Irr. Dist.*, 109 Cal. 29, 41 Pac. Rep. 1024; *Goodell v. Verdugo etc. Co.*, 138 Cal. 308, 71 Pac. Rep. 354.

¹ *McLure v. Koen*, 25 Colo. 284, 53 Pac. Rep. 1058.

as above, a water company whose business is to furnish water to consumers, under a parol agreement, which it was contemplated should be reduced to writing, but which was not so reduced, it was held that a recovery could not be had upon the contract, but that the company could only recover on a *quantum meruit*.²

As is the case with other contracts, contracts with a water company must be duly executed by the parties thereto. Otherwise it can not be regarded that the minds of the parties have met, and there is, therefore, no binding contract between them.³ Such contracts may be executed by an agent upon the part of the company, where he has been duly authorized to act in such behalf. In fact, this is a very common method for the execution of such contracts. But, where so executed, the contracts are subject to the general rule, that the agent must not be interested in the contract adversely to the rights of the company. Neither can the directors, making a contract in behalf of a company, be interested in the same adversely to the interests of the corporation, or the remainder of the stockholders who are not so interested.⁴ "The existence of an agent's authority is a question of fact to be ascertained by the jury, but what the agent may do under the power conferred is a question of law to be determined by the Court."⁵

But it is held that a parol contract to furnish water "at all times" is void under the statute of frauds as a contract not to be performed within one year. *Metropolitan etc. Co. v. Topeka etc. Co.*, 132 Fed. Rep. 702.

See, also, for the sale of water rights by parol executed contracts, Secs. 998-1000.

² *Ferre Canal Co. v. Burgin*, 106 La. 309, 30 So. Rep. 863.

³ *Ferre Canal Co. v. Burgin*, 106 La. 309, 30 So. Rep. 863.

⁴ *Goodell v. Verdugo etc. Co.*, 138 Cal. 308, 71 Pac. Rep. 354, where it was held that a corporation is not estopped from challenging the validity of a contract made on its behalf by its directory, interested therein adversely to the corporation, by laches

on the part of such directors in not causing the contract to be set aside, but allowing the other party to expend money on the strength of the contract.

A principal is bound by the contract of his agent within the ostensible scope of the agent's authority. *Bay City Irr. Co. v. Sweeney*, — Tex. Civ. App. —, 81 S. W. Rep. 545.

Where an agent makes a contract on behalf of his principal in excess of his authority, he is personally liable thereon, under an implied warranty of authority, even though he made no false representations concerning his authority. *Anderson v. Adams*, 43 Ore. 621, 74 Pac. Rep. 215.

⁵ *Anderson v. Adams*, 43 Ore. 621, 74 Pac. Rep. 215.

§ 1513. **Contracts—Construction.**—The construction of contracts made with water companies for the furnishing of water to consumers, or upon other phases of the subject, are held to be subject to the usual rules of construction as are other contracts. In the construction of such a contract, its true intent and the meaning of the intentions of the parties thereto must be first determined from the terms of the instrument itself. And, therefore, rights of the respective parties under such a contract are also to be governed by its express terms.¹

¹“We need not stop to inquire what are the rights of the separate appropriators of the water in the absence of a contract. We are dealing with those which grew out of this contract, bearing in mind that all rights are reserved to the appellee which are not in terms granted to the appellant.” *Consolidated Canal Co. v. Mesa Canal Co.*, 177 U. S. 296, 44 L. Ed. 777, 20 Sup. Ct. Rep. 628; affirming *Id.*, 6 Ariz. 135, 53 Pac. Rep. 575.

Under the Revised Codes of Montana, Section 5025, the intention of the parties must be ascertained in the first instance by reference to the language used in the contracts, and, where the words used are clear and unambiguous, interpretation need not be resorted to. *Quirk v. Rich*, 40 Mont. 552, 107 Pac. Rep. 821.

A contract perfectly clear in its terms, parol evidence of prior conversations between the parties, and of what was understood respecting the consideration, was properly rejected. *Bryan v. Idaho etc. Co.*, 73 Cal. 249, 14 Pac. Rep. 859.

“The vendors in an action for damages for failure to comply with a contract can not show by oral evidence that they were not required to furnish the amount of water specified in the contract.” *Babcock-Cornish Co. v. Urquart*, 53 Wash. 168, 101 Pac. Rep. 713.

A prospectus containing statements as to the character and nature of contracts proposed to be made and entered into by a company issuing the prospectus, standing alone, is not sufficient to found a cause of action. Where the action is based upon a written contract entered into in pursuance of the statements contained in such prospectus, the presumption is the entire contract was embodied in the writing, and the writing itself is the best evidence of its contents and the rights conferred thereunder. *Idaho etc. Co. v. Great Western Beet Sugar Co.*, 18 Idaho 1, 107 Pac. Rep. 989.

“In the construction of a written contract, if there is room for doubt as to its true meaning, the facts and circumstances out of which such contract arose should be considered and the contract construed in the light of such facts and circumstances. It is the universal rule in the construction of contracts that the intention of the parties to the contract should be ascertained, if possible, and given effect.” *State v. Twin Falls Canal Co.*, — Idaho —, 121 Pac. Rep. 1039.

See, also, for the construction of contracts, *Wyoming Cent. Irr. Co. v. Burroughs*, — Wyo. —, 115 Pac. Rep. 434; *Platte Land & Water Co. v. Arnett*, 88 Neb. 821, 130 N. W. Rep. 752; *Wingard v. Copeland*, 64 Wash.

If, however, from the terms of the contract itself, the meaning is ambiguous and the true intent of the parties thereto is not disclosed by the language therein employed, then competent evidence bearing on the construction of the instrument by the parties themselves,² also as to the circumstances surrounding the parties at the time of its execution, the subject matter of the contract, and the purposes and objects to be accomplished, and other facts and circumstances surrounding each particular case, may be considered for the purpose of ascertaining the true intent of the contract and the understanding of the parties as to its terms. And if it is possible to give such a construction of the contract that will render it valid, it is the duty of the Court to render such a construction.³ Local

214, 116 Pac. Rep. 670; *Abbott v. 76 Land & Water Co.*, — Cal. —, 118 Pac. Rep. 425; *Jones v. Van Nuys*, — Cal. —, 118 Pac. Rep. 541; *Lombard v. Schlotsfeldt*, — Wash. —, 123 Pac. Rep. 787; *Continental & Commercial Trust & Savings Bank v. McCarty*, 188 Fed. Rep. 273, 110 C. C. A. 251; *Spokane Canal Co. v. Coffman*, 54 Wash. 646, 103 Pac. Rep. 1106; *Evans v. Prosser Falls Land & Pr. Co.*, 62 Wash. 178, 113 Pac. Rep. 271.

² *Tilton v. Sterling Coal Co.*, 28 Utah 173, 77 Pac. Rep. 758, 107 Am. St. Rep. 689.

The construction placed upon a contract by the parties thereto is important only where the express language of the contract is doubtful. *Davis v. Randall*, 44 Colo. 488, 99 Pac. Rep. 323.

³ *Wyatt v. Larimer etc. Co.*, 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280, where it is said: "If the terms of the contract admit of two meanings, one of which would render the contract unlawful, and the other lawful, the latter construction must be adopted."

"Taking the two papers together, and having in view the circumstances

under which the contract was entered into, the meaning and intention of the parties can be understood with sufficient clearness. The contract should receive a reasonable interpretation, and such that would give it effect, instead of that which would make it void." *Sample v. Fresno etc. Co.*, 129 Cal. 222, 61 Pac. Rep. 1085.

"The least that can be said of this provision of the contract is that it is ambiguous and doubtful. Such being the case, the practical construction placed upon it by the parties must control." *Mayberry v. Alhambra etc. Co.*, 125 Cal. 444, 54 Pac. Rep. 530, 58 Pac. Rep. 68.

"As a guide to a correct interpretation, the law permits the subject-matter of a contract, the situation of the parties at the time of the execution, and all the surrounding facts and circumstances to be taken into consideration." *True v. Rocky Ford etc. Co.*, 36 Colo. 143, 85 Pac. Rep. 842.

See, also, *Animas etc. Co. v. Smallwood*, — Colo. —, 125 Pac. Rep. 594; *Bonslett v. Butte County C. Co.*, — Cal. App. —, 122 Pac. Rep. 821.

See, also, *Farmers' Pawnee Canal*

customs, when reasonable, uninterrupted, and uniform, in a locality or district, and not contrary to public policy, may be considered by the Court in the construction of contracts, and may affect their interpretation, by raising the presumption that such contracts were made with respect to such custom.⁴ The custom or usage must also be alleged and proven as any other fact.⁵ It is the general custom of these water companies in contracts for the furnishing of water

Co. v. Henderson, 46 Cal. 37, 102 Pac. Rep. 1063; Pomona etc. Co. v. San Antonio W. Co., 152 Cal. 618, 93 Pac. Rep. 881; Salt Lake City etc. Co. v. Salt Lake City, 24 Utah 249, 25 Utah 441, 67 Pac. Rep. 672, 71 Pac. Rep. 1069, 61 L. R. A. 648; Brighton v. Little Co., 14 Utah 42, 46 Pac. Rep. 268; Los Angeles v. Los Angeles City W. Co., 124 Cal. 368, 57 Pac. Rep. 211, 571; North Point etc. Co. v. Utah etc. Co., 14 Utah 155, 46 Pac. Rep. 824; Tilton v. Sterling etc. Co., 28 Utah 173, 77 Pac. Rep. 758, 107 Am. St. Rep. 689; Jenkins v. Hooper Irr. Co., 13 Utah 100, 44 Pac. Rep. 829; Ellerbeck v. Salt Lake City, — Utah —, 81 Pac. Rep. 273; Twin Falls etc. Co. v. Lind, 14 Idaho 348, 94 Pac. Rep. 164; Great Western Sugar Co. v. White, 47 Colo. 547, 108 Pac. Rep. 156.

See, also, cases cited under Sec. 919.

See, also, as to the construction of contracts, Fresno etc. Co. v. Dunbar, 80 Cal. 530, 34 Pac. Rep. 275; San Diego Flume Co. v. Chase, 87 Cal. 561, 25 Pac. Rep. 756, 26 Pac. Rep. 825; Pallett v. Murphy, 131 Cal. 192, 63 Pac. Rep. 366; Russ Lumber Co. v. Muscupiabe etc. Co., 120 Cal. 521, 52 Pac. Rep. 995, 65 Am. St. Rep. 186; Hewitt v. San Jacinto etc. Dist., 124 Cal. 186, 56 Pac. Rep. 893; Giddings v. Seventy-Six Land & Water Co., 109 Cal. 116, 41 Pac. Rep. 788; San Diego Flume Co. v. Souther,

90 Fed. Rep. 164; Hargrave v. Hall, 3 Ariz. 252, 73 Pac. Rep. 400; Wright v. Platte Valley Irr. Co., 27 Colo. 322, 61 Pac. Rep. 603; Brighton etc. Co. v. Little, 14 Utah 42, 46 Pac. Rep. 268; Rockwell v. Highland D. Co., 1 Colo. 396, 29 Pac. Rep. 285; Western etc. Co. v. Chapman, 8 Kan. App. 778, 59 Pac. Rep. 1098; Moore-Cortes C. Co. v. Gyle, 36 Tex. Civ. App. 442, 82 S. W. Rep. 350; Riverside etc. Co. v. Riverside etc. Co., 148 Cal. 457, 83 Pac. Rep. 1003; Dyer v. Middle Kittitas Irr. Dist., 40 Wash. 238, 82 Pac. Rep. 301; Farmers' Pawnee Canal Co. v. Henderson, 46 Colo. 37, 102 Pac. Rep. 1063; Lanham v. Wenatchee Canal Co., 48 Wash. 337, 93 Pac. Rep. 522; Gravity Canal Co. v. Sisk, 43 Tex. Civ. App. 194, 95 S. W. Rep. 724; Miller & Lux v. California etc. Co., 163 Fed. Rep. 462, 90 C. C. A. 8.

In an action by tenants against their landlords for breach of the landlords' agreement to furnish water, a contract between the landlords and an irrigation company to which the tenants were not parties, by which the company agreed to furnish water to the landlords, was inadmissible as *res inter alios acta*. Stockton v. Brown, —Tex. Civ. App. —, 106 S. W. Rep. 423.

⁴ Jenkins v. Hooper Irr. Co., 13 Utah 100, 44 Pac. Rep. 829.

⁵ Perrine v. San Jacinto etc. Co., 4 Cal. App. 376, 88 Pac. Rep. 293.

to have them prepared on printed forms. Where this is the case, it must be considered that the words therein selected were chosen by the company, and, if of doubtful import, they must be construed most strongly against it.⁶ Contracts between a company and the consumers requiring them to prorate the available supply in times of scarcity are valid, and will be enforced by the courts, even in those States which hold that the consumer is the appropriator of the water and therefore the owner of the water rights.⁷

Contracts may be made between the company and individuals, or between the company and groups of individuals. Where the contract is to furnish all the consumers from a certain ditch or lateral with water, whether the contract is joint or several is a question of construction. Generally where a certain amount of water is to be furnished to a group of individuals taking their water from the same ditch or lateral, the contract is joint, and the consumers are to apportion the water among themselves according to their respective rights, and it is only the duty of the company to deliver the amount of water for all, according to the quantity and at the point named in the contract. Where, however, the language of the contract requires the company to account to each of the consumers, respectively, or, by use of any words, imports a separate right of action, the contract is several, and each consumer may sue thereon for damages caused by the failure of the company to furnish him with the quantity of water named in the contract.⁸

The decisions of the State courts as to the validity of contracts made between water companies and the consumers, are binding upon the Federal Courts.⁹

⁶ "Doubtful words and provisions are to be taken most strongly against the grantor, he being supposed to select the words which are used in the instrument." *Adams v. Frothingham*, 3 Mass. 352, 3 Am. Dec. 151.

See, also, *Noonan v. Bradley*, 76 U. S. 9 Wall. 394, 19 L. Ed. 757; *People v. Farmers' etc. Co.*, 25 Colo. 202, 54 Pac. Rep. 626; *Wyatt v. Larimer etc. Co.*, 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280.

⁷ For the relation of the company to the consumers, see Secs. 1475-1477.

For pro-rating the water in times of

scarcity, see Sec. 1502; *O'Neil v. Ft. Lyon Canal Co.*, 39 Colo. 487, 90 Pac. Rep. 849; *Jackson v. Indian Creek etc. Co.*, 16 Idaho 430, 101 Pac. Rep. 814; *Id.*, 18 Idaho 513, 110 Pac. Rep. 251; *Souther v. San Diego Flume Co.*, 121 Fed. Rep. 347, 57 C. C. A. 561; affirming *Id.*, 112 Fed. Rep. 228.
⁸ *Consolidated Canal Co. v. Peters*, 5 Ariz. 80, 46 Pac. Rep. 74.

⁹ *San Diego Flume Co. v. Souther*, 90 Fed. Rep. 164, 32 C. C. A. 548, 61 U. S. App. 134; *Id.*, 104 Fed. Rep. 706, 44 C. C. A. 143.

§ 1514. **The extent of rights conferred by contracts.**—Where a water company enters into a contract to furnish water to a consumer, the extent of the rights of such consumer is limited by the terms of the contract. The consumer only acquires such rights as he bargained for and no more. A contract with a company to deliver to the consumer so much water as may be necessary to irrigate a certain specified tract of land, is construed to limit the right of the consumer to the amount of water necessary to irrigate such tract.¹ Where the company agrees to furnish water sufficient to irrigate a certain number of acres, the consumer only acquires the right to have so much water furnished and for such lengths of time, as the land, in its existing condition requires. So, where a consumer admitted that he irrigated another tract of land from the surplus after watering the tract described, he admitted the violation of the contract, even though he was not using more water than the maximum amount provided for in the contract.² And, where the terms of the written contract are ambiguous and uncertain, in the determination of the extent of the rights which a consumer has under it, the Court may resort to the usual rules for the interpretation of the contract.³ The extent of the right of consumers to the use of water in times of scarcity may be limited by contract to a prorated amount of the available supply. This is true even in those jurisdictions that hold that the consumer is the appropriator of the water and therefore the owner of the water right, as is the case in Colorado.⁴

¹ *Wright v. Platte Valley Irr. Co.*, 27 Colo. 322, 61 Pac. Rep. 603.

See, also, *Pallett v. Murphey*, 131 Cal. 192, 63 Pac. Rep. 366; *Richter v. Union etc. Co.*, 129 Cal. 367, 62 Pac. Rep. 39; *Ferrea v. Cabot*, 121 Cal. 233, 53 Pac. Rep. 689; *Mayberry v. Alhambra etc. Co.*, 125 Cal. 444, 54 Pac. Rep. 530, 58 Pac. Rep. 68; *Quirk v. Rich*, 40 Mont. 552, 107 Pac. Rep. 821.

See, also, for the extent of rights limited by contract, *Consolidated Canal Co. v. Mesa Canal Co.*, 177 U. S. 296, 44 L. Ed. 777, 20 Sup. Ct. Rep. 628; affirming *Id.*, 6 Ariz. 135, 53 Pac. Rep. 575.

² *Wright v. Platte Valley Irr. Co.*, 27 Colo. 322, 61 Pac. Rep. 603.

³ For the construction of contracts, see Secs. 919, 1513.

⁴ "In the case at bar, however, the contracts provide for pro-rating water in times of scarcity, and are binding between the parties." *Larimer etc. Co. v. Wyatt*, 23 Colo. 480, 48 Pac. Rep. 528.

See, also, *Souther v. San Diego Flume Co.*, 112 Fed. Rep. 228; affirmed, 121 Fed. Rep. 347, 57 C. C. A. 561; *O'Neil v. Ft. Lyon Canal Co.*, 39 Colo. 487, 90 Pac. Rep. 849; *Great Western Sugar Co. v. White*, 47 Colo. 547, 108 Pac. Rep. 156;

§ 1515. **Extent of rights—Contracts that run with the land.**—

Valid contracts between water companies and their consumers for the furnishing of water may be expressed in such terms that they "run with the land." This is true not only as far as the land of the consumer is concerned, in creating a lien in favor of the company for the payment of the water furnished by the company,¹ but also running with the water rights, works, and other property of the company, in favor of the consumers, and having the effect of securing a permanent supply of water to such consumers, and as against the company or its grantees. In other words, such a contract has the effect of giving the consumer a proprietary estate or interest in the water rights of the company, its system of works, and other property, for the performance of the obligations to furnish the water to the consumer as provided for in the contract. By some courts this proprietary interest of the consumer is deemed an easement in the ditch. This is the holding in those jurisdictions where the consumer is considered to be the appropriator of the water and the owner of the water right, and the company merely the carrier of the water.²

But in jurisdictions where it is considered that the company is the appropriator, and, therefore, the owner of the water rights, this proprietary interest is considered a lien on the water rights and other property of the company, or a covenant running with the land, in favor of the consumer for the performance of the act of furnishing the water as agreed.³ But whatever it may be termed, such

Shafford v. White Bluffs Land & Irr. Co., 63 Wash. 10, 114 Pac. Rep. 883.

See, also, for the relation of the company to the consumer, Secs. 1475-1477.

For act of God as excuse of failure to perform, see Sec. 1527.

¹ For the recovery on contracts for water furnished where a lien on the land, see Sec. 1522.

² For the relation of the carrier to consumers, see Secs. 1475-1477.

"It hardly seems necessary to again state, as this Court has so often stated, that the perpetual right to have water carried by a ditch constitutes an easement in the ditch. Such

an easement is real estate—a freehold estate." *Farmers' etc. Co. v. New Hampshire etc. Co.*, 40 Colo. 46, 92 Pac. Rep. 290.

See, also, *Wyatt v. Larimer etc. Co.*, 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; *People ex rel. Standard v. Farmers' etc. Co.*, 25 Colo. 202, 54 Pac. Rep. 626; *Grand Valley Irr. Co. v. Leshner*, 28 Colo. 273, 65 Pac. Rep. 44.

³ "If it had been provided that the agreement to furnish the water should bind the canal of the company, there would have been created thereby a lien for the performance of the act of furnishing the water as agreed."

a contract gives a property right to the consumer in the property of the company to have the company or its successors continue to furnish the water in accordance with the conditions thereof. Such an agreement upon the part of the company to furnish the necessary water from its canal from year to year, during the time specified, and to deliver it to the land of the consumer for the irrigation thereof, for an agreed price, is in substance and effect, an agreement for the sale of real property of the company.⁴

In a late case⁵ the California Court repudiated the doctrine as above set forth, and especially as decided in *Stanislaus W. Co. v. Bachman*,⁶ and the other cases cited above, and upon this subject said: "If, by any method, however devious, there can be carved out of this public trust such a private right, it must obviously result in the destruction of the public use itself. Nakedly stated, it amounts to this: That a corporation which has appropriated water which the Constitution has declared shall forever be devoted to a public use, may contract with A, B, and C to supply them in per-

Stanislaus W. Co. v. Bachman, 152 Cal. 716, 93 Pac. Rep. 858.

The covenant for the delivery of the water was a covenant running with the land. *Bean v. Stoneman*, 104 Cal. 49, 37 Pac. Rep. 777.

⁴ "The agreement to furnish the necessary water from the canal from year to year, during the time specified, and deliver it upon the Thelfall lands for the irrigation thereof, for an agreed price, was in substance and effect an agreement for the sale of real property of the canal company." *Stanislaus W. Co. v. Bachman*, 152 Cal. 716, 93 Pac. Rep. 858.

Farmers' etc. Co. v. New Hampshire etc. Co., 40 Colo. 467, 92 Pac. Rep. 290, holding that such a contract created an easement and covenants running with the land, binding upon the owners of the ditch.

Where a quasi-public corporation engaged in supplying water to the inhabitants of a municipality transfers its property, franchises, and business

to a city, the city acquires the property subject to the obligation to furnish water to the inhabitants of the municipality, which obligation it must perform. *South Pasadena v. Pasadena etc. Co.*, 152 Cal. 590, 93 Pac. Rep. 490.

See, also, *Graham v. Pasadena etc. Co.*, 152 Cal. 596, 93 Pac. Rep. 498; *Fudickar v. East Riverside Irr. Dist.*, 109 Cal. 29, 41 Pac. Rep. 1024; *Dorris v. Sullivan*, 90 Cal. 279, 27 Pac. Rep. 216; *Hunt v. Jones*, 149 Cal. 297, 86 Pac. Rep. 868; *San Diego etc. Co. v. Sharpe*, 97 Fed. Rep. 394, 38 C. C. A. 220; *Mandell v. San Diego etc. Co.*, 89 Fed. Rep. 295; *Orcutt v. Pasadena etc. Co.*, 152 Cal. 599, 93 Pac. Rep. 497; *South Pasadena v. Pasadena L. & W. Co.*, 152 Cal. 590, 93 Pac. Rep. 490.

⁵ *Leavitt v. Lassen Irr. Co.*, 157 Cal. 82, 106 Pac. Rep. 404.

⁶ 152 Cal. 716, 93 Pac. Rep. 858, 15 L. R. A., N. S., 359.

petuity with a given quantity of this water, and then, by assigning in turn to A, B, and C its rights under these contracts, confer upon A, B, and C a private right superior to and destructive of the public use. If this can be done with one, it may be done with many, and water which has thus been appropriated for public rental, distribution, and sale may, by this legerdemain of the law, be transferred into private ownership and use. This may not be done."⁷

We are not in accord with the statement made by the Court in the above opinion. Again, this statement was entirely unnecessary in deciding the actual points involved in the case. A public service corporation may be organized with the express purpose, upon the sale of a certain number of its shares of stock and water rights, of turning over the management and control to the stockholders so purchasing or to a corporation organized by them for that purpose. No matter who is the owner or manager of such a corporation, it is still impressed with the public duty of furnishing water to all consumers who may apply, provided, of course, it has the water to spare. This very thing is done in other States, as we shall show in the following sections.⁸ And upon this subject, as was said by a late Idaho case:⁹ "The canal corporation is not one organized for profit, but is one organized really for the purpose of performing a public duty. The stock of that corporation represents the right to the water, and a refusal to deliver the stock amounts to a refusal to deliver water and a refusal to perform the public duty for which the corporation was organized. Mandamus is therefore a proper remedy."

§ 1516. **Contracts to turn control of companies over to the consumers—General scheme and results.**—In the formation of many irrigation companies, organized for the purpose of profit to its stockholders, it has been provided that perpetual water rights should be sold to the consumers, and that when water rights to the extent of the estimated capacity of the works of the corporation shall have been sold, the full management and control of the corporation should also be turned over to the consumers, or that the water rights, diverting and conveying works, and other property of the original cor-

⁷ See, also, *Lassen Irr. Co. v. Long*, 157 Cal. 94, 106 Pac. Rep. 409.

⁹ *State v. Twin Falls Canal Co.*, — Idaho —, 121 Pac. Rep. 1039.

⁸ See Secs. 1516-1518.

poration should be conveyed to some new corporation organized by such consumers. This scheme originated in Colorado, and, although it was evidently with the view of avoiding the Anti-Royalty Act of that State,¹ it has resulted in much good, both as far as the original company and its consumers are concerned. The plan has also been followed by other corporations operating in other States, and has also been adopted by the Government in the National Reclamation Act, as far as the management and operation are concerned,² Section 6 of which Act provides that when the payments required by the Act are made for the major portion of the lands irrigated from the waters of any of the works therein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior. However, in this case it is provided that the title to the property shall remain in the Government until otherwise provided by Congress.³

As far as private corporations are concerned, this plan enables its stockholders to get quicker and larger returns for the money invested; and as far as the consumers of the water are concerned, it secures to them perpetual water rights, and not only that, but it enables them to operate and control the rights and works through their own organization, either as a mutual corporation or otherwise, as they see fit. The general plan is a good one, as far as all parties are concerned, but in certain instances it has been abused, as has been the case where the company has sold perpetual water rights far beyond either the capacity of the works or of the supply of water owned or controlled by the company. But in these cases the courts have always stepped in and protected the rights of the consumers.⁴ There are two general modes of operation by companies which have adopted this plan: First, that with the perpetual water rights which are sold a certain proportion of the stock in the original corporation is also issued to each purchaser, and when a certain amount

¹ For the Anti-Royalty Act, see Sec. 1584.

² For the National Reclamation Act, see Secs. 1235-1286.

³ For water users' associations

under the Reclamation Act, see Secs. 1282-1286.

⁴ For these contract rights, see Sec. 1511.

of the stock has been passed to the purchasers of water rights the control of the original company is turned over to such purchasers;⁵ and, second, upon the happening of a certain contingency, such as the sale of water rights to the extent of the capacity of the works of the company or of all the rights for water owned or controlled by the company, it is provided in the deeds of conveyance to the consumers that the original corporation will deed and convey all of its property rights either to the holders of the deeds or to some new corporation organized by the consumers for the purpose of owning, managing, and controlling the same.⁶

Under the provisions of a contract it was held by the Idaho Court that the Twin Falls Canal Co. was organized under the laws of that State for the purpose and object of taking over and holding the title to the canal system of the Twin Falls Land & Water Co. and the water rights connected therewith, and to hold the same in trust for the settlers and land owners within said project, and that each owner of a water right has proportionate interest in the entire irrigation works.⁷

§ 1517. Contracts to turn control over to consumers—The enforcement of such contracts.—The courts, while generally upholding the validity of such contracts by a corporation, that upon the happening of a certain contingency it will turn the ownership and

⁵ See *Wyatt v. Larimer & Weld Irr. Co.*, 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; reversing 1 Colo. App. 480, 29 Pac. Rep. 906, where the agreement provided that upon the happening of the contingency, to wit, the disposition of a certain amount of water rights, the company should issue to the consumers a certain number of shares in the corporation, which would be evidence of their right to the control and management of the property.

See, also, *Eaton v. Larimer & Weld Irr. Co.*, 35 Colo. 16, 83 Pac. Rep. 627.

⁶ See *La Junta etc. Co. v. Hess*, 6 Colo. App. 497, 42 Pac. Rep. 50; affirmed, 31 Colo. 1, 71 Pac. Rep. 415,

where it was stipulated that when the company should have sold, and have outstanding, a number of "water rights" equal to the estimated capacity of the company to furnish water, and two-thirds of those rights should have been fully paid for according to the terms of the contract, then the title to the canal and the other works should pass to the holders of the deeds.

See, also, *Jackson v. Indian Creek etc. Co.*, 16 Idaho 430, 101 Pac. Rep. 814; *Id.*, 18 Idaho 513, 110 Pac. Rep. 251; *Nampa Irr. Co. v. Gess*, 17 Idaho 552, 106 Pac. Rep. 993.

⁷ *State v. Twin Falls Canal Co.*, — Idaho —, 121 Pac. Rep. 1039.

control of its property rights over to the consumers of the water furnished by it,¹ they have been inclined to protect the consumers to the full extent of the rights granted by the corporation. Therefore, where the deeds to the water rights provided that when the water company had sold a number of "water rights" equal to its estimated capacity, and two-thirds of those rights had been paid for, the title to the canal and other works should pass to the grantees or to some new corporation organized for that purpose, it was held that the Court would specifically enforce such covenants in the deeds.² The question at just what point the companies would be compelled to make the proper transfer under these contracts has led to the construction of the term "estimated capacity." And it is held in this connection that a company can not prolong its control by increasing its capacity to furnish water after executing its contract in such deeds.³ The expression, "estimated capacity," has been construed to mean not only the physical capacity of the works of the contracting company, but also as having reference to the water supply owned or controlled by the company at the time of making the contracts, and that, too, without resorting to prorating or rotation by the consumers, although it might provide in the contracts that in times of scarcity of the water the consumers should prorate the available water supply.⁴ And although contracts to prorate water by consumers in times of scarcity will be enforced,⁵ this provision can not be resorted to as a subterfuge to prolong its control by a company under contract with its consumers to turn over the property to them upon the full happening of a certain contingency also provided for in their deeds.⁶

¹ See, for such contracts in general, Sec. 1516.

For the cancellation or annulment of contracts for the sale of excess rights, see Sec. 1518.

² *La Junta etc. Co. v. Hess*, 6 Colo. App. 497, 42 Pac. Rep. 50; affirmed, 31 Colo. 1, 71 Pac. Rep. 415.

See, also, *Blakely v. Ft. Lyon Canal Co.*, 31 Colo. 224, 73 Pac. Rep. 249; *Patterson v. Ft. Lyon Canal Co.*, 36 Colo. 175, 84 Pac. Rep. 807.

³ *La Junta etc. Co. v. Hess*, 6 Colo.

App. 497, 42 Pac. Rep. 50; affirmed, *Id.*, 31 Colo. 1, 71 Pac. Rep. 415.

⁴ *Wyatt v. Larimer etc. Co.*, 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280.

⁵ See Sec. 1502.

⁶ The estimated capacity of an irrigation canal means the ability of the canal to supply water, based on its physical capacity and the probability of obtaining water from the stream, supplying it under normal conditions during the season of irrigation.

§ 1518. **Contracts to turn control over to consumers—Liability of contracts for the sale of excess rights.**—But, in a number of instances, corporations organized under this plan sold water rights far in excess of their estimated capacity to furnish the water. This proceeding upon the part of the company, in a proper action, upon behalf of those who have purchased rights within the capacity of the company, will be enjoined by the courts.¹ Purchasers of water rights under deeds providing that when the estimated capacity of the company is sold the title shall pass to the purchasers, are put on inquiry as to whether the prior sales have reached that limit.² The question has then arisen as to which company was liable to the purchasers of these supposed rights. And in this connection it is held that the consumers' company or the vendees of the water rights assumed no obligations arising from the obligations of the original company in attempting to sell that which they had no right to dispose of, and which was already vested in others; and, therefore, it is not liable either for the purchase price paid for these excess rights or for damages in refusing to furnish water beyond its capacity.³

Blakely v. Ft. Lyon Canal Co., 31 Colo. 224, 73 Pac. Rep. 249.

See, also, for "estimated capacity," *Broadmoor etc. Co. v. Brookside etc. Co.*, 24 Colo. 541, 52 Pac. Rep. 792; *Water Supply Co. v. Larimer etc. Co.*, 24 Colo. 322, 51 Pac. Rep. 496, 46 L. R. A. 322; *Patterson v. Ft. Lyon Canal Co.*, 36 Colo. 175, 84 Pac. Rep. 807; *La Junta etc. Co. v. Hess*, 6 Colo. App. 497, 42 Pac. Rep. 50; affirmed, *Id.*, 31 Colo. 1, 71 Pac. Rep. 415.

¹ See duty to furnish water—compulsory service, Sec. 1506.

It is held that, when the original company has sold rights up to the full extent of its capacity, it has nothing more to sell, and that the purchasers of excess rights take nothing by their purchase; and, in a proper action brought by the consumers company, these contracts will be annulled by the Court. *Blakely v. Ft. Lyon Canal*

Co., 31 Colo. 224, 73 Pac. Rep. 249; *New La Junta etc. Co., v. Kreybill*, 17 Colo. App. 26, 67 Pac. Rep. 1026; *La Junta etc. Co. v. Hess*, 6 Colo. App. 497, 42 Pac. Rep. 50; affirmed, *Id.*, 31 Colo. 1, 71 Pac. Rep. 415; *Patterson v. Ft. Lyon Canal Co.*, 36 Colo. 175, 84 Pac. Rep. 807.

² *Blakely v. Ft. Lyon Canal Co.*, 31 Colo. 224, 73 Pac. Rep. 249.

³ "The vendees of water rights assumed no obligations arising from the action of their vendors in attempting to sell that which they had no right to dispose of, and which had already vested in others." *Blakely v. Ft. Lyon Canal Co.*, 31 Colo. 224, 73 Pac. Rep. 249.

See, however, *La Junta etc. Co. v. Hess*, 31 Colo. 1, 71 Pac. Rep. 415, holding that debts incurred by a receiver in the management of the property during litigation should have been paid by the new company.

§ 1519. **Performance of contracts.**—Water contracts must be performed according to a reasonable construction of their terms. Here, again, there is nothing peculiar to contracts relating to water rights in regard to their performance. The general rules of law governing the performance of contracts also govern here. Neither is there anything peculiar to the performance of such contracts as between a water company and a consumer, to those made between two individuals. Therefore, the performance of such contracts, the breach, enforcement, and kindred subjects will be discussed together in this chapter, and that, too, regardless of the question as to whether the contracts in question are between a water company and consumers or between individuals.¹

A contract by a water company to furnish water from a particular source of supply is fulfilled by furnishing the water of an equal quality from another source, since the amount of the water and not the source of supply is considered as the gist of the contract.² Where time is not made the essence of the contract, or there has been a waiver of the right to insist that time was the essence, a reasonable time will be allowed to perform any act required by it before a contract can be considered as violated or rescinded.³ Where there has been an exchange made by a city of certain lake water to farmers for the water from mountain streams, so long as the city does that which it will be its legal duty to do, and which the farmers, in case of default, could by judicial proceedings compel it to do if there was no forfeiture clause in the contract of exchange, there can be no forfeiture of the water thus acquired by the city, and its title to the same will be as clear and indefensible as though the exchange were absolute and unconditional.⁴ The performance of a contract to convey "a good and sufficient water right" for the irrigation of a certain tract of land was sufficiently tendered upon the part of the vendor by an offer of water certificates issued by an irrigation corporation guaranteeing the holder a flow of water of the quantity specified in the contract.⁵ Where a contract pro-

¹ See, however, for contracts relating to water rights, also, Secs. 917-926.

² *Houston River Canal Co. v. Kopke*, 106 La. 609, 31 So. Rep. 156.

But see *Lewis v. Fox*, 122 Cal. 244, 54 Pac. Rep. 823.

³ *Daly v. Ruddell*, 137 Cal. 671, 70 Pac. Rep. 784.

⁴ *State ex rel. Ellerbeck v. Salt Lake City*, 29 Utah 361, 81 Pac. Rep. 273.

⁵ *Fairbanks v. Rollins*, 121 Cal. 17, 54 Pac. Rep. 79.

vides for the performance of certain labor and the payment of the purchase price by the other party, and the acts can not be concurrently performed, the question as to which act is to be performed first must be determined from the nature of the contract and the character of the subject matter.⁶

§ 1520. **Contracts—The enforcement of performance.**—Where a valid contract has been duly entered into, either between a corporation and individuals, for the conveyance of a definite water right and has been fully performed upon the part of one party and the other party defaults in its performance, and it is physically possible that the contract can be performed upon the part of the latter, equity will enforce the performance by the defaulting party. The usual form of action which may be brought for this purpose is a bill in equity by the party who seeks to protect his rights against the defaulting party for a specific performance of the contract. And where nothing remains to be performed by the plaintiff under the contract, equity will protect the right so acquired and decree a specific performance.¹ So, if the owner of land enters into a

⁶ *Gagnon v. Molden*, 15 Idaho 727, 99 Pac. Rep. 965; *Russ Lumber etc. Co. v. Muscupiabe etc. Co.*, 120 Cal. 521, 52 Pac. Rep. 995, 65 Am. St. Rep. 186.

¹ *Perrin v. San Jacinto etc. Co.*, 4 Cal. App. 376, 88 Pac. Rep. 293; *Hunt v. Jones*, 149 Cal. 297, 86 Pac. Rep. 686.

See, also, *Stanislaus W. Co. v. Bachman*, 152 Cal. 716, 93 Pac. Rep. 858, 15 L. R. A., N. S., 359; *Gelwicks v. Todd*, 24 Colo. 494, 52 Pac. Rep. 788; *Clyne v. Benicia W. Co.*, 100 Cal. 310, 34 Pac. Rep. 714; *Bree v. Wheeler*, 4 Cal. App. 109, 87 Pac. Rep. 255; *San Diego W. Co. v. San Diego Flume Co.*, 108 Cal. 549, 41 Pac. Rep. 495, 29 L. R. A. 839; *Giddings v. Seventy-Six etc. Co.*, 109 Cal. 116, 41 Pac. Rep. 788.

For actions for specific performance, see, also, Sec. 1650.

If, before a suit for breach of a condition in a contract, plaintiff makes a default in the performance of a subsequent condition, all unperformed conditions must be treated as concurrent, since plaintiff can not enforce performance while he himself is in default. *Russ etc. Co. v. Muscupiabe etc. Co.*, 120 Cal. 521, 52 Pac. Rep. 995, 65 Am. St. Rep. 186.

See, also, *State ex rel. Krutz v. Washington Irr. Co.*, 41 Wash. 283, 83 Pac. Rep. 308, 111 Am. St. Rep. 1019, holding that mandamus would not lie to enforce a private contract.

Creer v. Bancroft etc. Co., 13 Idaho 407, 90 Pac. Rep. 228, holding that the action would not lie because of misjoinder of parties plaintiff.

A contract for the use of water for a valuable consideration with a corporation organized for the purpose of supplying water for irrigating

covenant concerning his land relative to its uses and subjecting it to easements or personal servitudes and the like, and the land is afterward conveyed or sold to one who has notice of such covenants, the grantee or purchaser will take the land bound by the contract and will be compelled in equity either to specifically execute it or will be restrained from violating it.² As treated elsewhere in this work, equity will decree specific performance of parol agreements for a water right given for a valuable consideration and where there has been a performance of the conditions of the contract by the one seeking the right.³ Where there still remains something to be performed upon the part of the one seeking to enforce the contract, an action for specific performance will not lie.⁴ Again, where under the facts it does not appear that a party is not fully able to perform the contract on his part, the party seeking to enforce it can not enforce a part specific performance.⁵ Again, a court of equity will not decree the performance of a contract where such performance would be a vain and useless thing, and it is a physical impossibility for the defaulting party to perform. But a consumer having a contract with a water company whereby the company engages to furnish the consumer with a continual supply of water, may by injunction compel the corporation to retain its ability to perform the contract with him and prevent the corporation from contracting with other parties and later comers than himself for furnishing them with water beyond the capacity of the canal company, which contracts, if performed, would lessen the company's ability to supply the amount of water called for under the first consumer's contract.⁶ However, consumers under contract with a water company

lands, which contract when made did not contravene the laws or policy of the State, may, as between the parties or their successors in interest, be enforced, subject to all reasonable regulations, provided that the rights of other water users are not thereby unlawfully curtailed. *Clague v. Tri-State Land Co.*, 84 Neb. 499, 121 N. W. Rep. 570, 133 Am. St. Rep. 637.

² *Hunt v. Jones*, 149 Cal. 297, 86 Pac. Rep. 686; *Pomeroy Eq. Juris.*, 2d Ed., Secs. 688, 689.

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³ For the performance of parol executed contracts, see Secs. 997-1000.

See, also, for the conveyance of water rights, Secs. 994-1032.

⁴ *Senior v. Anderson*, 115 Cal. 496, 47 Pac. Rep. 454.

⁵ *Dorris v. Sullivan*, 90 Cal. 279, 27 Pac. Rep. 216.

⁶ *Wyatt v. Larimer etc. Co.*, 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; *Larimer etc. Co. v. Wyatt*, 23 Colo. 480, 48 Pac. Rep. 528; *Merrill v. South Side Irr. Co.*, 112 Cal. 433,

can not complain of any use of the water granted by its owner or acquired by operation of law not interfering with their rights.⁷

Where the contract is for the furnishing of a continual supply of water made between a water company and the consumers the authorities differ somewhat as to the proper mode of procedure for its enforcement. And in this connection a distinction must be noted between the duty of a corporation to furnish water to consumers under the statute and as public service and quasi-public corporations, and the duty of the same company to furnish water in accordance with the terms of a contract with consumers. As we have seen, to compel the performance of the statutory duty to the public, the remedy is by mandamus or mandatory injunction.⁸ The general rule of law is that the action of mandamus will not lie to enforce the performance of a private contract. In other words, the writ of mandamus will lie only to compel the performance of an act which the law specially enjoins. It is therefore held by this line of authorities that a company contracting to furnish water to consumers can not be compelled to comply with the terms of the contract in this respect in an action for mandamus.⁹ But it is held that a manda-

44 Pac. Rep. 720; *Eaton v. Larimer etc. Co.*, 35 Colo. 16, 83 Pac. Rep. 627.

⁷ *Hackett v. Larimer etc. Co.*, 48 Colo. 178, 109 Pac. Rep. 965.

See, also, *Animas etc. Co. v. Smallwood*, — Colo. —, 125 Pac. Rep. 594.

⁸ For the compulsory service of water as a public duty, see Sec. 1506.

⁹ *Perrine v. San Jacinto etc. Co.*, 4 Cal. App. 376, 88 Pac. Rep. 293, holding that an action for mandamus would not lie.

A person having a contract with an irrigation company, binding it to furnish water for the irrigation of his lands, has an adequate remedy at law for the company's refusal to comply with the contract, though it be conceded that the company is a common carrier of water, and mandamus does not lie to compel it to comply with

the contract. *State ex rel. Krutz v. Washington Irr. Co.*, 41 Wash. 283, 83 Pac. Rep. 308, 111 Am. St. Rep. 1019.

In *Merrill v. South Side Irr. Co.*, 112 Cal. 433, 44 Pac. Rep. 720, although the rights of the parties were originally based on a contract, and the defendant having supplied the plaintiff with water for irrigation thereunder, the mandamus was granted upon the theory that it was the statutory duty of the defendant to continue the supply, and that the defendant was not at liberty, without good cause, to refuse to supply the plaintiff, while she, on her part, was ready and willing to pay the established price for the water.

See, also, *Lanham v. Wenatchee Canal Co.*, 48 Wash. 337, 93 Pac. Rep. 522.

tory injunction will be granted to enforce the specific performance of the contract.¹⁰ However, as all corporations organized for the purpose of furnishing consumers with water for profit are considered in all jurisdictions public service or quasi-public corporations, there is another line of authorities which hold, as it seems to us, to the better rule, that, regardless of the contract, the company may be compelled to furnish the water to consumers by an action for mandamus. In other words, these authorities treat the contract as merely incidental and descriptive of the right of the consumer, and that the writ may be granted under the public duty of the company to furnish the water. As was said in a Colorado case: "While the right recognized in these cases was one conferred by statute, which the relator, upon the performance of certain conditions precedent, was entitled to enjoy, we are unable to perceive any reason why the same right, when conferred by contract, is not equally susceptible of enforcement in this manner, when clearly established, as in this case, and the consequence of its denial are the same."¹¹ "The consumer is entitled to compel performance of the contract by mandamus."¹² Under this line of authorities, therefore, it makes no difference in an action for mandamus whether the plaintiff's right comes under the terms of a private contract or grows out of the statutory duty of the company to furnish the water.¹³ The petition for a writ of mandate must, of course, state all the facts necessary to the granting of the relief sought for.¹⁴ Upon the other hand, a

¹⁰ One who has prepared his land and planted a crop, relying on a contract whereby a water company agreed to furnish him water, is entitled to an injunction compelling the specific performance of the contract. *Bay City Irr. Co., v. Sweeney*, — Tex. Civ. App. —, 81 S. W. Rep. 545.

See, also, *New Iberia etc. Co. v. Romero*, 105 La. 439, 29 So. Rep. 876.

¹¹ *People ex rel. Standard v. Farmers' High Line etc. Co.*, 25 Colo. 202, 54 Pac. Rep. 626; reversing *Id.*, 8 Colo. App. 246, 45 Pac. Rep. 543, the latter holding that an action for mandamus would lie.

¹² *Farnham on Waters*, p. 1924.

¹³ *Combs v. Agricultural D. Co.*, 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; *People ex rel. Standard v. Farmers' High Line etc. Co.*, 25 Colo. 202, 54 Pac. Rep. 626; reversing *Id.*, 8 Colo. App. 246, 45 Pac. Rep. 543; *Bardaly v. Boise etc. Co.*, 8 Idaho 155, 67 Pac. Rep. 428; *Wilterding v. Green*, 4 Idaho 773, 45 Pac. Rep. 134.

See, also, *Cozzens v. North Fork etc. Co.*, 2 Cal. App. 404, 84 Pac. Rep. 342.

¹⁴ Appellant's application "shown that she holds a private contract whereby the respondent obligated itself to furnish water. She can resort to the ordinary remedies upon

contract made in violation of law or discriminatory can not be enforced by either party thereto.¹⁵

§ 1521. **Recovery on contracts for water furnished.**—Where a contract of a water company for the furnishing water is valid in all respects, a recovery may be had by the company against the consumers for the rental or sale of the water rights or for its services as the carrier of water. And the measure of the recovery is the amount fixed in the contract.¹ Of course, as is the case with other contracts, a water company can not recover for water claimed to have been furnished to a consumer unless it proves the contract and a full compliance with its terms. So, a company is not entitled to a *pro tanto* recovery based upon a partial fulfillment of the contract unless it may be apportioned to definitely established benefits derived by the consumer contracting for the water over and above the amount of damages resulting from the failure of the company to furnish the full quantity of water provided for under the contract.²

that contract, as in the case of any private contract. . . . We think appellant has an adequate remedy upon her contract, and that mandamus does not lie." *State ex rel. Krutz v. Washington Irr. Co.*, 41 Wash. 283, 83 Pac. Rep. 308, 111 Am. St. Rep. 1019.

See, also, *Fulton Irr. Co. v. Twombly*, 6 Colo. App. 554, 42 Pac. Rep. 253, holding that the equitable remedy of a mandatory injunction will not be granted to compel the delivery of water under a contract without the allegation of the insolvency of the defendant, or other ground for equitable relief; *Golden Canal Co. v. Bright*, 8 Colo. 144, 6 Pac. Rep. 142; *Wheeler v. Northern Colo. Irr. Co.*, 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603.

¹⁵ *Leavitt v. Lassen Irr. Co.*, 157 Cal. 82, 106 Pac. Rep. 404; *Lassen Irr. Co. v. Long*, 157 Cal. 94, 106 Pac. Rep. 409; *Nampa Irr. Co. v. Gess*, 17 Idaho 552, 106 Pac. Rep. 993.

¹ *Stanislaus W. Co. v. Bachman*, 152 Cal. 716, 93 Pac. Rep. 858, 15 L. R. A., N. S., 359, that this rule holds, even in States where the law provides for the regulation of water rates, but where the rates have not been so regulated.

Where the terms for the furnishing the water were agreed upon, and it was contemplated that the agreement should be reduced to writing, but it was not so reduced, it was held that the company could not recover on the contract, and could recover only on a *quantum meruit*. *Ferre Canal Co. v. Burgin*, 106 La. 309, 30 So. Rep. 863.

See, also, *Lassen Irr. Co. v. Long*, 157 Cal. 94, 106 Pac. Rep. 409; *Leavitt v. Lassen Irr. Co.*, 157 Cal. 82, 106 Pac. Rep. 404; *South Boulder etc. Co. v. Marfell*, 15 Colo. 302, 25 Pac. Rep. 504.

For the regulation of water rates, see Chap. 69, Secs. 1368-1385.

² *Houston River C. Co. v. Kopke*, 106 La. 609, 31 So. Rep. 156; *Landers*

The water company is entitled to recover for the water from the time it is prepared to furnish it. So, it is held that when the company had complied with its contract to bring the water through its main ditch and to construct a box or gate through which to pass the water into a ditch to be constructed by the consumer, as provided in the contract, it had done all that was necessary to be done on its part, and the defendant could not avoid a recovery by the failure on his part to construct the ditch agreed to be constructed by him.³ In an action to set aside the contract and for damages for failure of the company to perform, and wherein the company set up a counter-claim for the water rent, and where the facts were that there was a refusal upon the part of the company to furnish the water, which was retracted within a few days, and before any damages had been caused, it was held that there was not such a non-performance of the contract which could be availed of by the consumer and that the company could recover.⁴

§ 1522. **Recovery on contracts for water furnished where a lien on the land.**—In a number of the Western States it is provided by statute to the effect that the contract amount, or the amount that may be provided for in accordance with law,¹ to be paid to water companies by the consumers furnished with water shall be a first lien upon the land for the irrigation of which the water is furnished and delivered.² But whether this right is provided for by statute or not, we take it that a corporation has the power to make such a contract with its consumers, and that the lien so provided for may

v. Garland Canal Co., 52 La. 1465, 27 So. Rep. 717.

Where the contract provided that the consumer was to pay \$2 per acre "for the use of water on the above described land," it was held that he was to pay \$2 per acre only for the number of acres on which the water was used, and not on the entire number of acres in the tract. *Purser v. Baker*, 129 Cal. 607, 62 Pac. Rep. 109.

See, also, *Granger v. Kishi*, — Tex. Civ. App. — 139 S. W. Rep. 1002.

3 Fresno etc. Co., v. Dunbar, 80 Cal. 530, 34 Pac. Rep. 275.

4 Perkins v. Frazer, 107 La. 390, 31 So. Rep. 773.

1 For the regulation of water rates, see Chap. 69, Secs. 1368-1385.

2 See Rev. Codes Idaho, 1908, Sec. 3288.

See, also, for statutes of other States, Part XIV; *Jackson v. Indian Creek etc. Co.*, 16 Idaho 430, 101 Pac. Rep. 814; *Id.*, 18 Idaho 513, 110 Pac. Rep. 251; *Fresno etc. Co. v. Park*, 129 Cal. 437, 62 Pac. Rep. 87.

be enforced.³ Therefore, where a land owner contracted with a water company that he and his successors in interest should take the water from the company at a certain price, payable annually, and that the contract and covenants therein contained should "run with and bind the land," it was held that such contract created a lien on the land for the water furnished, which was binding on the land owner's successors with notice thereof, but that no personal judgment against the purchaser of the land can be given where he was not a party to the contract and never bound himself personally for its performance.⁴ But in order to create the lien on the land the language used in the contract must be definite and specific, and must be a direct declaration that such a lien is created by its terms. Therefore, in a recent case in California where the language in a contract was as follows: "The parties agree to and with each other that this contract shall have the force and effect of a covenant running to and with the said land," it was held that the language used did not create a lien for the reason that there was no direct declaration of lien which would bind either the consumer or the company. But it was held in the same case, in making a somewhat technical distinction, that a lien was created by the agreement to furnish the necessary water from the canal from year to year during the times specified for the irrigation of certain lands for the agreed price upon the theory that such an agreement was in effect for the sale of real property and thus created a lien therefor, and where performed by the company could be enforced, both as against the original owner of the land and as against his grantee with notice.⁵

But in order to give constructive notice to subsequent purchasers of a lien of a water company for the furnishing of water, the contract should be duly executed, acknowledged, and recorded.⁶

³ "A lien may be created on property by contract." *Fresno etc. Co. v. Powell*, 80 Cal. 114, 22 Pac. Rep. 53, 13 Am. St. Rep. 112, citing Cal. Civ. Code, Secs. 2881-2884.

⁴ *Fresno etc. Co. v. Rowell*, 80 Cal. 114, 22 Pac. Rep. 53, 13 Am. St. Rep. 112; *Fresno etc. Co. v. Dunbar*, 80 Cal. 530, 34 Pac. Rep. 275.

⁵ *Stanislans W. Co. v. Bachman*, 152 Cal. 716, 93 Pac. Rep. 858, 15 L.

R. A., N. S., 359, where it is said: "Such an agreement, with all its terms, is binding, not only upon the maker, but upon all persons who subsequently acquire the maker's title to the property."

⁶ *Fresno etc. Co. v. Powell*, 80 Cal. 114, 22 Pac. Rep. 53, 13 Am. St. Rep. 112; *Fresno etc. Co. v. Dunbar*, 80 Cal. 530, 34 Pac. Rep. 275.

The usual method of procedure for enforcing such contracts where the payment of the water rates is neglected or refused is by a foreclosure and sale of the lien.⁷ And the fact that the defendant did not use the water if the company complied with the contract is immaterial. The land is bound whether the water was used or not.⁸

§ 1523. **Reformation of contracts.**—Where the contract, by mistake or otherwise, does not express the true intent of the parties it may be reformed in a proper case for that purpose by a court of equity. So, in a suit on a written contract for furnishing water, in which contract the date when the first payment was due was left blank, it was held that under the evidence the defendant could have it reformed so as to show that the first payment was not due until he should acquire and use water in irrigating his lands.¹ Where a defective deed, given to convey a certain water right, was executed in 1890, and the water was used by the grantee until 1898, without any claim of right being made by the grantor, the statute of limitations will not prevent the grantee from maintaining a suit to reform the instrument at any time within the period prescribed by the statute after the assertion of the adverse claim, as the statute does not begin to run until such assertion.² But, "In order to grant relief the mistake must not only be mutual, but all the parties to the deed who are affected, immediately or consequently, by the mistake should be made parties, as they are entitled to be heard upon any matter that might affect their rights under the decree."³

§ 1524. **Rescission of contracts.**—Where a party has been induced to enter into a contract by the fraudulent representations of the other party, the party defrauded may, as soon as he discovers the facts, rescind the contract and bring a suit for the cancellation of the same, and a court of equity will decree the rescission thereof. But in order to rescind a contract entered into upon the ground of fraudulent representations, the evidence that such representations

⁷ See cases *supra*.

⁸ Fresno Canal Co. v. Hart, 152 Cal. 450, 92 Pac. Rep. 1010; Fresno Canal etc. Co. v. Howell, 80 Cal. 114, 22 Pac. Rep. 53, 13 Am. St. Rep. 112.

¹ Fresno etc. Co. v. Hart, 152 Cal.

450, 92 Pac. Rep. 1010; State v. Lorenz, 22 Wash. 289, 60 Pac. Rep. 644.

² State v. Lorenz, 22 Wash. 289, 60 Pac. Rep. 644.

³ Center Creek W. & Irr. Co. v. Lindsay, 21 Utah 192, 60 Pac. Rep. 559.

were fraudulent must be clear and convincing.¹ Again, where there has been no fraud or other special legal reason, one can not rescind a contract entered into at pleasure, and especially is this true where there has been part performance and the party seeking to rescind still retains the benefits received under the contract.² Neither will a court of equity interfere to decree the cancellation of a contract to furnish water unless the facts as alleged in the bill show the necessity of equitable interference.³ A contract to supply water "year after year, so long as he shall pay the annual rental therefor," is held in Colorado to be one which may be terminated by the consumer at the end of any year.⁴ The general rule of law is that before a suit can be maintained for the recovery of the consideration paid under a contract there must be first a formal rescission of the contract.⁵ Where, however, a water company under the terms of a contract agreed to deliver water to a consumer and there was a total failure of the company to deliver any water, the purchaser can recover not only what he paid under the contract, but also his damages for the breach; and, furthermore, such failure of consideration being total, no formal rescission is necessary before bringing the suit.⁶

¹ *Owen v. Pomona Land & W. Co.*, 131 Cal. 530, 63 Pac. Rep. 850; *Id.*, 64 Pac. Rep. 253; *Perkins v. Frazer*, 107 La. 390, 31 So. Rep. 773.

² *Bowman v. Ayers*, 2 Idaho 465, 21 Pac. Rep. 405.

³ *San Diego Flume Co. v. Souther*, 90 Fed. Rep. 164, 32 C. C. A. 548, 61 U. S. App. 134; *Id.*, 104 Fed. Rep. 706, 44 C. C. A. 143.

⁴ *South Boulder etc. Co. v. Marfell*, 15 Colo. 307, 25 Pac. Rep. 504; *San Diego etc. Co. v. Sharp*, 97 Fed. Rep. 394, 38 C. C. A. 220.

See, also, for rescission of contract, *Lombard v. Schlotfeldt*, — Wash. —, 123 Pac. Rep. 787; *Peterson v. North Yakima etc. Irr. Co.*, 63 Wash. 636, 116 Pac. Rep. 279.

⁵ *Owen v. Pomona etc. Co.*, 131 Cal. 530, 63 Pac. Rep. 850, 64 Pac. Rep. 253; *Kelley v. Owens*, 120 Cal. 502, 47 Pac. Rep. 369, 52 Pac. Rep. 797.

⁶ *Richter v. Union etc. Co.*, 129 Cal. 367, 62 Pac. Rep. 39.

Where there has been a total failure of consideration of a contract induced by fraudulent representations of plaintiff, and plaintiff is unable to perform, no notice of rescission is required to enable the defendant to plead failure of consideration as a defense to a suit on the contract. *Russ etc. Co. v. Muscupiabe etc. Co.*, 120 Cal. 521, 52 Pac. Rep. 995, 65 Am. St. Rep. 186.

Where a contract provided that it might be canceled on 30 days' notice if the purchaser should default in payment, and the purchasers being eight months in default, they could not complain of the vendor's failure to furnish water under the contract, and if a new contract was not made or the past due payments waived, the vendor was entitled to rescission of the

§ 1525. **The cancellation or annulment of contracts.**—The Court in a proper action in equity, and upon a proper showing, may cancel or annul certain contracts for water rights, where the exercise of such rights would interfere with the vested rights of others. So, where a company has sold certain perpetual water rights and in the deeds of conveyance it is provided that upon the fulfillment of the contingency of the sale of all its rights up to the extent of the estimated capacity of the company to furnish water, the property of the corporation would be turned over to the purchasing consumers or to a company organized by them, and the company continued to sell supposed rights in excess of its capacity, an action by the consumers who purchased rights within the capacity of the selling company or by the corporation organized by them to take over the property, will be maintained to cancel or annul the outstanding contracts for the excess rights. This is upon the theory that the purchasers of these supposed rights took their deeds containing such a provision with notice that when the rights to the extent of the estimated capacity of the company to furnish water was sold, the property would be turned over to the consumer grantees, and they were therefore put upon inquiry as to whether, by sales prior to their own, the company had reached that limit, and if the prior sales had reached such limit, the company had no rights which it could thereafter sell, and the purchasers of such supposed rights took nothing by their purchase, and it was held that the Court would annul such contracts.¹

Contracts may also be annulled by action of the parties thereto. So, where one of the parties to a contract has by purchase or otherwise acquired the rights of both the contracting parties granting a

contract and possession of the land sold with the water right therefor. *Spokane Canal Co. v. Coffman*, 54 Wash. 645, 103 Pac. Rep. 1106.

¹ *Blakely v. Ft. Lyon Canal Co.*, 31 Colo. 224, 73 Pac. Rep. 249, holding that persons against whom an action is brought to cancel such rights can not complain that the action is not also maintained against others having no better rights.

See, also, *New La Junta etc. Co. v. Kreybill*, 17 Colo. App. 26, 67 Pac.

Rep. 1026; *La Junta etc. Co. v. Hess*, 6 Colo. App. 497, 42 Pac. Rep. 50; affirmed, *Id.*, 31 Colo. 1, 71 Pac. Rep. 415; *Patterson v. Ft. Lyon Canal Co.*, 36 Colo. 175, 84 Pac. Rep. 807, holding that the right of action to cancel such contracts accrued immediately after the contracts conveying such excess rights were issued, and was barred after five years thereafter.

See, also, for contracts to turn control over to consumers, Secs. 1515-1518.

perpetual water right, it results in an extinguishment of the contract.² And even when the contract has expired by the limitation of time, the consumer can not be deprived of the water where his right originated under the contract and where he has made valuable improvements upon his land, but may claim the water under the statutory duty of the company to furnish the water.³

§ 1528. **Breach of contracts.**—Contracts relative to the rights in question are often broken, as well as is the case with other contracts. And for the breach of these contracts the respective parties have their remedies, according to the general law of contracts.¹

One of the most common classes of cases involving the breach of a contract is where there is a total or part failure of consideration; as, for example, where a certain amount of water is paid for and the same is not delivered. And it is held in cases of this nature that where a contract provides for the delivery of a certain amount of water, the failure to deliver any water constituted a failure of consideration, and the purchaser is entitled to recover the money paid under the contract, and was not confined to an action for damages, and that, too, without any formal rescission of the contract before his bringing suit.² The fact that the company is prevented from fur-

² "This condition, it seems to us, might result in an extinguishment of the contract, or rather a merger of the duty on the one hand to comply with the contract, and the privileges acquired on the other hand under the contract, and that the result would be an extinguishment of the contract." *Jackson v. Indian Creek etc. Co.*, on second appeal, 18 Idaho 513, 110 Pac. Rep. 251; see *Id.*, 16 Idaho 430, 101 Pac. Rep. 814.

³ *San Diego etc. Co. v. Sharpe*, 97 Fed. Rep. 394, 38 C. C. A. 220; *Id.*, 89 Fed. Rep. 295; *South Boulder etc. Co. v. Marfell*, 15 Colo. 302, 25 Pac. Rep. 504.

For statutory duty to furnish water, see Secs. 1496, 1497.

¹ For actions on contracts, see Sec. 1529.

² *Richter v. Union Land etc. Co.*, 129 Cal. 367, 62 Pac. Rep. 39, where it is said: "Nor, where the failure of consideration is total—which implies, of course, that nothing of value has been received under the contract by the party seeking to rescind—is it necessary that a formal rescission be made before bringing suit. In such cases a suit may always be maintained for the recovery of the consideration paid."

See, also, *Russ etc. Co. v. Muscupiabe etc. Co.*, 120 Cal. 521, 52 Pac. Rep. 995, 65 Am. St. Rep. 186.

Where there was a partial breach of contract for the failure to furnish sufficient water for irrigation for a certain year, and no demand was made for the rental, and the same parties entered into another contract for an-

nishing the water by a writ of injunction sued out by a third party is not a legal excuse for the failure to furnish the water according to the contract, although the injunction may deprive the company of the means of the performance.³ The rule is otherwise where the company is prevented from furnishing the water by the consumer himself, or where the consumer fails to avail himself of the water furnished by the company, or where he negligently contributes to the injury. In such cases the consumer can not hold the company liable.⁴

In an action by a consumer against a water company for the failure to furnish the water according to a contract, and where the contract was proven and also the breach of the same by the company in failing to furnish the water, it devolves upon the company to explain such failure, and the sufficiency of the explanation is a question of fact for the jury to determine.⁵

§ 1527. Breach of contracts—Act of God as excuse for failure to perform.—Under certain circumstances, a corporation or person contracting to do a certain thing will be excused from performing through an act of God or *vis major*. It is a well-recognized principle that when it is apparent that the parties have contracted on the basis of the continued existence of a given thing, then, on performance becoming due, if, without the fault of the obligor, the thing has ceased to exist, the case has become one of mutual mistake and the duty to perform no longer exists.¹ So, where a water com-

other year, and afterward a demand for payment was made for the first year, it was held that the previous debt for rent was presumed to have entered into the contract for the latter year. *Perkins v. Fraizer*, 107 La. 390, 31 So. Rep. 773.

See, also, *Leavitt v. Lassen Irr. Co.*, 157 Cal. 82, 106 Pac. Rep. 404; *Lassen Irr. Co. v. Long*, 157 Cal. 94, 106 Pac. Rep. 409; *Beaumont Irr. Co. v. Gregory*, — Tex. Civ. App. —, 136 S. W. Rep. 545; *Luitweiler Pumping Engine Co. v. Ukiah W. & Imp. Co.*, 16 Cal. App. 198, 116 Pac. Rep. 707; *Abbott v. Seventy-Six Land &*

W. Co., — — Cal. —, 118 Pac. Rep. 425; *Just v. Idaho Canal & Imp. Co.*, 16 Idaho 639, 102 Pac. Rep. 381, 133 Am. St. Rep. 140.

³ *Sample v. Fresno etc. Co.*, 129 Cal. 222, 61 Pac. Rep. 1085.

⁴ *Carr v. Miller-Morris etc. Co.*, 105 La. 239, 29 So. Rep. 715; *Fresno etc. Co. v. Dunbar*, 80 Cal. 530, 34 Pac. Rep. 275.

⁵ *Rocky Ford Canal Co. v. Sampson*, 5 Colo. App. 30, 36 Pac. Rep. 638.

¹ *Bishop on Contracts*, Sec. 588; *Chitty on Contracts*, 1070.

pany by contract agrees to furnish its consumers a certain amount of water during the irrigating season, and it is impossible for the company to perform this part of the contract without any fault upon its part either in the making of such a contract, through some inevitable accident, such as some extraordinary and unprecedented flood, which ordinary prudence might not have anticipated, the company may be excused from performing the contract. But whether or not such an excuse will avail depends upon the facts and circumstances of each particular case. The subject will be more thoroughly discussed when we come to the subject of defenses to actions for damages for act of God or inevitable accident.²

§ 1528. **Breach of contracts—Forfeiture of rights.**—Where the proper forfeiture clause is made in the contract, one result of the breach of the contract is a forfeiture of all rights acquired under it. As held in a very recent case in Colorado that, under a contract whereby defendant granted water rights to plaintiff, such rights to be forfeited on plaintiff's failure to complete certain work within a stated time, the fact that the plaintiff expended in the work large sums for which it could obtain no equivalent in case of forfeiture was not ground for relieving against the same, the defendant not being in fault and its damages being difficult to estimate.¹ But where the provisions in a written contract relative to the forfeiture of the consumer's right have been waived, the company can not thereafter insist on the right, and a forfeiture can not be enforced.² Forfeitures, under the well-known rule of law, are not favored, and such contracts will be strictly construed against the company, especially where the consumer has the right of compulsory

² See Secs. 1691, 1692.

¹ *Farmers' etc. Co. v. Pawnee etc. Co.*, 47 Colo. 239, 107 Pac. Rep. 286.

² *Kimball v. Northern Colo. Irr. Co.*, 42 Colo. 412, 94 Pac. Rep. 333; *Cooper v. Shannon*, 36 Colo. 98, 85 Pac. Rep. 175, 118 Am. St. Rep. 95.

Where the written contract provided that the consumers must furnish a written notice or application within a certain time if they wanted the water for a certain year, but the company

continually furnished the water when verbally requested to do so, and the officers told the consumers that such written notice was not necessary, it was held that the company was estopped to deny a waiver of the provisions of the written contract, and to thereafter require the written notice. *Colorado Canal Co. v. McFarland*, 50 Tex. Civ. App. 92, 94 S. W. Rep. 400, 109 S. W. Rep. 435.

service.³ But it is held that where a water company tenders water to a consumer first at the rate fixed by law and next at the rate fixed by a contract, and the consumer refuses to pay anything, this amounts to a repudiation, by which his rights under the contract are ended.⁴

It was held in Washington that a promoter of an irrigation corporation who acquired a right to purchase land through one who had a contract to purchase at \$5 per acre can not recover damages from the corporation on the ground of fraud, because on forfeiture of the contract the corporation bought the same land at about \$5 per acre, where the promoter sought without actual investment of money to make a large profit from the corporation by a sale of the land to the same at \$30 per acre.⁵

The forfeiture of a consumer's right to the use of the water, where he has been once served by the company, involves more than the mere terms of the contract under which the forfeiture is claimed. The contract right to be furnished with water by the company may, by apt terms therein, be forfeited. But the right of the consumer under the law, if he complies with its provisions, to have the company continue to furnish him with the water, can not be forfeited by any breach upon his part of a contract. As we have discussed in previous sections of this chapter, all companies organized for the purpose of furnishing water to consumers for profit are under the duty imposed by the law, because of their quasi-public character, to furnish water to consumers each year without discrimination, except as to their respective priority of rights,⁶ upon the payment or tender for the current year of the water rate mutually agreed upon by the parties, or, in lieu thereof, upon the payment or tender of such sum as may be fixed in accordance with law,⁷ and that, too, wholly irrespective of the nature of the rights of the consumers as to whether they are under a contract or under the statute, and that an action for mandamus will lie to compel the company to furnish the water.⁸ However, it has been claimed a number of times that,

³ *Cooper v. Shannon*, 36 Colo. 98, 85 Pac. Rep. 175, 118 Am. St. Rep. 95.

⁴ *Leavitt v. Lassen Irr. Co.*, 157 Cal. 82, 106 Pac. Rep. 404.

⁵ *Mangold v. Adrian Irr. Co.*, 60 Wash. 286, 111 Pac. Rep. 173.

⁶ For priority of rights to be furnished with water, see Secs. 1500, 1502.

⁷ For the regulation of water rates, see Secs. 1368-1385.

⁸ See Sec. 1506.

because of the failure of a consumer to pay the water rates charged by the company for previous years, under the terms of the contract under which the water was furnished, such consumer had forfeited his right to the use of the water for the subsequent years. The courts, however, hold to the contrary, and hold that it is the duty of the company to furnish the water to a consumer for the current year where he has defaulted in his payments of the water rates for previous years, upon the payment or tender of the legal rates for that year; and that the remedy of the company for furnishing the water for which payment was not made was by an action by the company against the consumer for debt. Therefore, a contract by which a company agrees to furnish a consumer with a certain amount of water "year after year, so long as he shall pay the annual rental therefor," is held to be a mere option, which may be terminated by the consumer at the end of the first year; and when the consumer causes the county commissioners to fix the water rate for water from the company's ditch, and declines to pay more than such rate, or the rate fixed in the contract, it is a termination of such contract, though the contract itself is not returned or canceled. The company, however, must continue to furnish the consumer with the water under its statutory duty.⁹

So, also, where a contract provides that upon failure to pay the annual rental the consumer "forfeits and relinquishes all rights and claims whatsoever in and to the use of said water from said ditch," it is held to apply only to the consumer's rights under his contract, and not to apply to the statutory right to have the company furnish him with the water at the rate fixed by law.¹⁰

⁹ South Boulder etc. Co. v. Marfell, 15 Colo. 302, 25 Pac. Rep. 504.

See, also, for contracts to furnish a certain amount of water, Sefton v. Prentice, 103 Cal. 670, 37 Pac. Rep. 641; San Diego Flume Co. v. Chase, 87 Cal. 561, 25 Pac. Rep. 756, 26 Pac. Rep. 825; Hewitt v. San Jacinto etc. Co., 124 Cal. 186, 56 Pac. Rep. 893; Bean v. Stoneman, 104 Cal. 49, 37 Pac. Rep. 777, 38 Pac. Rep. 39.

For the statutory duty to furnish water, see Secs. 1495-1497.

For the regulation of water rates, see Chap. 69, Secs. 1368-1385.

¹⁰ South Boulder etc. Co. v. Marfell, 15 Colo. 302, 25 Pac. Rep. 504.

Contracts providing for forfeitures, even when not invalid as unreasonable, will be strictly construed. Cooper v. Shannon, 36 Colo. 98, 85 Pac. Rep. 175, 118 Am. St. Rep. 95.

See, also, Kimball v. Northern Colo. Irr. Co., 42 Colo. 412, 94 Pac. Rep. 333; San Diego etc. Co. v. Sharp, 97 Fed. Rep. 394, 38 C. C. A. 220; *Id.*, 89 Fed. Rep. 295.

§ 1529. Breach of contracts—Damages.—The most common remedy for the breach of a contract is an action at law for damages.¹ This is true where there has been a partial or total breach of a contract to furnish water or for the sale of water rights.²

The subject of actions for damages for the failure to furnish water under contract, and also the measure of damages which may be recovered in such actions will be more thoroughly discussed when we come to the chapter upon actions for damages.³

¹ For the enforcement of contracts breach of contract to furnish water, at equity, see Secs. 1520, 1650. see Sec. 1529.

² For contracts for the sale of water For the measure of damages for the rights, see Secs. 1511-1513. failure to furnish water, see Secs.

³ For the right to damages for 1696-1700.

PART XIII.

ADJUDICATION AND PROTECTION OF RIGHTS— INJURIES TO RIGHTS AND REMEDIES THEREFOR.

CHAPTER 78.

THE ADJUDICATION OF WATER RIGHTS IN EQUITY.

- § 1530. Scope of part and chapter.
- § 1531. Necessity of adjudication or legal determination of water rights.
- § 1532. The general power of courts to adjudicate water rights.
- § 1533. The jurisdiction of courts—Definition—Venue.
- § 1534. The nature of the action—Suit to quiet title.
- § 1535. Actions to quiet title.
- § 1536. Actions to quiet title and injunctions in the same suits.
- § 1537. Actions to quiet title and damages in the same suits.
- § 1538. Actions to apportion the use of water among riparian proprietors.
- § 1539. Actions to apportion subterranean waters among the owners of the lands under which they flow.
- § 1540. Actions to determine the rights as between appropriators and riparian owners.
- § 1541. Actions to adjudicate and quiet title to ditches and canals and easements therefor.
- § 1542. Parties to action to adjudicate rights—The rights of strangers not before the court.
- § 1543. Parties to actions to adjudicate rights—Where there are several on the same source of supply.
- § 1544. Who may bring the action—Parties plaintiff.
- § 1545. Parties defendant—Right to affirmative relief.
- § 1546. Parties to actions—Intervenors.
- § 1547. Pleadings—Complaint or bill in actions to quiet title by appropriators.
- § 1548. Pleadings—Complaint or bill in actions to quiet title by riparian owners.
- § 1549. Pleadings—Complaint or bill in actions to quiet title to ditch or canal.
- § 1550. Pleadings—Demurrer—Answer—And cross-complaint or bill.
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- § 1552. Pleadings—Where the claim to the right is made by prescription.
- § 1553. Practice and procedure—Submission of questions of fact to a jury.
- § 1554. Proof of claims—Burden of proof.
- § 1555. Proof necessary to establish a right by prescription—Burden of proof.
- § 1556. The findings of fact and conclusions of law.
- § 1557. The decrees and judgments—On rights by appropriation.
- § 1558. The decrees and judgments—On rights by appropriation—Quantity of water.
- § 1559. Decrees and judgments—Apportioning the water between riparian proprietors.
- § 1560. Decrees and judgments—In actions to quiet title to ditches and canals.
- § 1561. Decrees and judgments—Apportioning the subterranean waters among the owners of the land.
- § 1562. Decrees and judgments—For costs.
- § 1563. The decrees and judgments—As res judicata—Rights by appropriation, etc.
- § 1564. The decrees and judgments—As res judicata—As to riparian rights.
- § 1565. Appeal from judgments and decrees.
- § 1566. The enforcement of judgments and decrees.

§ 1530. Scope of part and chapter.—In this part of our work we will discuss the adjudication and protection of all rights, the injuries to rights, and the remedies therefor. And where the pleadings and practice differ in any respect from the pleadings and practice in other actions, these subjects will also be discussed under the respective heads.

In the present chapter we will discuss the adjudication of water rights by courts under their general equity powers, leaving the discussion of the determination and adjudication of water rights under special statutory proceedings, both by the courts and by administrative officers, to other chapters.¹

§ 1531. Necessity of adjudication or legal determination of water rights.—Although a person may make a valid prior appropriation of the water of a natural stream or other source of natural water supply,¹ he may record his notice in accordance with the law,² he may apply the water to some beneficial use or purpose for many years, he may lay claim to his rights adversely to all the

¹ See Chaps. 79, 80, Secs. 1567-1597.

² For the recording of notices, see

¹ For the appropriation of water, Sec. 713.

see Chap. 38, Secs. 706-732.

world, and yet this is not deemed a sufficient determination of his rights, for the reason that there may be many others who have made like appropriations from the same source of supply, and whose claims are bound in time in some manner to conflict with the claims of the prior appropriator. Simply because a person lays claim to certain rights, although he does it by means of notice to all the world, and while it may put others on their guard, is no proof of the validity of his claim. As regards water rights, as shown from the history of water right litigation, persons are inclined to claim, at times, many times more than they have any valid right to. This is especially true as to all the older water rights in all States where the appropriations were made before the adoption of the newer method of the acquisition of water rights under the laws of State control, discussed in a previous chapter of this work, and which method in and of itself somewhat checks the avaricious claims of some appropriators.³ As was well said in a late South Dakota case:⁴ "Perhaps there is in all water right cases some mysterious relation between the quantity of water and the quantity of language—a law of supply and demand, which required that the volume of language shall increase in direct ratio to the deficiency in volume of water."

However, be this as it may, the title to a water right is not perfect in any claimant until there has been an adjudication or legal determination of the same and the title thereto adjudged to be in the claimant as against all the world, either by the judgment or decree in a proper action brought in a court of competent jurisdiction or the award or determination as the result of a proceeding before some board or administrative officers under a special statute authorizing such proceeding,⁵ and such final decree or determination designating the owner of the right and defining the nature and extent of the same and making a permanent record thereof.

§ 1532. The general power of courts to adjudicate water rights.—The adjudication of the ownership, nature, and extent of a water right, or water rights, as the term indicates, is a matter for the

³ For the laws of State control, see Chap. 68, Secs. 1337-1367.

⁴ Redwater etc. Co. v. Reed, 26 S. D. 466, 128 N. W. Rep. 702.

⁵ For the determination of water rights by administrative officers, see Chap. 80, Secs. 1585-1595.

courts; and unless there are statutes prescribing special proceedings therefor, such an action is subject to the ordinary rules of pleading and procedure as are other civil actions. Even in those States which have statutes providing for the determination of water rights, in the first instance, by special boards of control or administrative officers, there are always provisions for a final resort to the courts by appeal by any party dissatisfied with the determination of the board or officers.¹ But without any special statutes upon the subject, under the practice in all the States a court of equity has the power in all proper actions to ascertain and determine, and by appropriate judgment or decree, to definitely fix the ownership and the nature and extent of the respective rights of all appropriators and users of water taken from the same stream or other source of natural water supply. It is held that in order to avoid a multiplicity of suits, where a large number of persons claim rights to use or divert the waters of a stream by virtue of riparian rights, appropriations, prescription, or otherwise, a suit in equity is the proper proceeding to determine such rights and to enjoin the infringement thereof.²

¹ For the determination of water rights by boards or officers, see Chap. 80, Secs. 1585-1595.

² *Crawford Co. v. Hathaway* (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; *Woodruff v. North Bloomfield Gravel M. Co.*, 8 Sawy. 628, 16 Fed. Rep. 25, 9 Sawy. 441, 18 Fed. Rep. 753; *Farmers' etc. Irr. Co. v. Cozad Irr. Co.*, 65 Neb. 3, 90 N. W. Rep. 951; *Andrews v. Lillian Irr. Dist.*, 66 Neb. 458, 92 N. W. Rep. 612, 97 N. W. Rep. 336; *McCook v. Crews*, 70 Neb. 109, 96 N. W. Rep. 996.

See, also, *Frey v. Loudon*, 70 Cal. 550, 11 Pac. Rep. 838; *Lorenz v. Jacobs*, 63 Cal. 73; *Combs v. Slayton*, 19 Ore. 99, 26 Pac. Rep. 661; *Riverside W. Co. v. Gage*, 89 Cal. 410, 26 Pac. Rep. 889; *Alhambra etc. Co. v. Richardson W. Co.*, 95 Cal. 490, 30 Pac. Rep. 577; *Barrows v. Fox*, 98 Cal. 63, 30 Pac. Rep. 768, 32 Pac. Rep. 811; *City of Salem Co. v. Salem*

etc. Co., 12 Ore. 374, 7 Pac. Rep. 497; *Schilling v. Romminger*, 4 Colo. 100; *Riverside W. Co. v. Sargent*, 112 Cal. 230, 44 Pac. Rep. 560; *Nevada D. Co. v. Bennett*, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777; *Platte Valley Irr. Co. v. Buckers etc. Co.*, 25 Colo. 77, 53 Pac. Rep. 334; *McGinness v. Stanfield*, 6 Idaho 372, 55 Pac. Rep. 1020; *Egan v. Estrada*, 6 Ariz. 248, 56 Pac. Rep. 721; *Brown v. Baker*, 39 Ore. 66, 65 Pac. Rep. 799, 66 Pac. Rep. 193; *Miller v. Dondero*, 139 Cal. 643, 73 Pac. Rep. 583; *Union M. & M. Co. v. Dangberg*, 81 Fed. Rep. 73; *Guthiel Park Inv. Co. v. Town of Montclair*, 32 Colo. 420, 76 Pac. Rep. 1050; *Haggin v. Saile*, 23 Mont. 375, 59 Pac. Rep. 154; *Hayes v. Buzard*, 31 Mont. 74, 77 Pac. Rep. 423; *South Tule etc. Co. v. King*, 144 Cal. 450, 77 Pac. Rep. 1032; *Smith etc. Co. v. Colorado etc. Co.*, 34 Colo. 485, 82 Pac. Rep. 940, 3 L. R. A., N. S., 1142; *Becker v. Marble Creek Irr.*

It is within the power of the Court to fix the dates of the respective appropriations.³ In the determination of the rights of the respective parties, where the Court has jurisdiction of the parties and the subject matter of the suit, a court of equity has the power to prescribe the method to be used in measuring the water, and to locate a measuring box for the distribution of the water.⁴ And in apportioning the water it is within the power of the Court to apportion the flow to which each party is entitled by periods of time rather than by a division of the quantity when such apportionment would best secure the rights of the parties.⁵ And having the power to make such a judgment or decree, the Court also has the power to enforce it, and to so regulate the use of the water by the respective owners as to protect the rights of each from infringement or impairment by others.⁶ This may be by way of an injunction issued in the same suit determining the rights.⁷

Courts of equity have the discretion to consolidate causes, the exercise of which right will not be reviewed on appeal, except for

Co., 15 Utah 225, 49 Pac. Rep. 892, 1119; *Harris v. Shontz*, 1 Mont. 212; *Nephi Irr. Co. v. Jenkins*, 8 Utah 369, 31 Pac. Rep. 986; *Gill v. Malan*, 29 Utah 431, 82 Pac. Rep. 471; *Van Camp v. Emery*, 13 Idaho 202, 89 Pac. Rep. 752.

³ See, also, judgments and decrees, Secs. 1557-1564.

It is no objection that the date fixed was arbitrarily selected so long as the priority was not affected. *McDonald v. Lannan*, 19 Mont. 78, 47 Pac. Rep. 648.

⁴ *Elliott v. Whitmore*, 10 Utah 246, 37 Pac. Rep. 461; *Tolman v. Casey*, 15 Ore. 83, 13 Pac. Rep. 669; *Becker v. Marble Creek Irr. Co.*, 15 Utah 225, 49 Pac. Rep. 892, 1119.

But see *McGuinness v. Stanfield*, 6 Idaho 372, 55 Pac. Rep. 1020, where in an action to settle water rights of various parties upon a stream, the District Court, after establishing the priorities of the various appropriators, proceeded to decree the time and quan-

tity which each appropriator was permitted to use such waters. Held error, upon the ground that it was not in the province of the Court to dictate how or when the right acquired by the appropriators should be exercised so long as such use was within the limits of their appropriation.

⁵ For the appropriation of water by periods of time, see Sec. 786.

For judgments and decrees, see Secs. 1557-1564; *Wiggins v. Muscupiabe etc. Co.*, 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337.

⁶ For the enforcement of judgment or decrees, see Secs. 1566, 1646.

For the protection of the right by injunction, see Secs. 1596-1647.

⁷ *Crawford Co. v. Hathaway (Hall)*, 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; *Frost v. Alturas W. Co.*, 11 Idaho 294, 81 Pac. Rep. 996.

For the enforcement of judgments and decrees, see Secs. 1566, 1646.

abuse of discretion. So, where two or more suits involving the adjudication of certain water rights could have been joined in the same complaint, and were between the same parties and with reference to the same subject-matter, the ditches in controversy only being different, it is held that they were properly consolidated.⁸

§ 1533. **The jurisdiction of courts—Definition—Venue.**—"Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials: First, the Court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; third, the point decided must be, in substance and effect, within the issue."¹ The above definition was adopted by the Supreme Court of Montana in an action to determine and adjudge water rights and to quiet title to the same.²

The State Courts have full and complete jurisdiction over actions brought to adjudicate the water rights claimed within their respective jurisdictions from a stream or other source of natural water supply. It is held by the Supreme Court of the United States that the question of the priority of possession of a water right and of the conformity to local customs, laws, and decisions do not constitute Federal questions under Section 2339, United States Revised Statutes, and, therefore, findings of fact or questions of local law upon which depend a party's right under the section to the protection of a vested water right are not reviewable in the Supreme Court of the United States on writ of error to a State Court.³ And the con-

⁸ *Hayward v. Mason*, 54 Wash. 649, 104 Pac. Rep. 139; *Peterson v. Dillon*, 27 Wash. 78, 85, 67 Pac. Rep. 397; *Wolff v. Pomponia*, — Colo. —, 120 Pac. Rep. 142.

¹ *Munday v. Vail*, 34 N. J. Law 418.

² *Sloan v. Byers*, 37 Mont. 503, 97 Pac. Rep. 855.

³ For the construction of Acts of 1866 and 1870, see Secs. 611-619; *Telluride Power Trans. Co. v. Rio Grande W. R. Co.*, 175 U. S. 639, 44 L. Ed. 305, 20 Sup. Ct. Rep. 245; dismissing writ of error to the Supreme Court of Utah, 16 Utah 125, 51

Pac. Rep. 146; *Id.*, on second appeal, 187 U. S. 569, 47 L. Ed. 307, 23 Sup. Ct. Rep. 178; dismissing writ of error to Supreme Court of Utah, 23 Utah 22, 63 Pac. Rep. 995.

A suit to establish and quiet title to water rights connected with lands included in a grant from the Mexican government, which rights are claimed to be within the protection of the treaty with Mexico involves no Federal question for the purpose of giving jurisdiction to the Federal courts. *Crystal Springs etc. Co. v. Los Angeles*, 177 U. S. 169, 44 L. Ed.

struction placed by the highest court of a State upon a State statute regulating the use and diversion of water is controlling and conclusive upon the Federal courts where jurisdiction is acquired by the Federal courts to hear and determine cases involving such rights.⁴

Where there is a diversity of citizenship and the jurisdictional amount, or a Federal question is involved, parties have the same right to originally bring the action or to remove the same to the Federal courts as they have in other actions.⁵

Where the controversy is over interstate waters and between two sovereign States of the Union, the sole and original jurisdiction to

720, 20 Sup. Ct. Rep. 573; affirming *Id.*, 82 Fed. Rep. 114, 76 Fed. Rep. 114, 76 Fed. Rep. 148; *Los Angeles v. Los Angeles etc. Co.*, 217 U. S. 217, 54 L. Ed. 736, 30 Sup. Ct. Rep. 452; writ of error to the Supreme Court of California dismissed for want of jurisdiction; for same case below see 152 Cal. 645, 93 Pac. Rep. 869, 1135; *Hooker v. Los Angeles*, 188 U. S. 314, 47 L. Ed. 487, 23 Sup. Ct. Rep. 395, 63 L. R. A. 471; *Crystal Springs etc. Co. v. Los Angeles*, 177 U. S. 169, 44 L. Ed. 720, 20 Sup. Ct. Rep. 573; *Boquillas etc. Co. v. Curtis*, 213 U. S. 339, 53 L. Ed. 822, 29 Sup. Ct. Rep. 493.

See, also, *Miller & Lux v. East Side etc. Co.*, 211 U. S. 293, 53 L. Ed. 189, 29 Sup. Ct. Rep. 111; *Pacific Gas Imp. Co. v. Ellert*, 64 Fed. Rep. 421; *Mohl v. Lamar Canal Co.*, 128 Fed. Rep. 776.

⁴ *Hawes v. Contra Costa W. Co.*, 5 Sawy. 287, Fed. Cas. No. 6235; *San Diego Flume Co. v. Souther*, 90 Fed. Rep. 164, 32 C. C. A. 548, 61 U. S. App. 134; *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56, rev'g *Id.*, 68 Fed. Rep. 948; *Mohl v. Lamar etc. Co.*, 128 Fed. Rep. 776.

⁵ *Anderson v. Bassman*, 140 Fed. Rep. 10, 140 Fed. Rep. 14.

But a corporation can not be exclusively organized for the purpose of creating a diversity of citizenship and thus giving the Federal courts jurisdiction. *Miller & Lux v. East Side etc. Co.*, 211 U. S. 293, 53 L. Ed. 189, 29 Sup. Ct. Rep. 111.

An appeal from a decision of the State Engineer to a State Court is removable to the Federal Court. *Waha etc. Co. v. Lewiston etc. Co.*, 158 Fed. Rep. 137.

See, also, *Rickey etc. Co. v. Miller & Lux*, 152 Fed. Rep. 11, 81 C. C. A. 207; affirming *Id.*, 146 Fed. Rep. 547; *Herring v. Modesto Irr. Dist.*, 95 Fed. Rep. 705; *Hagge v. Kansas City etc. R. Co.*, 104 Fed. Rep. 391; *Morris v. Bean*, 123 Fed. Rep. 618, 146 Fed. Rep. 423; *Eaton v. Hoge*, 141 Fed. Rep. 64, 72 C. C. A. 74.

An allegation in a bill that complainant is a corporation organized under an Act of Congress makes the case as arising under the laws of the United States, and confers jurisdiction upon a Federal Court. *United States etc. Co. v. Gallegos*, 89 Fed. Rep. 769.

try and determine the cause is vested in the Supreme Court of the United States.⁶

Where, however, the controversy is over interstate waters and between the citizens of different States, or the citizens of the same State, the State courts where the diversion is made have full and complete jurisdiction to determine all questions, with the exception of the right to quiet title to the use of the water where a stream rises in one State and flows into another State and is there diverted and used for irrigation. In such cases the courts of the former State have no jurisdiction to try and determine the right to the use of the water in the latter State.⁷ So, also, where there is a diversity of citizenship the action may be originally brought in or removed to the Federal Court.⁸

An action to quiet title to water rights must be prosecuted and maintained in the jurisdiction in which the *res* or subject-matter is situated. Where, therefore, the rights to be settled are wholly within one county the action should be brought in the court having jurisdiction in such county.⁹ So, an action brought by a riparian proprietor to quiet title to his right to the use of the water flowing by his land must be commenced in the county where the land or some part of it is situated.¹⁰ Where the controversy is over water flowing through different counties of the same State, or where they are diverted in one county and conducted by a canal to another

⁶ *Kansas v. Colorado*, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655; *Id.*, on demurrer, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552; *Missouri v. Illinois*, 180 U. S. 208, 45 L. Ed. 497, 21 Sup. Ct. Rep. 331; *Id.*, 200 U. S. 496, 50 L. Ed. 572, 26 Sup. Ct. Rep. 268, 202 U. S. 598, 50 L. Ed. 1160, 26 Sup. Ct. Rep. 713.

See for jurisdiction of courts over interstate waters, Secs. 1233, 1234.

⁷ *Conant v. Deep Creek Irr. Co.*, 23 Utah 627, 66 Pac. Rep. 188, 90 Am. St. Rep. 721; *Lamson v. Vailes*, 27 Colo. 201, 61 Pac. Rep. 231; *Willey v. Decker*, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939; *Taylor v. Hulett*, 15 Idaho 265, 97 Pac. Rep. 37, 19 L. R. A., N. S., 535.

⁸ See, also, for the jurisdiction of courts over interstate waters, Secs. 1233-1533; *Morris v. Bean*, 123 Fed. Rep. 618, 146 Fed. Rep. 423; *Howell v. Johnson*, 89 Fed. Rep. 556; *Rickey etc. Co. v. Miller & Lux*, 152 Fed. Rep. 11, 81 C. C. A. 207.

⁹ *Taylor v. Hulett*, 15 Idaho 265, 97 Pac. Rep. 37, 19 L. R. A., N. S., 535; *Pacific Yacht Club v. Sausalito Bay W. Co.*, 98 Cal. 487, 33 Pac. Rep. 322; *Fritts v. Camp*, 94 Cal. 393, 29 Pac. Rep. 867.

¹⁰ *Miller & Lux v. Madera etc. Co.*, 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391; *Lux v. Haggin*, 69 Cal. 255, 9 Pac. Rep. 919, 10 Pac. Rep. 674.

county for use there, the Court of either county has jurisdiction to try and determine the case.¹¹

In those States where the statutes provide for State boards and give them jurisdiction to determine existing water rights, with right of appeal to the courts from the decision of the boards, the court will generally refuse to take jurisdiction of a case where a hearing has not been first had by the board.¹² But in Nebraska it is held that notwithstanding the authority of an administrative board to determine controversies over water rights,¹³ whenever a controversy arises over the substance of the rights of the various parties making use of a stream, such controversies are proper for the courts to take judicial cognizance of.¹⁴

Where the jurisdiction of a court of equity is properly invoked upon one branch of a case, the Court has jurisdiction to settle all the rights of the parties in that action.¹⁵ Where a party to an action fails to object to the jurisdiction of the Court, but acquiesces in the

¹¹ *Deseret Irr. Co. v. McIntyre*, 16 Utah 398, 52 Pac. Rep. 628; *Lower Kings River etc. Co. v. Kings River etc. Co.*, 60 Cal. 408; *Last Chance etc. Co. v. Emigrant etc. Co.*, 129 Cal. 277, 61 Pac. Rep. 960.

¹² For the laws of State control, see Chap. 68, Secs. 1337-1367.

¹³ For the adjudication of water rights by administrative boards, see Chap. 80, Secs. 1585-1595.

¹⁴ "The courts can not administer the statute nor regulate the use of the streams, but they can and should adjudicate disputes based on the rights of parties acquired under the statutes." *Crawford Co. v. Hathaway* (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; modifying *Crawford Co. v. Hathaway*, 60 Neb. 754, 84 N. W. Rep. 271; *Id.*, 61 Neb. 317, 85 N. W. Rep. 303.

See, also, *Farm Invest. Co. v. Carpenter*, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918.

¹⁵ "It may be possibly true that the interference was so slight and inconsequential that plaintiff might have been relegated to its remedy at law, but, since jurisdiction in equity was properly invoked at least upon one branch of the case, the trial court should have retained jurisdiction to settle all the rights of the parties in one action, and it ought not to require the plaintiff to bring another to have determined the relative rights of the parties in and to this strip of land." *Smith etc. Co. v. Colorado etc. Co.*, 34 Colo. 485, 82 Pac. Rep. 940, 3 L. R. A., N. S., 1148; *Feeney v. Chester*, 7 Idaho 324, 63 Pac. Rep. 192; *Gutheil Park Inv. Co. v. Town of Montclair*, 32 Colo. 420, 76 Pac. Rep. 1050.

The rights of the owners to the waters of a ditch and the right to change the point of diversion may be determined in one action. *Hallett v. Carpenter*, 37 Colo. 30, 86 Pac. Rep. 317.

decree for a number of years, and enjoys the benefit thereof, he is estopped from subsequently attacking the decree collaterally.¹⁶ Where the question of jurisdiction is not waived, it is the duty of the Court to dismiss the action whenever during the trial want of jurisdiction appears.¹⁷

§ 1534. The nature of the action—Suit to quiet title.—The nature of an action to determine ownership, description, and extent of a water right, if not technically one to quiet title, is closely analogous thereto. Strictly speaking, an action to quiet title is one *in personam*, but by the statutes of a number of the States there has been given to it an additional effect *in rem* as far as the adjudication of water rights is concerned. Such actions at times may be regarded as strictly *in personam*, as is the case where they are brought to settle the individual and several rights of the different appropriators, and these respective parties are enjoined from interfering with the other parties, as set forth by the terms of the decree. But the action may be brought to settle the rights of certain ditches as against the rights of other ditches or for the awarding of a certain amount of water to a definite tract of land where the action might be deemed to be strictly *in rem* or quasi *in rem*. But, again, there may be mixed actions *in rem* and *in personam*, as is illustrated by the many cases where not only the rights of the individual appropriators but also the rights of certain ditches and canals are determined and adjudicated. But as far as any set form of action is concerned, such actions brought for the determination and adjudication of water rights are more analogous to actions to quiet title than to any other. They are, therefore, commonly referred to as actions to quiet title.¹ And, as said by the Supreme Court of Ore-

¹⁶ Consolidated etc. Co. v. New Loveland etc. Co., 27 Colo. 521, 62 Pac. Rep. 364; Boulder & Weld etc. Co. v. Lower Boulder D. Co., 22 Colo. 115, 43 Pac. Rep. 540; Otero Canal Co. v. Fosdick, 20 Colo. 522, 39 Pac. Rep. 332.

An objection to the jurisdiction of the Court can not be raised for the first time on appeal. Elliott v. Whitmore, 10 Utah 246, 37 Pac. Rep. 461.

The District Court, being a Superior

Court of general jurisdiction, want of jurisdiction must affirmatively appear, to overthrow the presumption that the Court had jurisdiction of the subject matter of the action. Beach v. Spokane etc. Co., 25 Mont. 367, 65 Pac. Rep. 106.

¹⁷ Union Light etc. Co. v. Lichty, 42 Ore. 563, 71 Pac. Rep. 1044.

¹ A suit to quiet title to a water right for irrigation purposes, and to determine the land owner's right to

gon: "Water suits are in many respects *sui generis*, by reason of which courts are sometimes confronted with the dilemma of either exercising their discretion in matters of practice coming before them or of making an exception to that well-known maxim, 'Equity will not suffer a right to be without a remedy.' " ²

An action for the partition of a water right as between appropriators will not lie for the reason that the title to the water in the stream does not vest in the appropriator, but he is merely given the right to divert and use the water for beneficial purposes; and, again, partition can not be had of property which is not owned jointly by two or more. ³

But it is held that a perpetual right to the use of water is not the proper subject-matter of adjudication by mandamus. ⁴

§ 1535. **Actions to quiet title.**—As discussed in a previous section, an action to determine and adjudicate water rights between the claimants to the same, where the water is taken by all from a common source of supply, while not technically so is more in the nature of an action to quiet title ¹ than any other form of action, and that by the courts and others such actions are commonly referred to as actions to quiet title, we will discuss more at length the nature and scope of these actions. A water right, or the right to the use of water, being in its nature real property, ² an action by the owner thereof can be maintained to quiet the title thereto in practically

divert waters from a stream for such purposes, is in the nature of an action to quiet title to real estate. *Rickey Land etc. Co. v. Miller & Lux*, 152 Fed. Rep. 11, 81 C. C. A. 207; affirming *Id.*, 146 Fed. Rep. 574.

See, also, *Taylor v. Hulett*, 15 Idaho 265, 97 Pac. Rep. 37, 19 L. R. A., N. S., 535; *Conant v. Deep Creek etc. Co.*, 23 Utah 627, 66 Pac. Rep. 188, 90 Am. St. Rep. 721.

For the nature of statutory actions, see Sec. 1569.

An action to set aside a decree fraudulently substituted for another in a proceeding for the determination of priority of water rights is not an action to determine such priority of

rights, but an action for relief on the ground of fraud. *Peck etc. Co. v. Pella etc. Co.*, 19 Colo. 222, 34 Pac. Rep. 988.

² *Whited v. Cavin*, 55 Ore. 98, 105 Pac. Rep. 396, quoting from Mr. Justice King in *Hough v. Porter*, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

³ *Crippen v. White*, 28 Colo. 298, 64 Pac. Rep. 184.

⁴ *Northern Colo. Irr. Co. v. Poup-pit*, 47 Colo. 490, 108 Pac. Rep. 23.

For the protection of rights by mandamus, see Secs. 1506, 1649.

¹ See Sec. 1534.

² See Secs. 768-771.

the same manner as is the case with other classes of real property. In fact, such an action, wherein the rights of the respective parties to the use of the water are determined, and by judicial decree the title to the same quieted in those found to be the owners thereof, is the most common form of actions brought for the purpose of settling those rights, for the reason that it enables the court of equity to acquire jurisdiction of all the rights involved and also of all the owners of those rights, and thus settle and permanently adjudicate in a single proceeding all the rights, or claims to rights, of all the claimants to the water taken from a common source of supply.³ It is therefore held that a bill in equity will lie to quiet the title to water rights, and that, too, regardless as to how those rights were acquired.⁴

There need not be an actual interference with plaintiff's right before an action may be brought. The assertion of an adverse claim is sufficient.⁵ It would be impossible to cite all the cases where

³ For jurisdiction of courts, see Sec. 1533.

For parties to actions to adjudicate water rights, see Secs. 1542-1546.

⁴ "In several cases this Court has recognized that such an action will lie." *Kimball v. Northern Colo. Irr. Co.*, 42 Colo. 412, 94 Pac. Rep. 333, citing *Grand Valley Irr. Co. v. Leasher*, 28 Colo. 273, 65 Pac. Rep. 44; *Gutheil etc. Co. v. Montclair*, 32 Colo. 420, 76 Pac. Rep. 1050; *Bessemer etc. Co. v. Woolley*, 32 Colo. 437, 76 Pac. Rep. 1053, 105 Am. St. Rep. 91; *Cooper v. Shannon*, 36 Colo. 98, 85 Pac. Rep. 175, 118 Am. St. Rep. 95; *Union M. & M. Co. v. Dangberg*, 81 Fed. Rep. 73; *Rickey Land etc. Co. v. Miller & Lux*, 152 Fed. Rep. 11, 81 C. C. A. 207; affirming *Id.*, 146 Fed. Rep. 574; *Rickey Land etc. Co. v. Wood*, 152 Fed. Rep. 22, 81 C. C. A. 218; affirming *Id.*, 146 Fed. Rep. 574; *Bullerdick v. Hermsmeyer*, 32 Mont. 541, 81 Pac. Rep. 334; *Salazar v. Smart*, 12 Mont. 395, 30 Pac. Rep. 675; *Katz v. Walkinshaw*, 141 Cal.

116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35; *Taylor v. Hulett*, 15 Idaho 265, 97 Pac. Rep. 37, 19 L. R. A., N. S., 535.

⁵ *Peregoy v. Sellick*, 79 Cal. 568, 21 Pac. Rep. 966; *Jones v. Conn*, 39 Ore. 30, 64 Pac. Rep. 855, 65 Pac. Rep. 1068, 54 L. R. A. 630, 87 Am. St. Rep. 634; *Hough v. Porter*, 51 Ore. 318, 372, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

"It is also argued that since the defendant concedes the plaintiff's prior right, and manifests no intention of continuing the interruption, the suit can not be maintained. But it is clearly established that he did insist upon the right to deplete the flow in the manner complained of, and in his answer prays that his rights therein be adjudicated, under which circumstances it is fully settled that a suit is maintainable." *Carnes v. Dalton*, 56 Ore. 596, 110 Pac. Rep. 170.

See, also, *Harris v. Harrison*, 93 Cal. 676, 29 Pac. Rep. 325; *Pacific*

suits to quiet water rights have been allowed under this section. However, they will be found under the various heads of this discussion.

A water right being real estate, upon the death of the owner thereof its title passes to his heirs. It is therefore held that an action to quiet title in such a case can not be maintained by an administrator, but that he may sue for the rents due the estate for the use of such water right.⁶

In Colorado, the rights and priorities as between ditches, canals, and reservoirs, must be determined under the statutory proceedings enacted for that purpose.⁷ But the rights of the respective consumers as between themselves, or as between themselves and the ditch owners, can not be adjudicated in these special statutory proceedings.⁸ However, the rights of the respective consumers under any of the works above named, after the award in the special pro-

Yacht Club v. Sausalito etc. Co., 98 Cal. 487, 33 Pac. Rep. 322; *Senior v. Anderson*, 130 Cal. 290, 62 Pac. Rep. 563; *Drake v. Russian River etc. Co.*, 10 Cal. 654, 103 Pac. Rep. 167; *Los Angeles v. Hunter*, 156 Cal. 603, 105 Pac. Rep. 755; *Foss v. Johnstone*, 158 Cal. 119, 110 Pac. Rep. 294; *King v. Ackroyd*, 28 Colo. 488, 66 Pac. Rep. 906; *San Luis W. Co. v. Estrada*, 117 Cal. 168, 48 Pac. Rep. 1075; *Standart v. Round Valley etc. Co.*, 77 Cal. 399, 19 Pac. Rep. 689.

"It may be regarded as well settled in this State that it is only necessary to the maintenance of suits of this character, either that it appear the defendants claim adversely to the moving party, or, if not asserting a hostile claim, that those made defendants are necessary to a complete determination of the controversy. Applying this rule here, this suit is maintainable, and each of the defendants are proper parties." *Whitehead v. Cavin*, 55 Ore. 98, 105 Pac. Rep. 396, citing *Jones v. Conn.*, 39 Ore. 30, 64 Pac. Rep. 855, 65 Pac. Rep. 1068, 54 L. R. A.

630, 87 Am. St. Rep. 634; *Hough v. Porter*, 51 Ore. 318, 372, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

⁶ *Travelers' Ins. Co. v. Childs*, 25 Colo. 360, 54 Pac. Rep. 1020.

⁷ For the statutory adjudication of water rights, see Chap. 79, Secs. 1567-1584.

⁸ "The question of the title of the sundry owners and users of the water covered by the priorities awarded to the same ditch can not be litigated or settled in the adjudication proceedings is well settled in this State." *Park v. Park*, 45 Colo. 347, 101 Pac. Rep. 406.

See, also, *Putnam v. Curtis*, 7 Colo. App. 437, 43 Pac. Rep. 1056; *Oppenlander v. Left Hand D. Co.*, 18 Colo. 142, 31 Pac. Rep. 854; *Hallett v. Carpenter*, 37 Colo. 30, 86 Pac. Rep. 317; *Evans v. Swan*, 38 Colo. 92, 88 Pac. Rep. 149; *O'Neil v. Ft. Lyon Canal Co.*, 39 Colo. 487, 90 Pac. Rep. 849; *Combs v. Farmers' etc. Co.*, 38 Colo. 420, 88 Pac. Rep. 396.

ceedings has been made to it, may be determined and adjudicated in an ordinary action in equity brought to quiet title.⁹ This, as can be readily seen, necessitates two actions before the individual rights as between the consumers under any ditch can be determined and adjudicated.¹⁰

An action will also lie to quiet title to stock in a mutual corporation, which stock represents water rights used for the purpose of irrigation of land.¹¹

§ 1536. **Actions to quiet title and injunctions in the same suits.** A court of equity having once acquired jurisdiction of the subject matter of the action and of the parties thereto,¹ acquires jurisdiction for all purposes of the suit;² and, therefore, it may grant all proper equitable relief prayed for in the complaint or the cross-complaint, or the bill or cross-bill, as the case may be.³

One of the most common reliefs granted by the Court, after the rights have been determined and adjudicated, and the title to the water rights quieted in the one declared to be the owner thereof, is, in the same action, to grant an injunction against the interference of the water rights the title to which was so quieted, by the other parties to the action. It was held in an early Montana case, that one owning a certain water right for which he was entitled to

⁹ See statutory adjudications, jurisdiction of subject matter, Sec. 1572.

See, also, *Park v. Park*, 45 Colo. 347, 101 Pac. Rep. 406; *Evans v. Swan*, 38 Colo. 92, 88 Pac. Rep. 149; *Combs v. Farmers' etc. Co.*, 38 Colo. 420, 88 Pac. Rep. 396; *Kimball v. Northern Colo. Irr. Co.*, 42 Colo. 412, 94 Pac. Rep. 333; *Cooper v. Shannon*, 36 Colo. 98, 85 Pac. Rep. 175, 118 Am. St. Rep. 95; *Grand Valley Irr. Co. v. Leshner*, 28 Colo. 273, 65 Pac. Rep. 44; *Gutheil etc. Co. v. Montclair*, 32 Colo. 420, 76 Pac. Rep. 1050; *Beesmer etc. Co. v. Woolley*, 32 Colo. 437, 76 Pac. Rep. 1053, 105 Am. St. Rep. 91; *Woods v. Sargent*, 43 Colo. 268, 95 Pac. Rep. 932; *Peterson v. Payne*, 48 Colo. 184, 95 Pac. Rep. 301; *Conley v. Dyer*, 43 Colo. 22, 95 Pac.

Rep. 304; *Cache La Poudre etc. Co. v. Hawley*, 43 Colo. 32, 95 Pac. Rep. 317; *Bowman v. Berdin*, 40 Colo. 247, 90 Pac. Rep. 506; *Bates v. Hall*, 44 Colo. 360, 98 Pac. Rep. 3; *Farmers' etc. Co. v. White*, 32 Colo. 114, 75 Pac. Rep. 416.

¹⁰ See Secs. 1572, 1573.

¹¹ *Wanamaker v. Pendleton*, — Colo. —, 121 Pac. Rep. 108.

¹ For jurisdiction of courts, see Sec. 1533.

For parties to the action, see Secs. 1542-1546.

² See Sec. 1533.

³ For pleadings in suits to quiet title, see Secs. 1547-1552.

See, also, *Cottonwood Ditch Co. v. Thom*, 39 Mont. 115, 121, 101 Pac. Rep. 825, 104 Pac. Rep. 281.

a decree to quiet his title thereto, was also entitled to a perpetual injunction restraining a diversion of the water to which he was declared entitled, by the other parties to the action.⁴ In such an action it is not necessary that the causes of action be separately stated in different counts.⁵ And, again, where the principal object of the suit is to enjoin the defendants from interfering with the plaintiff's use of the water rights, the equitable jurisdiction of the Court is invoked, and it can decide all questions involved, and grant appropriate relief, such as the quieting of the title to the water rights.⁶

§ 1537. Actions to quiet title and damages in the same suits.—

Although it is a somewhat uncommon practice, an action may be brought to quiet the title to a water right, ditch or canal, and also for damages suffered by the plaintiff for the wrongful diversion of the water, or for the wrongful obstruction of the ditch or canal.¹ Where such a mixed action is permitted the question of damages

⁴ *Harris v. Shontz*, 1 Mont. 212.

See, also, *Power v. Switzer*, 21 Mont. 523, 55 Pac. Rep. 32; *King v. Ackroyd*, 28 Colo. 488, 66 Pac. Rep. 906; *Duckworth v. Watsonville etc. Co.*, 158 Cal. 206, 110 Pac. Rep. 927; *Id.*, 150 Cal. 520, 89 Pac. Rep. 338; *Town of Sterling v. Pawnee etc. Co.*, 42 Colo. 421, 94 Pac. Rep. 339, 15 L. R. A., N. S., 238; *Sanders v. Wilson*, 34 Wash. 659, 76 Pac. Rep. 281; *South Tule etc. Co. v. King*, 144 Cal. 450, 77 Pac. Rep. 1032; *Twaddle v. Winters*, 29 Nev. 88, 85 Pac. Rep. 280, 89 Pac. Rep. 289; *Hulsman v. Todd*, 96 Cal. 228, 31 Pac. Rep. 39; *Sisk v. Caswell*, 14 Cal. App. 377, 112 Pac. Rep. 185; *Jacob v. Lorenz*, 98 Cal. 332, 33 Pac. Rep. 119; *The Salton Sea Cases*, 172 Fed. Rep. 820, 97 C. C. A. 242; *Watterson v. Saldunbehere*, 101 Cal. 107, 35 Pac. Rep. 432.

⁵ *Patterson v. Mills*, 138 Cal. 276, 71 Pac. Rep. 177; *Silver Creek etc. Co. v. Hayes*, 113 Cal. 142, 45 Pac. Rep. 191.

⁶ *Bessemer Irr. Ditch Co. v. Woolley*,

32 Colo. 437, 76 Pac. Rep. 1053, 105 Am. St. Rep. 91; *Guthell Park Inv. Co. v. Montclair*, 32 Colo. 420, 76 Pac. Rep. 1050; *Rincon etc. Co. v. Anaheim Union W. Co.*, 115 Fed. Rep. 543; *Burr v. Maclay Rancho W. Co.*, 154 Cal. 428, 98 Pac. Rep. 260; *Id.*, 160 Cal. 268, 116 Pac. Rep. 715; *Gates v. Settlers' etc. Co.*, 19 Okla. 83, 91 Pac. Rep. 856; *Simpson v. Harrah*, 54 Ore. 448, 103 Pac. Rep. 58; *Sand Point etc. Co. v. Panhandle Dev. Co.*, 11 Idaho 405, 83 Pac. Rep. 347.

An action for an injunction to protect water rights, upon the evidence considered, was held sufficient to establish prior appropriation by plaintiffs. *Watts v. Spencer*, 51 Ore. 262, 94 Pac. Rep. 39.

See, also, actions for injunction for the protection of the right, Secs. 1596-1647.

¹ *Sisk v. Caswell*, 14 Cal. App. 377, 112 Pac. Rep. 185; *Hartson v. Dill*, 151 Cal. 137, 90 Pac. Rep. 530; *Hoyt v. Hart*, 149 Cal. 722, 87 Pac. Rep. 569; *Anderson v. Cook*, 25 Mont. 330,

should be submitted to a jury, where a proper demand for the same has been made by either party. However, where the jury is waived, the question of damages may be tried by the Court.² The rule as to the procedure in such cases is for the Court to first try the equitable part of the action; and, afterwards, if a jury is demanded to try the issue of damages, submitting that question to the jury. After the verdict of the jury, the Court must make its findings of fact and conclusions of law, and enter judgment accordingly.³

§ 1538. **Actions to apportion the use of water among riparian proprietors.**—In those States which adhere to the modified form of the common law doctrine of riparian rights,¹ an action in equity will lie to adjudicate the right of each riparian proprietor upon a stream to his use of the water, and to apportion the use of all of the water of the stream among all of the riparian proprietors, where, of course, the right to the use of such water is all in riparian proprietors.² This rule is firmly settled in California, and in all the Western States which recognize the common law of riparian rights, as one of its rules of law governing the waters flowing within its boundaries. However, this rule is not peculiar to the Western common law States; but it is taken from the decisions of the Eastern States, where the only rule governing waters is the common law.³ In an early case in California, it was said that riparian rights in the use of the waters of a stream, "being held in common, it is well settled that in a controversy between such owners as to their rights, it is the duty of a court of equity to determine the respective rights of the parties so as to give to each the just proportion to which he may be entitled, and, if necessary, regulate the use between them according to their rights."⁴

64 Pac. Rep. 873, 65 Pac. Rep. 113, 66 Pac. Rep. 504; *Hulsman v. Todd*, 96 Cal. 228, 31 Pac. Rep. 39.

For injunctions and damages in the same action, see Sec. 1599.

For the submission of questions of fact to a jury in equity cases, see Sec. 1553.

² For actions for damages, see Secs. 1660 *et seq.*

³ *Stocker v. Kirtley*, 6 Idaho 795, 59 Pac. Rep. 891.

¹ For the modified doctrine of riparian rights, see Secs. 508-512.

² For the adjudication of water rights as between riparian owners and appropriators, see Sec. 1540.

³ For the common law doctrine of riparian rights, see Chaps. 21-28, Secs. 450-551.

⁴ *Mr. Justice McKee in Anaheim W. Co. v. Semitropic W. Co.*, 64 Cal. 185, 30 Pac. Rep. 623; citing: *Lyon v. McLaughlin*, 32 Vt. 423; *Arthur v. Case*,

An action to adjudicate and apportion the use of water as between riparian owners, or on behalf of riparian owners as against appropriators, will not lie in a State which has abrogated the common law of riparian rights.⁵

Having determined the quantity of water which each riparian proprietor is entitled to use, the Court will quiet the title thereto in him and grant an injunction in the same action against the other owners on the same stream and parties to the action, enjoining the interference with the respective rights awarded.⁶

§ 1539. **Actions to apportion subterranean waters among the owners of the lands under which they flow.**—Under the more modern rule of the correlative rights of land owners to the waters of subterranean basins, streams, or water-bearing strata, over which their lands overlie in common, as adopted in the case of *Katz v. Walkinshaw*,¹ an action will lie to determine the extent of the rights of each land owner to the use of such water. The paramount right to the use of such waters is in the owners of the land overlying the water-bearing strata. And, where there is not sufficient water for

1 *Paige* 447; *Belknap v. Trimble*, 3 *Paige* 577; *Webber v. Gage*, 39 N. H. 182; *Bardwell v. Ames*, 22 *Pick.* 353; *Ballou v. Hopkinton*, 4 *Gray* 324; *Roath v. Driscoll*, 20 *Conn.* 535, 52 *Am. Dec.* 352; *Brown v. Ashley*, 16 *Nev.* 311.

See, also, *Warren v. Westbrook Mfg. Co.*, 86 *Me.* 32, 29 *Atl. Rep.* 927, 26 *L. R. A.* 284, and note; *Union M. & M. Co. v. Dangberg*, 81 *Fed. Rep.* 73; *Senior v. Anderson*, 130 *Cal.* 290, 62 *Pac. Rep.* 563; *Id.*, 115 *Cal.* 496, 47 *Pac. Rep.* 454; *Miller & Lux v. Madera etc. Co.*, 155 *Cal.* 59, 99 *Pac. Rep.* 502, 22 *L. R. A.*, N. S., 391; *Nesalious v. Walker*, 45 *Wash.* 621, 88 *Pac. Rep.* 1032; *Verdugo etc. Co. v. Verdugo*, 152 *Cal.* 655, 93 *Pac. Rep.* 1021; *Rianda v. Watsonville etc. Co.*, 152 *Cal.* 523, 93 *Pac. Rep.* 79; *Gutierrez v. Wege*, 151 *Cal.* 587, 91 *Pac. Rep.* 395; *McCook etc. Co. v. Crews*, 70 *Neb.* 109, 96 *N. W. Rep.* 996; *Rose v. Mes-*
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mer, 142 *Cal.* 322, 75 *Pac. Rep.* 905; *Filippine v. Hewlett*, — *Cal.* —, 121 *Pac. Rep.* 376; *Caviness v. La Grande Irr. Co.*, — *Ore.* —, 119 *Pac. Rep.* 731.

For decrees apportioning the water between riparian proprietors, see *Sec.* 1559.

⁵ *Sternberger v. Seaton etc. Co.*, 45 *Colo.* 401, 102 *Pac. Rep.* 168.

⁶ For decrees as to riparian rights, see *Sec.* 1559.

For decrees apportioning water between riparian owners as *res judicata*, see *Sec.* 1564.

¹ 141 *Cal.* 116, 70 *Pac. Rep.* 663, 74 *Pac. Rep.* 766, 64 *L. R. A.* 236, 99 *Am. St. Rep.* 35.

See, also, for the rights to subterranean waters, *Secs.* 1148-1211.

For the correlative rights to subterranean waters, see *Secs.* 1173-1178, 1198-1200.

the use of all such owners, each land owner is entitled to a fair and just proportion, based upon the correlative rights of all of the land owners.² But, as it is not the policy of the law to permit any of the available waters of the country to remain unused, or to allow one having the natural advantage of a situation, which gives him a legal right to use the water, to prevent another from using it while he himself does not desire to do so, or can not do so, the surplus subterranean water, over and above the amount actually needed by the land owners whose lands overlie common water-bearing strata, may be awarded to an appropriator for use upon distant lands not overlying such strata.³ But where there is no surplus over and above the amount needed by such land owners, an appropriator of such waters can not carry them beyond the watershed for commercial purposes, to the injury of the owners of the land overlying the common water-bearing strata.⁴ An action will also lie to quiet the title to the waters of springs.⁵

§ 1540. **Actions to determine the rights as between appropriators and riparian owners.**—In those States which have both the Arid Region Doctrine of appropriation and the common law of riparian rights, an action in equity will lie to determine and adjudicate the respective rights as between appropriators and of riparian owners, who take the water from the same stream or other source of water supply.¹ And, the rights having been determined, a decree will be made by the Court quieting the title to the same in the respective owners, and enjoining the other parties to the action

² *Katz v. Walkinshaw*, *supra*.

The right of a land owner to a quantity of percolating water necessary for use on the tract of land overlying such water is paramount to that of an adjoining land owner to take the water to distant land. *Burr v. Macley Rancho W. Co.*, 154 Cal. 428, 98 Pac. Rep. 260; *Id.*, 160 Cal. 268, 116 Pac. Rep. 715.

See, also, for decrees in actions to adjudicate rights to subterranean waters, Sec. 1561.

³ *Burr v. Macley*, 154 Cal. 428, 98 Pac. Rep. 260.

⁴ *Miller v. Bay Cities W. Co.*, 157 Cal. 256, 107 Pac. Rep. 115, 27 L. R. A. 772.

⁵ *Le Quime v. Chambers*, 15 Idaho 405, 98 Pac. Rep. 415, 21 L. R. A., N. S., 76.

¹ For rights as between appropriators and riparian owners, see Secs. 810-823.

from interfering with such rights.² As far as possible the courts of these jurisdictions will reconcile the rights both of the appropriators of the water for beneficial uses and the rights of riparian owners. Under the modified rule of the common law of riparian rights, riparian owners have the right to the use of water flowing by their lands to practically the same extent as have appropriators of the water for beneficial purposes. Neither can use more water than is necessary for the purpose for which the water is diverted from the streams. It is, therefore, within the power of a Court of equity in cases where these relative rights are contested to determine and adjudicate by proper decree the rights of the respective owners of the water, and that, too, whether they claim under one doctrine or the other.

§ 1541. **Actions to adjudicate and quiet title to ditches and canals and easements therefor.**—An equitable action will also lie to determine the rights of various parties in and the title to ditches and canals, constructed for the purpose of conducting the water to the place of use, also the rights in and title to easements for ditches and canals.¹ An action will lie to quiet title to an easement for a

² *Bincon etc. Co. v. Anaheim Union W. Co.*, 115 Fed. Rep. 543; *Williams v. Altnow*, 51 Ore. 275, 95 Pac. Rep. 200, 97 Pac. Rep. 539; *Miller & Lux v. Madera etc. Co.*, 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391; *Mentone Irr. Co. v. Redlands etc. Co.*, 155 Cal. 323, 100 Pac. Rep. 1082, 22 L. R. A., N. S., 382, 17 Am. & Eng. Ann. Cas. 1222; *Arroyo etc. Co. v. Baldwin*, 155 Cal. 280, 100 Pac. Rep. 874; *Gallagher v. Montecito Valley W. Co.*, 101 Cal. 245, 35 Pac. Rep. 770; *Bathgate v. Irvine*, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158; *Arroyo etc. Co. v. Dorman*, 137 Cal. 611, 70 Pac. Rep. 737; *Duckworth v. Watsonville etc. Co.*, 158 Cal. 206, 110 Pac. Rep. 927; *Id.*, 150 Cal. 520, 89 Pac. Rep. 338; *People's Ditch Co. v. Fresno etc. Co.*, 152 Cal. 87, 92 Pac. Rep. 77.

¹ For rights of way over public lands, see Secs. 927-971.

For rights of way over private lands, see Secs. 972-993.

Bashore v. Mooney, 4 Cal. App. 276, 87 Pac. Rep. 553; *Crawford v. Minnesota etc. Co.*, 15 Mont. 153, 38 Pac. Rep. 713; *Hoyt v. Hart*, 149 Cal. 722, 87 Pac. Rep. 569; *Shaw v. Proffitt*, 57 Ore. 192, 109 Pac. Rep. 584, 110 Pac. Rep. 1092; *Swank v. Sweetwater Irr. & Pr. Co.*, 15 Idaho 583, 98 Pac. Rep. 297; *Ruhnke v. Aubert*, 58 Ore. 6, 113 Pac. Rep. 38; *Bowen v. Webb*, 37 Mont. 479, 97 Pac. Rep. 839; *Cottonwood D. Co. v. Thom*, 39 Mont. 115, 101 Pac. Rep. 825, 104 Pac. Rep. 281.

See, also, *Smith v. Hampshire*, 4 Cal. App. 8, 87 Pac. Rep. 224; *Sisk v. Caswell*, 14 Cal. App. 377, 112 Pac. Rep. 185; *Riverside etc. Co. v. Jansen*, 66 Cal. 300, 5 Pac. Rep. 486.

the use of all such owners, each land owner is entitled to a fair and just proportion, based upon the correlative rights of all of the land owners.² But, as it is not the policy of the law to permit any of the available waters of the country to remain unused, or to allow one having the natural advantage of a situation, which gives him a legal right to use the water, to prevent another from using it while he himself does not desire to do so, or can not do so, the surplus subterranean water, over and above the amount actually needed by the land owners whose lands overlie common water-bearing strata, may be awarded to an appropriator for use upon distant lands not overlying such strata.³ But where there is no surplus over and above the amount needed by such land owners, an appropriator of such waters can not carry them beyond the watershed for commercial purposes, to the injury of the owners of the land overlying the common water-bearing strata.⁴ An action will also lie to quiet the title to the waters of springs.⁵

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³ *Burr v. Maclay*, 154 Cal. 428, 98 Pac. Rep. 260.

⁴ *Miller v. Bay Cities W. Co.*, 157 Cal. 256, 107 Pac. Rep. 115, 27 L. R. A. 772.

⁵ *Le Quime v. Chambers*, 15 Idaho 405, 98 Pac. Rep. 415, 21 L. R. A., N. S., 76.

¹ For rights as between appropriators and riparian owners, see Secs. 810-823.

from interfering with such rights.² As far as possible the courts of these jurisdictions will reconcile the rights both of the appropriators of the water for beneficial uses and the rights of riparian owners. Under the modified rule of the common law of riparian rights, riparian owners have the right to the use of water flowing by their lands to practically the same extent as have appropriators of the water for beneficial purposes. Neither can use more water than is necessary for the purpose for which the water is diverted from the streams. It is, therefore, within the power of a Court of equity in cases where these relative rights are contested to determine and adjudicate by proper decree the rights of the respective owners of the water, and that, too, whether they claim under one doctrine or the other.

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² *Rincon etc. Co. v. Anaheim Union W. Co.*, 115 Fed. Rep. 543; *Williams v. Altnow*, 51 Ore. 275, 95 Pac. Rep. 200, 97 Pac. Rep. 539; *Miller & Lux v. Madera etc. Co.*, 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391; *Mentone Irr. Co. v. Redlands etc. Co.*, 155 Cal. 323, 100 Pac. Rep. 1082, 22 L. R. A., N. S., 382, 17 Am. & Eng. Ann. Cas. 1222; *Arroyo etc. Co. v. Baldwin*, 155 Cal. 280, 100 Pac. Rep. 874; *Gallagher v. Montecito Valley W. Co.*, 101 Cal. 245, 35 Pac. Rep. 770; *Bathgate v. Irvine*, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158; *Arroyo etc. Co. v. Dorman*, 137 Cal. 611, 70 Pac. Rep. 737; *Duckworth v. Watsonville etc. Co.*, 158 Cal. 206, 110 Pac. Rep. 927; *Id.*, 150 Cal. 520, 89 Pac. Rep. 338; *People's Ditch Co. v. Fresno etc. Co.*, 152 Cal. 87, 92 Pac. Rep. 77.

¹ For rights of way over public lands, see Secs. 927-971.

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Bashore v. Mooney, 4 Cal. App. 276, 87 Pac. Rep. 553; *Crawford v. Minnesota etc. Co.*, 15 Mont. 153, 38 Pac. Rep. 713; *Hoyt v. Hart*, 149 Cal. 722, 87 Pac. Rep. 569; *Shaw v. Proffitt*, 57 Ore. 192, 109 Pac. Rep. 584, 110 Pac. Rep. 1092; *Swank v. Sweetwater Irr. & Pr. Co.*, 15 Idaho 583, 98 Pac. Rep. 297; *Ruhnke v. Aubert*, 58 Ore. 6, 113 Pac. Rep. 38; *Bowen v. Webb*, 37 Mont. 479, 97 Pac. Rep. 839; *Cottonwood D. Co. v. Thom*, 39 Mont. 115, 101 Pac. Rep. 825, 104 Pac. Rep. 281.

See, also, *Smith v. Hampshire*, 4 Cal. App. 8, 87 Pac. Rep. 224; *Sisk v. Caswell*, 14 Cal. App. 377, 112 Pac. Rep. 185; *Riverside etc. Co. v. Jansen*, 66 Cal. 300, 5 Pac. Rep. 486.

ditch or canal.² A ditch or canal being real property,³ an action to quiet title to the same must be brought in the county where it is situated.⁴ Again, in the same action the title to both the water rights and to the ditch or canal through which it flows may be adjudicated, and a decree made by the Court quieting the title in the respective owners of both.⁵ As was held by the Colorado Court, where the trial Court only decided the rights as to the water, "The trial Court should have retained jurisdiction to settle all the rights of the parties in one action, and it ought not to require the plaintiff to bring another to have determined the relative rights of the parties in and to this strip of land."⁶ In the pleadings, however, the separate causes of action must be separately stated.⁷

§ 1542. Parties to action to adjudicate rights—The rights of strangers not before the Court.—It is a fundamental principle of law that no person is bound by a judgment or decree who has not had his day in court. In other words, to bind a person to a judgment or decree, he must either be a plaintiff or a party to the action, and be served with summons or process, according to the law of the State wherein the action is brought. He must be given full and complete opportunity, as the law of the jurisdiction allows, to answer to the complaint and set up his claim. And, it may be said to be a well-settled proposition of law that a judgment or decree is only binding between the actual parties to the action, and their privies, and in no way affects the rights of those who are not parties to the action. So where the lower Court rendered a decree "although general in form, and broad enough in language to include the whole world," it was held by the Supreme Court that it could have no such effect, and the Court said: "They are binding on the

² Gutheil Park Inv. Co. v. Montclair, 32 Colo. 420, 76 Pac. Rep. 1050.

³ See Sec. 834.

⁴ Pacific Yacht Club v. Sausalito Bay etc. Co., 98 Cal. 487, 33 Pac. Rep. 322.

⁵ Fudickar v. East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. Rep. 1024.

⁶ Smith Canal etc. Co. v. Colorado etc. Co., 34 Colo. 485, 82 Pac. Rep. 940, 3 L. R. A., N. S., 1148.

See, also, Blake v. Boye, 38 Colo. 55, 88 Pac. Rep. 470, 8 L. R. A., N. S., 418; Collins v. Gray, 154 Cal. 131, 97 Pac. Rep. 142.

See, also, for decrees in actions to quiet title to ditches and canals, Sec. 1560.

⁷ Nevada etc. Co. v. Kidd, 37 Cal. 282; Bear River etc. Co. v. Boles, 24 Cal. 354.

parties to the action and their privies, but upon no one else. As to strangers claiming rights in the waters of the lake the decrees in no manner affect them. The decrees are not even evidence of adverse rights. Strangers may proceed as if the decree had never been entered."¹ It therefore must follow that in order to bind by a decree or judgment any persons interested in the subject matter of the action must be made parties to the action, legally served with process, and given an opportunity to answer and set up their claims.

As no one is bound by the judgment or decree unless they are made parties to the action, so also the rights of a person not a party to the waters of a stream can not be raised by a party to the action upon the ground that the stranger has a superior right to that of his opponent. In other words, the Court must determine the action as between the rights of the persons actually made parties and before it. In a leading case upon this subject it is said:² "Neither do we think that the trial Court was called upon, at the instance of the defendants, entire strangers in every aspect to other appropriators, to inquire into and pass upon the question whether appropriators of water below the mouth of the proposed canal of appellee would be injured by the construction of the canal. The rights of such persons will not, of course, be injuriously affected by the decree in this cause, and *non constat* but that they may yet intervene for their own protection, if they deem that the construction of the canal will be an invasion of their rights, or that they may be willing to forego objection to the construction of the canal."³ However, upon

¹ *State ex rel. McConihe v. Steiner*, 58 Wash. 578, 109 Pac. Rep. 57.

See, also, *Josselyn v. Daly*, 15 Idaho 137, 96 Pac. Rep. 568; *State ex rel. Pew v. District Court*, 34 Mont. 233, 85 Pac. Rep. 525; *McLean v. Farmers' etc. Co.*, 44 Colo. 184, 98 Pac. Rep. 16.

See, also, for decrees as *res judicata*, Secs. 1563, 1564.

² *Gutterries v. Albuquerque etc. Co.*, 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338.

³ See, also, *Carnes v. Dalton*, 56 Ore. 596, 110 Pac. Rep. 170; *Senior v. Anderson*, 138 Cal. 716, 72 Pac. Rep.

349; *Seven Lakes etc. Co. v. New Loveland etc. Co.*, 40 Colo. 382, 93 Pac. Rep. 485, 17 L. R. A., N. S., 329; *Boulder etc. Co. v. Hoover*, 48 Colo. 343, 110 Pac. Rep. 75; *Hackett v. Larimer etc. Co.*, 48 Colo. 178, 109 Pac. Rep. 965; *Humphreys v. Frank*, 46 Colo. 524, 105 Pac. Rep. 1093; *Schneider v. Schneider*, 36 Colo. 518, 86 Pac. Rep. 347; *Crippen v. Glasgow*, 38 Colo. 104, 87 Pac. Rep. 1073; *Diez v. Hartbauer*, 46 Colo. 599, 105 Pac. Rep. 868; *Lower Latham etc. Co. v. Bijou etc. Co.*, 41 Colo. 212, 93 Pac. Rep. 483; *Utt v. Frey*, 106 Cal. 392, 39 Pac. Rep. 807; *Clark v. Ashley*, 34 Colo. 285, 82

suggestion or a showing to the Court that other persons are interested in the waters, which are the subject-matter of the action, as we shall see, it is the common practice for the Court to make an order that such persons be made parties and duly served with process.⁴

We will discuss in the following sections who may be parties plaintiff or defendant.

§ 1543. Parties to actions to adjudicate rights—Where there are several on the same source of supply.—But where there are a number of appropriators and claimants of the water from the same source of supply, the rights to the use of the water can not be adjudicated in an action between a single plaintiff as against the rights of a single defendant. A decree attempting to adjudicate and settle the rights as between two appropriators or claimants in an action between themselves only as parties would not bind in any way the other appropriators and users of the water from the same source, and not made parties to the action. Then, again, if this was the rule, the litigation and the multiplicity of suits in attempting to settle and determine the rights of all claimants to the waters from the common source of supply would be interminable, and such suits would end just where they began without there having been a final settlement or adjustment of the rights. So, the statutes of the various States provide to the effect that, in the adjudication of the water rights between claimants to the same from a common source of supply, all claimants who are not made parties plaintiff,¹ must be made parties defendant. And the courts are inclined to protect the interests of persons interested and not made parties to the suit; and, when it is discovered during the progress of the case that there are other parties interested in the waters who have valid claims thereto, it is the usual practice for the Court to make an order to make them parties to the action, and they are then served with process and are permitted to come in and defend and set up their rights.² And, in this connection, necessary parties to such an action

Pac. Rep. 588; *Burkhart v. Meiberg*, 37 Colo. 187, 86 Pac. Rep. 98, 6 L. R. A., N. S., 1104, 119 Am. St. Rep. 279; *Humphreys v. McCall*, 9 Cal. 59, 70 Am. Dec. 621; *United States v. Lee*, 15 N. M. 382, 110 Pac. Rep. 607.

⁴ See Secs. 1543-1546.

¹ See Sec. 1544.

² For the statutes of the various States as to parties in suits for the adjudication of water rights, see Part XIV.

See, also, as to parties in actions in statutory adjudications, Sec. 1573.

are all those who have an interest in the subject and object of the action, and all persons against whom relief must be obtained to accomplish the object of the suit.³ So, in all cases where there are several appropriators and claimants of the waters from the same stream or other source of natural water supply, or who take water from the same ditch, canal, or reservoir, in order to permanently adjudicate the rights to all the water, all parties having a valid claim thereto must be made parties to the action.⁴ The same rule is applied

³ *McLean v. Farmers' Highline etc. Co.*, 44 Colo. 184, 98 Pac. Rep. 16.

In an action to determine the priority of rights, all parties claiming rights of appropriation should be made either parties plaintiff or defendant; but the failure to make all such persons who claim a right of appropriation parties to such an action will not affect the rights and interests as adjudicated between the parties to such action and determined by the court. *Frost v. Idaho Irr. Co.*, 19 Idaho 372, 114 Pac. Rep. 38.

⁴ "If there are other persons not parties whose rights must be ascertained and settled before the rights of the parties to the suit can be determined, then the statute is peremptory, and the court must cause such persons to be brought in." *Pomeroy's Remedies and Remedial Rights*, Sec. 419.

"It is also a well and reasonably established rule in equity that, if the defendants actually before the court may be subject to undue inconvenience or danger of loss, or to future litigation, or to a liability under the decree more extensive and direct than if the absent parties were before the court, that, of itself, will furnish sufficient grounds to enforce the rule of making absent persons parties to the action." *Story, Eq. Pl.*, 9th Ed., Sec. 338.

In *Bliss v. Grayson*, 24 Nev. 422, 56 Pac. Rep. 231, after citing Sec. 3039 of the Gen. Stat. of Nevada, the Court

said: "It will be observed that this statute practically adopts the rules of equity requiring all persons materially interested, either legally or beneficially, in the subject-matter of the suit, to be made parties to the suit, when their rights will be affected by the final decree."

"In a water suit, an appropriator from a certain stream would have to bring an action against each other appropriator from the same stream before he could have his rights finally adjudicated as to all such appropriators. His bringing a suit against one appropriator would not settle his rights. It would leave him with other litigation to settle them, and for that reason he is permitted to join as plaintiff or defendant every other appropriator of water from the stream." *Creer v. Bancroft etc. Co.*, 13 Idaho 407, 90 Pac. Rep. 228.

See, also, *Frost v. Alturas etc. Co.*, 11 Idaho 294, 81 Pac. Rep. 996; *Rickey v. Wood*, 152 Fed. Rep. 22, 81 C. C. A. 218; *Union M. & M. Co. v. Dangberg*, 81 Fed. Rep. 73; *Hough v. Porter*, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; *Sloan v. Byers*, 37 Mont. 503, 97 Pac. Rep. 855; *Senior v. Anderson*, 115 Cal. 496, 47 Pac. Rep. 454; *Lytle Creek W. Co. v. Perdew*, 65 Cal. 447, 2 Pac. Rep. 732, 4 Pac. Rep. 426; *Williams v. Altnow*, 51 Ore. 275, 95 Pac. Rep. 200, 97 Pac. Rep. 539.

where the water is claimed by riparian owners by virtue of their riparian rights.⁵ In either case the respective parties having proven their rights, the Court must then make specific findings as to the amount of water to which each party is entitled, and upon which the decree must be based.⁶ And, in making this adjustment of the rights, "a Court may determine any controversy between the parties before it when it can be done without prejudice to the rights of others, or by saving their rights; but, where a complete determination of the controversy can not be had without the presence of other parties, it may dismiss the complaint, or cause them to be brought in, as the exigencies of the case may require. The better practice in the Circuit Courts is to order the necessary parties to be brought in, and that should always be done under ordinary circumstances."⁷

⁵ *Charnock v. Higuerra*, 111 Cal. 473, 44 Pac. Rep. 171, 32 L. R. A. 190, 52 Am. St. Rep. 195; *Duckworth v. Watsonville etc. Co.*, 150 Cal. 520, 89 Pac. Rep. 338; *Bathgate v. Irvine*, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158; *Smith v. Hawkins*, 127 Cal. 119, 59 Pac. Rep. 295.

⁶ *Lakeside etc. Co. v. Crane*, 80 Cal. 181, 22 Pac. Rep. 76; *Duckworth v. Watsonville etc. Co.*, 150 Cal. 520, 89 Pac. Rep. 338.

For the decrees and judgments in the adjudication of water rights, see Secs. 1557-1564.

⁷ *Beasley v. Shively*, 20 Ore. 508, 26 Pac. Rep. 846; citing *Russell v. Clark's Exr.*, 11 U. S. 7 Cranch 69, 3 L. Ed. 271; *Young v. Cushing*, 4 Biss. 456.

See, also, *Brown v. Farmers' etc. Co.*, 26 Colo. 66, 56 Pac. Rep. 183; *Nichols v. McIntosh*, 19 Colo. 22, 34 Pac. Rep. 278; *Charnock v. Higuerra*, 111 Cal. 473, 44 Pac. Rep. 171, 32 L. R. A. 190, 52 Am. St. Rep. 195; *Hough v. Porter*, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1032, 102 Pac. Rep. 728, where it is said: "It is consonant with public policy, and public in-

terests require, that when in the determination of conflicting claims to the right to the use of public streams, for irrigation, manufacturing, or other useful purposes, it appears that many suits must eventually be brought to determine the various rights of persons whose property is to be affected by such use, it should be within the sound discretion of the trial court to require all, or any, of the persons interested to be made parties, as was done here, in order that the rights of each may be adjudicated and finally determined in one proceeding. This course should be permitted, and is obviously contemplated by the statute, not only with the view to economy in litigation, but that the respective interests of all affected may be justly, peaceably, and permanently ascertained and settled during the lifetime of those cognizant of the facts upon which the adjudications must be had. It is obvious that it is not only impracticable to determine such rights in many instances without adopting such course, but that if left to separate suits to be brought from year to year as disputes may arise, not only

And in this connection we will add that it makes very little difference as far as the settlement and adjudication of water rights are concerned as to who are made plaintiffs or defendants in the action, or whether parties interested are permitted to come in the action as intervenors. Of course, somebody has got to bring the suit as the plaintiff. But the Court having acquired jurisdiction over the subject matter and the parties will settle and adjudicate the rights of all, and that, too, whether it be as between the plaintiffs as against the defendants or intervenors, or any converse of the proposition, or as between the plaintiffs, defendants, or intervenors themselves.⁸ In some jurisdictions, notably Colorado, the rights may be adjudicated as between the ditches and canals owned by different parties or corporations. In such cases the only necessary parties to the action are the parties or corporations owning such ditches and canals; and the rights of the consumers under those ditches and canals are left to a separate determination and adjudication. In which case all the consumers under any one ditch or canal must be made parties to the action.⁹

will most valuable evidence pass beyond the reach of all, but such course, if pursued, must necessarily result in years of litigation and turmoil, and, in many instances, in a complete denial of justice. We are of the opinion, therefore, that no error was committed by the Court in requiring the appearance of all the defendants."

⁸ *Union M. & M. Co. v. Dangberg*, 81 Fed. Rep. 73; *Rickey etc. Co. v. Wood*, 152 Fed. Rep. 22, 81 C. C. A. 218; *Ames etc. Co. v. Big Indian etc. Co.*, 146 Fed. Rep. 166; *Barham v. Hostetter*, 67 Cal. 272, 7 Pac. Rep. 685; *Deseret etc. Co. v. McIntyre*, 16 Utah 398, 52 Pac. Rep. 628; *United States v. Conrad Investment Co.*, 156 Fed. Rep. 123; *Norton v. Colusa*, 167 Fed. Rep. 202; *Churchill v. Lauer*, 84 Cal. 233, 24 Pac. Rep. 107; *Forman v. Boyle*, 88 Cal. 290, 26 Pac. Rep. 94; *Miller v. Highland etc. Co.*, 87 Cal. 430, 25 Pac. Rep. 550, 22 Am. St. Rep. 254;

Greer v. Bancroft etc. Co., 13 Idaho 407, 90 Pac. Rep. 228; *Geurkink v. Petaluma*, 112 Cal. 306, 44 Pac. Rep. 570.

⁹ For the adjudication of water rights in Colorado, see Chap. 87.

"But in this case the rights of the stockholders, as among themselves, are directly involved, and their relative rights can not be finally settled and their respective claims judicially determined in their absence. They are therefore necessary parties and should have been made defendants." *Brown v. Farmers' etc. Co.*, 26 Colo. 66, 56 Pac. Rep. 183.

See, also, parties defendant, Sec. 1545.

See, also, *Montezuma Canal Co. v. Smithville Canal Co.*, 11 Ariz. 99, 89 Pac. Rep. 512; *Crawford v. Minnesota etc. Co.*, 15 Mont. 153, 38 Pac. Rep. 713; *Bullerdick v. Hermesmeyer*, 32 Mont. 541, 81 Pac. Rep. 334.

The *pro rata* interests of the owners

§ 1544. **Who may bring the action—Parties plaintiff.**—An action to settle and adjudicate the water rights from a certain source of natural supply may be maintained by anyone who has an actual right in or legal claim to the use of the water, and the nature and extent of whose rights are contested by other parties.¹ Where the plaintiff is a corporation, it is immaterial whether the company owns the water right in question, or merely distributes the water to its shareholders or to others.² And, where a number of land owners own tracts in severalty, and make several appropriations of the water from the common source of supply, they may join as parties plaintiff in a suit in equity to have their several rights adjudicated as between themselves and as against the claims of others.³ In fact, the statutes of the various States provide to the effect that all persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as parties plaintiff.⁴ A

of a mutual ditch using the water severally and the right to change the point of diversion may be determined in one proceeding. *Hallett v. Carpenter*, 37 Colo. 30, 86 Pac. Rep. 317.

See, also, *Southside Imp. Co. v. Burson*, 147 Cal. 401, 81 Pac. Rep. 1107.

¹ *McDonald v. Bear River etc. Co.*, 13 Cal. 220, 15 Cal. 145, 1 Morr. Min. Rep. 626; *Custer Consol. Mines Co. v. Helena*, — Mont. —, 122 Pac. Rep. 567; *Merritt v. Los Angeles*, — Cal. —, 120 Pac. Rep. 1064; *Inyo Consol. W. Co. v. Jess*, — Cal. —, 119 Pac. Rep. 934.

² *Arroyo etc. Co. v. Baldwin*, 155 Cal. 280, 100 Pac. Rep. 874.

See, also, for control by corporations, Secs. 1464-1529.

³ So, in an action, where it was sought to obtain a decree declaring that the rights of the plaintiffs to the water of a certain stream were prior and superior to the claim of the defendant, and to settle and adjudicate the relative priorities among the plaintiffs themselves, and to perpetually enjoin the defendant from diverting any

of the waters of a tributary of the stream, it was held that a number of land owners in severalty of divers tracts of land might join in the bringing of the action and maintain the same as parties plaintiff. *Beach v. Spokane Ranch etc. Co.*, 25 Mont. 387, 65 Pac. Rep. 106.

Settlers along a stream, who own lands under such stream and have acquired the right to appropriate and use water from such stream as the common source of supply, each owning his separate land and water right in his individual capacity, have such a common interest in having the rights of the respective appropriators determined and quieted, and a decree enjoining interference therewith, as to entitle them to join as parties plaintiff. *Frost v. Alturas Water Co.*, 11 Idaho 294, 81 Pac. Rep. 996.

⁴ *Daly v. Ruddell*, 137 Cal. 671, 676, 70 Pac. Rep. 784.

See, also, *Brown v. Farmers' Highline etc. Co.*, 26 Colo. 66, 56 Pac. Rep. 183; *Egan v. Estrada*, 6 Ariz. 428, 56 Pac. 721; *Daly v. Ruddell*, 137 Cal.

water right being real estate, it is held in Colorado, where the administrator is not entitled to the possession of the decedent's estate, that an action to quiet title to a water right can not be maintained by such administrator.⁵ However, persons whose rights are divided from and subordinate to those of the plaintiffs in a suit over the waters of a stream need not be joined as parties, even though they are tenants in common of the water with the plaintiffs.⁶ So, also, where the water rights are owned by a corporation organized for the purpose of distributing water to consumers, the consumers need not be joined as parties.⁷ Both a mutual corporation, and a corporation organized for the purpose of profit have the right to bring an action for the adjudication and protection of the rights of their shareholders and consumers.⁸

But a person who has no legal or equitable title or right to the use of water, but has merely posted notice of his intent to appropriate water, without following it up with the other essentials necessary to make a valid appropriation, can not maintain such an action.⁹ As was said by the Circuit Court for the Southern District of California: "It is obvious that a person who intends to become an appropriator under these sections,¹⁰ can not acquire the exclusive right to the use of the water he intends appropriating, nor maintain any suit, either at law or in equity, for its diversion, until all the steps requisite to an appropriation have been made."¹¹ It is

671, 676, 70 Pac. Rep. 784; *Farmers' etc. Co. v. White*, 32 Colo. 114, 75 Pac. Rep. 416; *Deseret Irr. Co. v. McIntyre*, 16 Utah 398, 52 Pac. Rep. 628; *Stetnam v. Skinner*, 11 Idaho 374, 82 Pac. Rep. 451.

⁵ *Travelers' Ins. Co. v. Childs*, 25 Colo. 360, 54 Pac. Rep. 1020.

⁶ *Spanish Fork City v. Hopper*, 7 Utah 235, 26 Pac. Rep. 293.

⁷ *Farmers' Co-operative D. Co. v. Riverside Irr. Dist.*, 14 Idaho 450, 94 Pac. Rep. 761; *Town of Sterling v. Pawnee D. Ex. Co.*, 42 Colo. 421, 94 Pac. Rep. 339, 15 L. R. A., N. S., 238.

⁸ For the rights of mutual corporations, see Secs. 1479-1489.

For the rights of corporations for profit, see Secs. 1490-1508.

See, also, *Thorpe v. Tenem Ditch Co.*, 1 Wash. 566, 20 Pac. Rep. 588; *Arroyo Ditch Co. v. Baldwin*, 155 Cal. 280, 100 Pac. Rep. 874; *Montezuma Canal Co. v. Smithville Canal Co.*, 218 U. S. 317, 54 L. Ed. 1074, 31 Sup. Ct. Rep. 67.

An irrigation district has no such interest in the water or water rights as entitles it to maintain a suit in equity to determine the rights of land owners in the distribution of waters. *Little Walla Walla Irr. Dist. v. Preston*, 45 Ore. 6, 78 Pac. Rep. 982.

⁹ For the appropriation of water, see Secs. 706-732.

¹⁰ Secs. 1415-1418, Civ. Code of Cal.

¹¹ *Rincon etc. Co. v. Anaheim Union Water Co.*, 115 Fed. Rep. 543, quoting

also held by the Supreme Court of Oregon that equity will not adjudicate a question of priority of title of a corporation to rights and franchises for irrigation purposes in order to enable it to issue bonds to continue and complete the work on a presumption of a possible intent of defendants to disturb the same, there having been no overt act or disturbance, the corporation not having diverted the water nor done any work, comparatively, of construction.¹² When, however, all the requirements of the law have been finally complied with, and, therefore, the right has fully vested by its final consummation, the action to adjudicate the right may be maintained, and the date of its priority, by the doctrine of relation, will be determined as of the date of the posting of the notice, or other inception of the right.¹³

It is held that under the police power of a State the legislature can not authorize a public officer to bring a suit to settle private rights to the use of water or the priority of such rights.¹⁴

§ 1545. Parties defendants—Right to affirmative relief.—Having seen in a previous section that, where the suit is for the adjudication of water rights between several claimants to the water taken from the same source of supply, all parties having a valid claim

Kinney on Irr., 1st Ed., Sec. 167; Nevada etc. Co. v. Kidd, 37 Cal. 282; Bear River etc. Co. v. Boles, 24 Cal. 354; Brown v. Smith, 10 Cal. 508; Harvey v. Chilton, 11 Cal. 114; Union Water Co. v. Crary, 25 Cal. 504, 85 Am. Dec. 145, 1 Morr. Min. Rep. 196; Weaver v. Conger, 10 Cal. 234, 6 Morr. Min. Rep. 203.

¹² Umatilla Irr. Co. v. Umatilla Imp. Co., 22 Ore. 366, 30 Pac. Rep. 30, where it is said: "The plaintiff may never construct a ditch or flume, and if it did, and is entitled to the water, it is not to be presumed or intended that the defendants would violate the plaintiff's rights. . . . The plaintiff has failed to bring itself within any principle of equity jurisdiction, which would enable a court of equity to consider or pass upon the supposed rights

alleged in its complaint, and the counter claims pleaded by several of the defendants must fail for the same reason. Within what we conceive to be the well-established doctrine of equity, neither party has as yet done anything to invite or justify equitable interposition."

See, also, Drake v. Russian River Land Co., 10 Cal. App. 654, 103 Pac. Rep. 167.

¹³ For the doctrine of relation, see Secs. 742-756.

For the appropriation by diversion and actual use, see Secs. 730, 751.

For the judgment or decree, see Secs. 1557-1564.

¹⁴ Bear Lake County v. Budge, 9 Idaho 703, 75 Pac. Rep. 614, 108 Am. St. Rep. 179.

thereto must be made either parties plaintiff or parties defendant,¹ before the question can be finally adjudicated, it therefore follows that all persons who are not made parties plaintiff should be made defendants in the action. And in this connection, we will say that it makes little difference who bring the action as plaintiffs or who are made the defendants, as far as the adjudication of their respective rights are concerned,² and as long as the Court has jurisdiction over all of the parties interested in the water of any common source of supply. Where an action is brought and all the parties interested are not originally made parties plaintiff or parties defendant, the better practice in the trial Court is for it to order the necessary parties brought in, and, under ordinary circumstances, that should always be done. And, in doing this they are usually made parties defendant.³

In the absence of statute requiring all parties interested in the waters of a certain stream to be joined as parties to adjudicate the same, the Court must proceed to determine the rights of the persons within its jurisdiction who have been properly brought before it where their rights can be determined without bringing in other parties.⁴ As was held in a recent California case in a suit by a city claiming a paramount right to the entire waters of a stream to quiet title thereto, as against the defendants, the Court being able to fully determine the controversy as between the parties to the ac-

¹ See Sec. 1544.

² For parties to the action, see Sec. 1542.

³ *Beasley v. Shively*, 20 Ore. 508, 26 Pac. Rep. 846; *Brown v. Farmers' etc. Co.*, 26 Colo. 66, 56 Pac. Rep. 183; *Nichols v. McIntosh*, 19 Colo. 22, 34 Pac. Rep. 278; *Bowman v. Bowman*, 35 Ore. 279, 57 Pac. Rep. 546; *Buckers etc. Co. v. Farmers' Ind. D. Co.*, 31 Colo. 62, 72 Pac. Rep. 49; *Squires v. Livesey*, 36 Colo. 302, 85 Pac. Rep. 181; *Union M. & M. Co. v. Dangberg*, 81 Fed. Rep. 73; *Senior v. Anderson*, 115 Cal. 496, 47 Pac. Rep. 454.

The district court has the power and jurisdiction to set aside and vacate an order inadvertently made, bringing in

new parties as defendants, and to strike from the files the answer and cross-complaint of such defendant, where no right has been acquired by such defendant except the right to file such answer. *Frost v. Idaho Irr. Co.*, 19 Idaho 372, 114 Pac. Rep. 38.

⁴ *Union M. & M. Co. v. Dangberg*, 81 Fed. Rep. 73; *Whited v. Cavin*, 55 Ore. 98, 105 Pac. Rep. 396; *Carns v. Dalton*, 56 Ore. 596, 110 Pac. Rep. 170; *Frost v. Idaho Irr. Co.*, 19 Idaho 372, 114 Pac. Rep. 38; *Hough v. Porter*, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; *Sloan v. Byers*, 37 Mont. 503, 97 Pac. Rep. 855.

tion, others similarly situated to those, who were defendants in the action, were not necessary parties.⁵ The authority for the joinder of all persons as defendants, and for the settlement of the rights of all the parties by one decree applies only to equitable actions.⁶ The misjoinder of two persons defendant can not be raised by joint demurrer.⁷

Parties having been made defendants in an action have the right to answer the complaint of the plaintiffs, and to set up by way of cross-complaint, or cross-bill, their own claims, praying for affirmative relief, to the effect that their own rights be determined and adjudicated.⁸ In fact, it is necessary that they do so in order that their rights be protected by the Court. Otherwise, a default may be entered against them for the failure to answer, and their rights may be awarded to others. The rights of the defendants are not subject to adjudication by the Court as against the rights of the plaintiffs, unless in the cross-complaints pleaded by such defendants it is set up that the interests of the defendants are hostile to those of the plaintiffs.⁹

Neither are the rights of the defendants as between themselves subject to determination or adjudication, except so far as, *inter se*, the pleadings contain an issue to that effect. In other words, they must join issue between themselves.¹⁰

⁵ *City of Los Angeles v. Hunter*, 156 Cal. 603, 105 Pac. Rep. 755, the court holding that the city was entitled to the entire flow of the stream.

⁶ *Miles v. Du Bey*, 15 Mont. 340, 39 Pac. Rep. 313.

⁷ *Empire etc. Co. v. Board of Commrs. of Rio Grande County*, 21 Colo. 244, 40 Pac. Rep. 449.

When the jurisdiction of a Court is questioned on the ground that the action is really against the State, the Court will look behind the nominal parties to the record to ascertain the real parties to the controversy, dismissing the action if it is really against the State, and retaining jurisdiction if it is not. *Salem Flouring Mills Co. v. Lord*, 42 Ore. 82, 69 Pac. Rep. 1033, 70 Pac. Rep. 832.

⁸ *Rickey v. Wood*, 152 Fed. Rep. 22, 81 C. C. A. 218; *Ames etc. Co. v. Big Indian etc. Co.*, 146 Fed. Rep. 166.

⁹ *Umatilla Irr. Co. v. Umatilla Imp. Co.*, 22 Ore. 366, 30 Pac. Rep. 30.

¹⁰ *Nevada Ditch Co. v. Bennett*, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777; *Hough v. Porter*, 51 Ore. 318, 372, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; *Sloan v. Byers*, 37 Mont. 503, 97 Pac. Rep. 855; *Conley v. Dyer*, 43 Colo. 22, 95 Pac. Rep. 304; *Strong v. Baldwin*, 154 Cal. 150, 97 Pac. Rep. 178, 129 Am. St. Rep. 141; *Bathgate v. Irvine*, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158.

It is error to adjudicate relative rights of defendants as to each other,

§ 1546. **Parties to actions—Intervenors.**—Prior appropriators and claimants of a certain quantity of water from a stream have such an interest in the matter in litigation, in an action between other parties to determine the respective rights of the parties to the waters of the stream, as to entitle them to intervene in the action, and to have their rights also determined and adjudicated in the same action.¹

§ 1547. **Pleadings—Complaint or bill in action to quiet title by appropriators.**—In an action to quiet title to a water right in the complaint or bill, it is sufficient to clearly and distinctly allege: First, the ownership and possession of the right;¹ second, the invasion and injury to the right,² and, third, to call upon the defendant or defendants to set up any adverse interest he or they may

where no issue was made or attempted to be framed between them, and all the parties were not ordered brought in. *Whited v. Cavin*, 55 Ore. 98, 105 Pac. Rep. 396.

¹ *West Point Irr. Co. v. Moroni etc. Co.*, 14 Utah 127, 46 Pac. Rep. 762; *Cache La Poudre etc. Co. v. Hawley*, 43 Colo. 32, 95 Pac. Rep. 317, holding that the purpose of the Civil Code, Sec. 22, *Mills' Ann. Code*, allowing persons to intervene in an action who have an interest in the matter in litigation in the success of either party, or an interest against both, is that one really interested in the result of the action may intervene and be made a party, so that the whole controversy shall be ended in one action and by a single judgment, the true test being whether the ultimate issue to be decided remains the same.

¹ *Merritt v. Los Angeles*, — Cal. —, 120 Pac. Rep. 1064; *Inyo Consol. W. Co. v. Jess*, — Cal. —, 119 Pac. Rep. 935.

² Where the complaint conceded defendant's superior right to the use of the water, except as to the transfer

of the place of use, and the lawful use of defendant's superior right would necessarily interfere with the exercise of the plaintiff's inferior right, and there was no allegation that defendant had made or threatened any improper use of their right, or that such use as proposed would cause needless injury to the plaintiff, it was held that there was no issue authorizing the Court to impose restrictions on the defendant's superior use. *Walnut Irr. Dist. v. Burke*, 158 Cal. 165, 110 Pac. Rep. 518.

See, also, *Peregoy v. Sellick*, 79 Cal. 568, 21 Pac. Rep. 966; *Umatilla Irr. Co. v. Umatilla Imp. Co.*, 22 Ore. 366, 30 Pac. Rep. 30; *Downing v. Agricultural D. Co.*, 20 Colo. 546, 39 Pac. Rep. 336; *Drake v. Russian River Land Co.*, 10 Cal. App. 654, 103 Pac. Rep. 167; *Hough v. Porter*, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; *Simpson v. Harrah*, 54 Ore. 448, 103 Pac. Rep. 58, where both the complaint and answer held insufficient to adjudicate rights.

have or claim. And, although it is sometimes done, it is not necessary to allege how the plaintiff became the owner of the water right, the title to which he seeks to quiet, whether it was by appropriation,³ adverse user amounting to prescription,⁴ or purchase, except where the plaintiff claims as a riparian owner, in which case he must plead that he claims the rights by virtue of such riparian ownership.⁵ Neither is it necessary to allege that the defendant had no right to use the water, as this is a matter for defense.⁶ Again, it is not necessary to state that the plaintiff's right is not lost by non-user.⁷

³ For the appropriation of water, see Chap. 38, Secs. 706-732.

⁴ For the acquisition of water rights by prescription, see Chap. 54, Secs. 1033-1058.

Where the plaintiff relies upon prescription, that in the complaint or bill a general allegation of ownership of the right suffices, see *Gillespie v. Jones*, 47 Cal. 259; *Sullivan v. Dumphy*, 4 Mont. 505; *Montecito etc. Co. v. Santa Barbara*, 144 Cal. 494, 77 Pac. Rep. 1113, where it is said: "Title by prescriptive right can be proved under the general allegation of ownership."

But see for pleading rights by prescription, Sec. 1552.

⁵ For complaint to quiet title to riparian rights, see latter part of this section.

For the purchase of water rights, see Secs. 994-1032.

See, also, for corporations, Secs. 1464-1529.

"Unlike an action where plaintiff seeks to restrain a defendant from unlawfully interfering with his prior appropriation, it is not necessary in a complaint to quiet title specifically to set forth the facts constituting a valid appropriation. In so far as this particular question of pleading is concerned, the established practice in this State in an action to quiet title is that a complaint may properly allege general ownership and possession, and

call upon defendant to set up any adverse interest he may have or claim." *Kimball v. Northern Colo. Irr. Co.*, 42 Colo. 412, 94 Pac. Rep. 333.

A cause of action is stated by alleging clearly and distinctly ownership, invasion of right, and injury, without distinct allegations of how plaintiff became the owner of the water right, whether by appropriation, adverse user, or purchase. *Hague v. Nephi Irr. Co.*, 16 Utah 421, 52 Pac. Rep. 765, 41 L. R. A. 311, 67 Am. St. Rep. 634.

In an action to quiet title to a certain tract of land and a water right used for the irrigation of the same, the complaint alleged the plaintiff to be the owner of the water right, and referred to the tract of land and the right as "the said premises," and prayed that the defendants have no estate or interest in "the said land and premises," and the answer made no distinction between the land and the water right, it was held that the ownership of the water right was in issue. *Brothers v. Brothers*, 29 Colo. 69, 66 Pac. Rep. 901.

⁶ *Town of Sterling v. Pawnee etc. Co.*, 42 Colo. 421, 94 Pac. Rep. 339, 15 L. R. A., N. S., 238.

⁷ *Corea v. Higuera*, 153 Cal. 451, 95 Pac. Rep. 882, 17 L. R. A., N. S., 1018.

The nature and place of the use of the water should be alleged.⁸ Again, if the plaintiff relies upon a former decree, he must particularly plead the same.⁹ More than one right may be set up by separate counts in the same complaint.¹⁰ The complaint should state that the plaintiff is the owner of the right and entitled to the use of the water, and not that he is the owner of the water.¹¹ The original complaint, if defective, may be amended, so as to show that an appropriation was made in compliance with the statute of the State.¹² But a complaint failing to show that the cause of action had accrued when the action was brought can not be aided by a supplemental complaint setting up facts showing that such cause of action has subsequently accrued.¹³ Only the ultimate facts, and not evidence, need be pleaded. It is, therefore, the rule that the title of the plaintiff need not be historically deraigned in his complaint or bill to quiet title. Such facts are matters of proof under the general allegation of ownership.¹⁴

⁸ *Miller & Lux v. Bickey*, 127 Fed. Rep. 573.

But see *Rincon etc. Co. v. Anaheim etc. Co.*, 115 Fed. Rep. 543.

⁹ *Davis v. Chamberlain*, 51 Ore. 304, 98 Pac. Rep. 154.

¹⁰ *Huffner v. Sawday*, 153 Cal. 86, 94 Pac. Rep. 424.

¹¹ *Smith v. Green*, 109 Cal. 228, 41 Pac. Rep. 1022.

But where the complaint alleged that the plaintiffs were the owners in fee simple and in possession of the first right to divert, for irrigation, stock, and domestic purposes, from a certain creek, in a certain county, a certain number of inches, miner's measurement, under a six-inch pressure, it was held sufficient. *Miller v. Lake Irr. Co.*, 27 Wash. 447, 67 Pac. Rep. 996.

¹² *Murray v. Tingley*, 20 Mont. 260, 50 Pac. Rep. 724, 19 Morr. Min. Rep. 137.

See, also, *Driskill v. Rebbe*, 22 S. D. 242, 117 N. W. Rep. 135.

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¹³ *Lewis v. Fox*, 122 Cal. 244, 54 Pac. Rep. 823.

¹⁴ *Hague v. Nephi Irr. Co.*, 16 Utah 421, 52 Pac. Rep. 765, 41 L. R. A. 311, 67 Am. St. Rep. 634, where it is held that, where the allegations of a complaint in a suit to determine the plaintiff's right to the use of water of a stream state, in general terms, a cause of action by alleging clearly and distinctly ownership, invasion of rights, and injury, without distinct allegations of how the plaintiff became the owner of the water right, whether by appropriation, adverse user, or purchase, plaintiff's title can be shown.

It is not necessary for the plaintiff to state how or from whom he acquired the superior right to the use of the water. *Downing v. Agricultural D. Co.*, 20 Colo. 546, 39 Pac. Rep. 336.

"We think it is of no moment that the appellant did not in his pleading expressly claim any right to these waters as an appropriator. He denied the claim of respondent to either

Where, however, the right is claimed by pleading prior appropriation, it is held in Colorado that a complaint is insufficient without a statement of the facts showing plaintiff's appropriation and priority.¹⁵ The description of the right of the plaintiff should be pleaded with great particularity. The full extent of the right should be stated, the purpose for which the water is used, and the amount necessary for that purpose. Where the water is used for

the necessity for, or continuous actual use of all of them, and set up a general right of ownership in himself to a use of a portion of them, and it is conceded that until enjoined he was actually diverting a portion and applying it for beneficial purposes upon his land." *Hufford v. Dye*, — Cal. —, 121 Pac. Rep. 400.

See, also, *Beach v. Spokane etc. Co.*, 25 Mont. 367, 65 Pac. Rep. 106; *Montecito etc. Co. v. Santa Barbara*, 144 Cal. 578, 594, 77 Pac. Rep. 1113; *McDonald v. Bear River etc. Co.*, 13 Cal. 220, 15 Cal. 145, 1 Morr. Min. Rep. 626; *Hough v. Porter*, 51 Ore. 318, 372, 95 Pac. Rep. 732, 98 Pac. Rep. 1032, 102 Pac. Rep. 728; *Norman v. Corbley*, 32 Mont. 195, 79 Pac. Rep. 1059; *Murry v. Nixon*, 10 Idaho 608, 79 Pac. Rep. 643; *Eaton v. Larimer etc. Co.*, 35 Colo. 16, 83 Pac. Rep. 627; *Hutchinson v. Mt. Vernon etc. Co.*, 49 Wash. 469, 95 Pac. Rep. 1023; *Strong v. Baldwin*, 154 Cal. 150, 97 Pac. Rep. 178, 129 Am. St. Rep. 141; *Harris v. Harrison*, 93 Cal. 676, 29 Pac. Rep. 325; *Farmers' Ind. D. Co. v. Agricultural D. Co.*, 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149; reversing *Id.*, 3 Colo. App. 255, 32 Pac. Rep. 722.

In an action by a purchaser at sheriff's sale to quiet title to a water right alleged to have been appurtenant to the land, whether the defendant has more water than is actually needed for

the irrigation of his land is entirely immaterial to the issue raised. *Cooper v. Shannon*, 36 Colo. 98, 85 Pac. Rep. 175, 118 Am. St. Rep. 95.

"It is not only unnecessary, but it would have been surplusage, for plaintiff to have pleaded the historical de-railment of its title and the varying methods of its use." *Wutehumna W. Co. v. Pogue*, 151 Cal. 105, 90 Pac. Rep. 362.

¹⁵ *Town of Sterling v. Pawnee etc. Co.*, 42 Colo. 421, 94 Pac. Rep. 339, 15 L. R. A., N. S., 238.

See, also, *Carroll v. Vance*, 39 Colo. 216, 88 Pac. Rep. 1069; *Farmers' etc. Canal v. Southworth*, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767; *Crippen v. White*, 28 Colo. 298, 64 Pac. Rep. 184; *Church v. Stillwell*, 12 Colo. App. 43, 54 Pac. Rep. 395.

But see *Farmers' Ind. D. Co. v. Agricultural D. Co.*, 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149, where Mr. Justice Hayt said: "Courts will never sanction a practice which imposes an impossible, or even an unreasonable, requirement upon litigants."

See, also, *Kimball v. Northern Colo. Irr. Co.*, 42 Colo. 412, 94 Pac. Rep. 333, holding that general allegations of ownership are sufficient.

See, also, *Hackett v. Larimer etc. Co.*, 48 Colo. 178, 109 Pac. Rep. 965; *Sternberger v. Seaton etc. Co.*, 45 Colo. 401, 102 Pac. Rep. 168.

irrigation, the area of land to which it is applied should be stated.¹⁶ The quantity of water claimed should be stated in cubic feet, acre feet, inches, or gallons, or in some other definite measurement of water.¹⁷ It is not sufficient to merely state the dimensions of the ditch through which it is carried, or the amount that it is stated will flow through a particular ditch.¹⁸ Or, the claim to the water may be stated as being the entire flow of the stream,¹⁹ or the quantity may be stated as being a certain proportion of all the water

¹⁶ *Town of Sterling v. Pawnee etc. Co.*, 42 Colo. 421, 94 Pac. Rep. 339, 15 L. R. A., N. S., 238, where it is held that a complaint to quiet title to appropriations of water claimed to have been made for domestic and irrigation purposes should allege what volume of water reaches the consumers under the ditch, how many consumers there are, the distance the water is carried, the area of land to which it is applied, when applied, and what volume is actually consumed for domestic and irrigation purposes.

A complaint to determine the priority of irrigation water rights is insufficient where it does not definitely describe plaintiff's lands, and does not show that any particular tract needed irrigation, does not specify the amount of water diverted nor the amount needed to the acre, or for any specific land, and does not show how much plaintiff's grantors acquired a right to use. *Porter v. Pettengill*, 57 Ore. 247, 110 Pac. Rep. 393.

The name and character of the pleading must be determined by the facts alleged, and the relief asked by the pleader. *Swank v. Sweetwater etc. Co.*, 15 Idaho 583, 98 Pac. Rep. 297.

It is necessary to plead the amount of the water claimed. *McLure v. Koen*, 25 Colo. 284, 53 Pac. Rep. 1058.

¹⁷ For the measurement of water, see Secs. 888-900; *Miller v. Lake Irr. Co.*, 27 Wash. 447, 67 Pac. Rep. 996;

Caviness v. La Grande Irr. Co., — Ore. —, 119 Pac. Rep. 731.

Although the cubic foot is prescribed by statute as the basis for the measurement of water for irrigation purposes, it does not prevent the expression of the quantity needed for a particular tract in inches, if the pressure and method of measurement are given. *Longmire v. Smith*, 26 Wash. 439, 67 Pac. Rep. 246, 58 L. R. A. 308.

For the measurement of water, see Secs. 888-900.

¹⁸ *Lakeside D. Co. v. Crane*, 80 Cal. 181, 22 Pac. Rep. 76; *Dougherty v. Haggin*, 61 Cal. 305; *Id.*, 56 Cal. 522; *Church v. Stillwell*, 12 Colo. App. 43, 54 Pac. Rep. 395.

¹⁹ One who has appropriated all of the water in a stream for the purposes of irrigation may sue persons who afterward acquire vacant land above the plaintiff's tract, and divert part of the stream to irrigate their crops, to quiet title to the full flow of the stream. *Peregoy v. Sellick*, 79 Cal. 568, 21 Pac. Rep. 966.

See, also, *Harris v. Harrison*, 93 Cal. 676, 29 Pac. Rep. 325; *Pacific Yacht Club v. Sausalito Bay W. Co.*, 98 Cal. 487, 33 Pac. Rep. 322; *Drake v. Earhart*, 2 Idaho 750, 23 Pac. Rep. 541.

But an allegation that plaintiff was entitled to all the water of a creek during the dry season was held to be too indefinite, where it did not show

flowing in a stream at all times, or, again, it may be stated as the entire flow of the stream for certain periods of time. And, again, the complaint may claim water sufficient for the irrigation of a certain number of acres of land.²⁰ In fact, in order to enable the Court to make a decree quieting the title to a water right, which will be definite and certain, it must have before it specific allegations as to the nature and extent of the water right claimed, which, of course, must be sustained by the proof.²¹

Owing to the fact that the rules of appropriation have everywhere in the Western portion of this country now passed into statute or judicial decisions, or both, thereby superseding the original customs on which the decisions and statutes are originally based, it is held to be unnecessary to plead or prove the customs of the early miners and appropriators of water, especially as specified in the Act of 1866.²²

§ 1548. Pleadings—Complaint or bill in actions to quiet title by riparian owners.—In an action in equity by riparian proprietors to adjudicate the rights, apportion the use of the water, and quiet the title to the same in the respective owners, the complaint or bill must contain a description of the lands which are riparian to the stream, or other natural body of water supply, the amount of such lands which are irrigable, and the amount of water which is reasonably necessary for his use upon such lands, that he claims such rights as the riparian owner, the invasion of the right by the defendants, and a call upon the defendants to set up any adverse interest which they may have or claim.¹ As we have discussed in a previous sec-

the amount of acres irrigated by the water, and the amount that was needed for that purpose. *Porter v. Pettingill*, 57 Ore. 247, 110 Pac. Rep. 393.

²⁰ *McLure v. Koen*, 25 Colo. 284, 53 Pac. Rep. 1058.

²¹ For the proof of claims, see Sec. 1554.

For decrees quieting title to water rights, see Secs. 1557-1564.

²² For the Act of 1866, see Sec. 611.

See, also, *Basey v. Gallagher*, 87 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683; *Drake v. Ear-*

hart, 2 Idaho 750, 23 Pac. Rep. 541; *Parkersville etc. Dist. v. Wattier*, 48 Ore. 332, 86 Pac. Rep. 775; *Crawford Co. v. Hathaway (Hall)*, 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647.

For the customs of the early miners, see also, Secs. 598, 599.

¹ "Moreover, considering Pogue's claim as resting upon his riparian ownership, he nowhere properly pleads his riparian rights, nor the amount of his irrigable lands, nor the amount of water reasonably necessary for his use upon

tion of this work, a person who happens to be a riparian owner may have certain riparian rights to the use of the water flowing by his lands as such, and, again, he may acquire other rights as a prior appropriator.² It therefore follows that, as such riparian proprietor or appropriator, under the law governing actions to quiet title, he may bring an action to quiet the title to either one or both of such rights, respectively; and, upon the proper pleading setting up the necessary allegations, followed up by the proof of both of his claims, the Court will render a decree settling and adjudicating his rights both as a riparian proprietor and as a prior appropriator. And, although as far as the pleadings are concerned, a plaintiff in different counts may set up his claim to the same use of the water

such lands." *Wutchumna W. Co. v. Pogue*, 151 Cal. 105, 90 Pac. Rep. 362.

The allegations of the petition being consistent with the lawful use of the water by the defendant by appropriation, the petition of a riparian owner will be so construed against the pleader. *Cline v. Stock*, 71 Neb. 70, 98 N. W. Rep. 454, 102 N. W. Rep. 265.

A bill by a riparian owner on a stream against persons who, by virtue of alleged prior appropriations, claim the right to use all of the waters of the stream, is not multifarious because complainant claims portions of the water in different rights, where it is alleged that all of such claims and rights are alike affected by the rights and claims of defendants, and the question in controversy is the extent of the rights. *Rincon etc. Co. v. Anaheim Water Co.*, 115 Fed. Rep. 543.

A complaint alleging that plaintiff is the owner in fee of lands through which there is a stream, that he is seized and possessed of the right to divert the flow of the stream; that defendant claims a right to, and threatens to divert some of the water, and praying that plaintiff be adjudged

the owner of the right to the use of the water, and that defendant be declared to have no right thereto, and be enjoined from diverting it, states facts sufficient to constitute a cause of action to quiet plaintiff's title, as a riparian owner, to the water. *Shurtleff v. Bracken*, — Cal. —, 124 Pac. Rep. 724.

See, also, *Miller & Lux v. Madera Canal Co.*, 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391; *Montecito etc. Co. v. Santa Barbara*, 151 Cal. 377, 90 Pac. Rep. 935; *San Luis W. Co. v. Estrada*, 117 Cal. 168, 48 Pac. Rep. 1075; *Riverside W. Co. v. Gage*, 89 Cal. 410, 26 Pac. Rep. 889; *Wiggins v. Muscupiabe etc. Co.*, 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337; *Sander v. Wilson*, 34 Wash. 659, 76 Pac. Rep. 280; *Bauers v. Bull*, 46 Ore. 60, 78 Pac. Rep. 757.

That a bill for apportionment is distinct from one simply for an injunction, see *Jones v. Conn*, 39 Ore. 30, 64 Pac. Rep. 855, 65 Pac. Rep. 1068, 54 L. R. A. 630, 87 Am. St. Rep. 634.

² For riparian proprietor and appropriator at the same time, see Secs. 519, 681.

both as riparian owner, and as prior appropriator,³ in actions where the right to the same use of the water is so set up, the better practice is for the Court to compel the plaintiff to elect upon which count he will stand, and this is generally done.⁴

As the complaint based upon an appropriation must contain allegations distinct and different from those in a complaint based upon riparian ownership,⁵ a riparian owner who bases his complaint upon an appropriation of the water can not recover as a riparian proprietor.⁶ And, again, such an owner who bases his right upon his riparian ownership can not recover as an appropriator. "The plaintiff must recover, if at all, upon the cause of action set out in his complaint, and not upon some other which may be developed by the proofs."⁷ In a suit for the partition of land to which there

³ *Huffner v. Sawday*, 153 Cal. 86, 94 Pac. Rep. 424; *Nesalhous v. Walker*, 45 Wash. 621, 88 Pac. Rep. 1032; *Davis v. Chamberlain*, 51 Ore. 304, 98 Pac. Rep. 154.

⁴ "While the doctrine of prior appropriation and riparian rights are not so antagonistic that they may not exist in the same locality, a settler upon a non-navigable stream has an election either to rely upon his rights as a riparian proprietor, or to make an appropriation of the water if it is free and subject to appropriation, and claim as an appropriator, but he can not do both." *Williams v. Altnow*, 51 Ore. 275, 95 Pac. Rep. 200, 97 Pac. Rep. 539.

Where a complaint asserted a right to a certain quantity of water from a stream by prior appropriation, and the reply of the plaintiff to the defendant's cross-complaint set up a claim to the entire flow by reason of riparian proprietorship, there was a departure, since a claim to the same right to the use both by prior appropriation and by riparian proprietorship are incompatible. *Brown v. Baker*, 39 Ore. 66, 65 Pac. Rep. 799, 66 Pac. Rep. 193.

See, also, *Davis v. Chamberlain*, 51

Ore. 304, 98 Pac. Rep. 154; *Hough v. Porter*, 51 Ore. 318, 372, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

But see *Hutchinson v. Mt. Vernon etc. Co.*, 49 Wash. 469, 95 Pac. Rep. 1023, where, in an action to establish plaintiffs' right to the waters of a spring, plaintiffs claimed the water as riparian owners, as appropriators, and also under contract with the defendants, the cause of action was held to be single and indivisible, so that plaintiffs were not required to separately state a cause of action based on each ground, and to elect on which they intended to rely.

⁵ For complaints based upon appropriation, see Sec. 1547.

⁶ *Riverside Water Co. v. Gage*, 89 Cal. 410, 26 Pac. Rep. 889; *San Luis W. Co. v. Estrada*, 117 Cal. 168, 48 Pac. Rep. 1075; *Strong v. Baldwin*, 137 Cal. 432, 70 Pac. Rep. 288.

⁷ *Shenandoah etc. Co. v. Morgan*, 106 Cal. 409, 39 Pac. Rep. 802, quoting from *Mondran v. Goux*, 51 Cal. 151.

But see *Hutchinson v. Mount Vernon W. Co.*, 49 Wash. 469, 95 Pac. Rep. 1023.

were attached riparian rights to water for irrigation, it is unnecessary to mention such rights in the complaint, as they are a part of the land.⁸

§ 1549. Pleadings—Complaint or bill in actions to quiet title to ditch or canal.—A complaint or bill in an action to quiet title to a ditch or canal, should describe the ditch or canal with sufficient certainty, the interest claimed by the plaintiff, and the wrongful interference with the plaintiff's rights by the defendant, and should pray that the respective rights of the parties be adjudicated and determined and that the defendant be enjoined from further interference with the plaintiff's rights.¹ Though, in a suit to quiet title to an irrigation ditch, the complaint alleged plaintiff to be the owner of the ditch in fee, it did not preclude the Court from finding a right or ownership in the nature of an easement.²

§ 1550. Pleadings—Demurrer—Answer—And cross - complaint or bill.—The defendant, or defendants, upon being served with process are entitled to file a demurrer, either general or special, to

⁸ *Rose v. Mesmer*, 142 Cal. 322, 75 Pac. Rep. 905, where it is said: "Being parcel of the land itself, the description of the land included the water."

¹ *Siak v. Caswell*, 14 Cal. App. 377, 112 Pac. Rep. 185; *Miller & Lux v. Kern etc. Co.*, 154 Cal. 785, 99 Pac. Rep. 179; *Lockwood v. Freeman*, 15 Idaho 395, 98 Pac. Rep. 295; *Bashore v. Mooney*, 4 Cal. App. 276, 87 Pac. Rep. 553; *Fudickar v. East Riverside Irr. Dist.*, 109 Cal. 29, 41 Pac. Rep. 1024, holding that defects in a complaint not going to the gist of the action may be cured by the judgment; *San Jose etc. Co. v. San Jose Ranch Co.*, 129 Cal. 673, 62 Pac. Rep. 269; *Smith Canal Co. v. Colorado etc. Co.*, 34 Colo. 485, 82 Pac. Rep. 940, 3 L. R. A., N. S., 1148; *Feeney v. Chester*, 7 Idaho 324, 63 Pac. Rep. 192; *Arroyo Ditch Co. v. Dorman*, 137 Cal.

611, 70 Pac. Rep. 737; *Schirmer v. Drexler*, 134 Cal. 134, 66 Pac. Rep. 180.

For actions to quiet title to ditch, see Sec. 1541.

An allegation of a "right" to maintain a ditch admits proof of an easement as well as a bare parcel license. *Shaw v. Proffitt*, 57 Ore. 192, 109 Pac. Rep. 584, 110 Pac. Rep. 1092.

² *Bashore v. Mooney*, 4 Cal. App. 276, 87 Pac. Rep. 553.

In a proceeding for the appointment of a distributor of water in a partnership ditch, a denial of joint ownership would not, of itself, oust the Court of jurisdiction, nor will its determination adjudicate the titles and interests of the parties in and to the ditch. *Mau v. Stoner*, 14 Wyo. 183, 83 Pac. Rep. 218; *Id.*, 15 Wyo. 109, 87 Pac. Rep. 434, 89 Pac. Rep. 466.

the allegations set forth in the complaint. However, a general demurrer to the whole complaint can not be sustained, if the complaint states facts, although imperfectly, showing that the plaintiff is entitled to either legal or equitable relief.¹ If the demurrer is sustained leave is always granted to amend the complaint; if, however, it is overruled, the defendant is granted time in which to answer.²

The answer should contain a sufficient denial of the allegations set forth in the complaint of the plaintiff so as to raise an issue by the pleadings of the rights in controversy. But an allegation in an answer that "defendant is informed and believes" that certain facts exist, without further alleging on information and belief that such facts do exist, is not a sufficient allegation of any issuable fact.³ And, although such denials may be made upon information and belief, a denial that defendant can not obtain sufficient information on which to base a belief tenders no issue.⁴

¹ *Hulsman v. Todd*, 96 Cal. 228, 31 Pac. Rep. 39; *Sisk v. Caswell*, 14 Cal. App. 377, 112 Pac. Rep. 185.

For demurrers to the complaint, see *Farmers' etc. Co. v. Southworth*, 18 Colo. 111, 117, 21 Pac. Rep. 1028, 4 L. R. A. 767; *Church v. Stillwell*, 12 Colo. App. 43, 54 Pac. Rep. 395.

² *Sisk v. Caswell*, 14 Cal. App. 377, 112 Pac. Rep. 185.

³ *Swank v. Sweetwater etc. Co.*, 15 Idaho 583, 98 Pac. Rep. 297; *Grand Val. Irr. Co. v. Leshner*, 28 Colo. 273, 65 Pac. Rep. 44; *Riverside Water Co. v. Gage*, 89 Cal. 410, 26 Pac. Rep. 889; *North Powder Milling Co. v. Coughanour*, 34 Ore. 9, 54 Pac. Rep. 223; *Fifield v. Spring Valley Waterworks*, 130 Cal. 552, 62 Pac. Rep. 1054; *Wellington v. Beck*, 30 Colo. 409, 70 Pac. Rep. 687; *Oglivy etc. Co. v. Insinger*, 19 Colo. App. 380, 75 Pac. Rep. 598; *Bauers v. Bull*, 46 Ore. 60, 78 Pac. Rep. 757; *Norman v. Corbley*, 32 Mont. 159, 79 Pac. Rep. 1059; *Miller & Lux v. Rickey*, 127 Fed. Rep. 573; *Hoge v. Eaton*, 135 Fed. Rep. 411, 141 Fed. Rep. 64, 72 C. C. A. 74.

Where, in a suit to enjoin defendant from interfering with the flow of water in plaintiff's ditch, defendant by answer made no claim to any water nor title to any land, and the plaintiffs made no claim to a definite quantity of water, and did not prove the amount to which they were entitled, a decree attempting to establish plaintiff's title to a definite amount of water was erroneous. *Simpson v. Harrah*, 54 Ore. 448, 103 Pac. Rep. 58.

Where the defendant demurred to a bill on the ground that an action to quiet title to a mere easement did not lie, but, after the demurrer had been overruled, filed an answer setting up an estate and title to such easement, and asked that the same be quieted in the same action, it thereby waived its objection to the form of the action. *Gutheil Park Inv. Co. v. Montclair*, 32 Colo. 420, 76 Pac. Rep. 1050.

⁴ *Grand Val. Irr. Co. v. Leshner*, 28 Colo. 273, 65 Pac. Rep. 44.

See, also, *Swank v. Sweetwater etc. Co.*, 15 Idaho 583, 98 Pac. Rep. 297.

An allegation that "defendant is

In the cross-complaint, or cross-bill, a defendant should state clearly and concisely the facts constituting his cause of action against the plaintiff, and pray for affirmative relief. This is so in order that the affirmative relief prayed for, if granted, may be decreed in accordance therewith, or in accordance with what the Court shall find to be just and equitable under all the facts and circumstances of the case.⁵ Where the defendant bases his right to the use of the water upon an appropriation, adverse user, or purchase, the same essentials must be set out in the cross-complaint as are required to set out in the complaint or plaintiff's acquiring their right to the use of the water by this means.⁶ The cross-complaint should allege facts relating to or depending upon those upon which the action is brought, or affecting the property to which the action re-

informed and believes" that certain things occurred by inadvertence, did not constitute any grounds of defense. *Swank v. Sweetwater etc. Co.*, 15 Idaho 583, 98 Pac. Rep. 297.

A general denial puts in issue all the material allegations of a verified complaint. *Mentone Irr. Co. v. Redlands etc. Co.*, 155 Cal. 323, 100 Pac. Rep. 1082, 22 L. R. A., N. S., 382, 17 Am. & Eng. Ann. Cas. 1222.

A refusal to allow the defendant to amend his answer, so as to assert a greater right than asserted in his original answer is immaterial where he acquiesced in the findings of a less right than asserted in his original answer. *Stevenson v. San Joaquin etc. Co.*, — Cal. —, 121 Pac. Rep. 398.

⁵ *Center Creek Irr. Co. v. Lindsay*, 21 Utah 192, 60 Pac. Rep. 559; *Duckworth v. Watsonville etc. Co.*, 150 Cal. 520, 89 Pac. Rep. 338.

The trial court has no power or right to dismiss an action over the objection of the defendant who has filed an answer and cross-complaint seeking affirmative relief. *Frost v. Idaho Irr. Co.*, 19 Idaho 372, 114 Pac. Rep. 38.

A defendant seeking specific relief in a suit in chancery must do so by

cross-bill, and must state the grounds upon which he relies for affirmative relief with the same strictness required of the plaintiff in the original bill. *Bessemer Irr. D. Co. v. Woolley*, 32 Colo. 437, 76 Pac. Rep. 1053, 105 Am. St. Rep. 91.

An answer consisting of denials of plaintiff's allegations, and containing no element of a cross-complaint, it was held error to award affirmative relief. *Hungarian etc. Co. v. Moses*, 58 Cal. 168.

See, also, *Islais etc. Co. v. Allen*, 132 Cal. 432, 64 Pac. Rep. 713; *Frost v. Idaho Irr. Co.*, 19 Idaho 372, 114 Pac. Rep. 38; *Custer Consol. Mines Co. v. Helena*, — Mont. —, 122 Pac. Rep. 567.

⁶ For complaint or bill in actions to quiet title, see *Sec. 1547*; *Rickey etc. Co. v. Wood*, 152 Fed. Rep. 22, 81 C. C. A. 218; *Buckers etc. Co. v. Platte Valley Irr. Co.*, 28 Colo. 187, 63 Pac. Rep. 305; *Hector Min. Co. v. Valley View M. Co.*, 28 Colo. 315, 64 Pac. Rep. 205; *McCall v. Porter*, 42 Ore. 49, 70 Pac. Rep. 820, 71 Pac. Rep. 976; *Ames etc. Co. v. Big Indian etc. Co.*, 146 Fed. Rep. 166.

lates.⁷ And, again, where the defendant claims his rights as a riparian owner, in those jurisdictions where such rights are allowed by law, he must properly plead his rights as such riparian owner.⁸

It is held in the later cases that in an action in equity to apportion the waters of a stream between riparian owners thereon, the parties must plead the amount of their irrigable lands and the amount of water reasonably necessary for the use upon such lands.⁹

⁷ *Lewis v. Fox*, 122 Cal. 244, 54 Pac. Rep. 823.

Where, however, in the prayer of the complaint, the plaintiff asks that the defendants might be required to set forth their alleged adverse claim and that the court might decree it to be null and void, and the defendants set up their agreement upon which they based their rights to the water, and pray that their rights as shown by their allegation in their answer may be decreed to them, the Court may grant to the defendants an affirmative decree, without a formal cross-complaint having been filed. *Brighton etc. Co. v. Little*, 14 Utah 42, 46 Pac. Rep. 268.

See, also, *Miller v. Dondero*, 139 Cal. 643, 73 Pac. Rep. 583; *Whited v. Cavin*, 55 Ore. 98, 105 Pac. Rep. 396.

⁸ For complaint or bill in actions to quiet title by riparian owners, see Sec. 1548.

An answer simply alleging the ownership of land through which a stream flowed, and that it would be susceptible of, and would be benefited by irrigation, is insufficient to raise any issue as to the right of defendant to take the water by virtue of his riparian ownership, in the absence of an allegation that he was entitled as riparian owner to any definite amount of water, or what portion of the stream he could exhaust for irrigating his land, nor whether his land was located above or below the point of

plaintiff's diversion. *Riverside W. Co. v. Gage*, 89 Cal. 410, 26 Pac. Rep. 889.

To authorize an award to defendant of the right to take water from a stream as a riparian owner, in an action to determine the rights of the parties to the use of the waters of the stream, defendant must properly plead his riparian rights, the amount of his irrigable lands, and the amount of water reasonably necessary for his use thereon. *Wutchumna W. Co. v. Pogue*, 151 Cal. 105, 90 Pac. Rep. 362.

See, also, *Sander v. Wilsons*, 34 Wash. 659, 76 Pac. Rep. 280; *Northport Brewing Co. v. Perrott*, 22 Wash. 243, 60 Pac. Rep. 403; *Bauers v. Bull*, 46 Ore. 60, 76 Pac. Rep. 757.

See, also, *Wiggins v. Muscupiabe etc. Co.*, 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337; *San Luis W. Co. v. Estrada*, 117 Cal. 168, 48 Pac. Rep. 1075; *Montecito etc. Co. v. Santa Barbara*, 151 Cal. 377, 90 Pac. Rep. 935; *Strong v. Baldwin*, 137 Cal. 432, 70 Pac. Rep. 288; *Smith v. Hawkins*, 127 Cal. 119, 59 Pac. Rep. 295.

⁹ *Riverside Water Co. v. Gage*, 89 Cal. 420, 27 Pac. Rep. 889; *Wutchumna Water Co. v. Pogue*, 151 Cal. 105, 90 Pac. Rep. 362; *Perry v. Calkins*, 159 Cal. 175, 113 Pac. Rep. 136; *Strong v. Baldwin*, 137 Cal. 432, 70 Pac. Rep. 288, 154 Cal. 150, 97 Pac. Rep. 178, 129 Am. St. Rep. 149; *Wiggins v. Muscupiabe etc. Co.*, 113 Cal.

And, again, in an action by a riparian proprietor against a defendant appropriator the latter may set up his claim by cross-complaint.¹⁰

In a suit in equity to determine water rights, as the rights of all parties to the action may be adjudicated in the same action, defendants are entitled to set up their claims *inter se* in their answers, and have the same adjudicated on such notice as the law and the Court may prescribe.¹¹

In Hawaii, it is held that a decree is binding as between co-defendants, when their claims are adverse, and when the water rights as against each other are adjudicated, whether there are cross-pleadings between them or not.¹²

§ 1551. **Pleadings—The replication or reply.**—In those jurisdictions which permit the filing of a reply to the cross-complaint or cross-bill of the defendants the plaintiff should file his reply answering the allegations of the cross-complaint. The reply should contain a sufficient denial of the rights claimed by the defendant in his cross-complaint so as to raise an issue by the pleadings of the rights in controversy.¹ The allegations contained in the reply, of course, should be consistent with the allegations of the complaint. Therefore, where a complaint set up the right to the use of a certain quantity of water by prior appropriation, and the reply set up the claim to the use of the same amount of water by reason of riparian ownership, it was held that there was a departure in the pleading, since the rights by prior appropriation and by riparian ownership are incompatible.²

194, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337; *San Luis v. Estrada*, 117 Cal. 182, 48 Pac. Rep. 1075.

¹⁰ *Van Bibber v. Hilton*, 84 Cal. 585, 24 Pac. Rep. 308.

¹¹ *Hough v. Porter*, 51 Ore. 318, 372, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; *Sloan v. Byers*, 37 Mont. 503, 97 Pac. Rep. 855.

¹² *Hawaiian etc. Co. v. Wailuku Sugar Co.*, 14 Haw. 50; *Id.*, 15 Haw. 675.

¹ *State v. Quantie*, 37 Mont. 32, 94 Pac. Rep. 491; *Watts v. Spencer*, 51 Ore. 262, 94 Pac. Rep. 39; *Duckworth v. Watsonville etc. Co.*, 158 Cal. 206, 110 Pac. Rep. 927; *Id.*, 150 Cal. 520, 89 Pac. Rep. 338; *Baldridge v. Leon Lake etc. Co.*, 20 Colo. App. 518, 80 Pac. Rep. 477.

² *Brown v. Baker*, 39 Ore. 66, 65 Pac. Rep. 799, 66 Pac. Rep. 193, citing *Kinney on Irr.*, 1st Ed., Sec. 272.

See, also, *Strong v. Baldwin*, 137 Cal. 432, 70 Pac. Rep. 288.

A departure in a pleading is waived

Where the complaint to establish the right to use the entire waters of a stream was met by denials raising the general issue, and also an allegation that the plaintiff was entitled to a certain number of inches, but no more, the latter allegation did not require a reply, and hence evidence that plaintiff was entitled to all the waters of the stream was admissible.³

§ 1552. **Pleadings**—Where the claim to the right is made by prescription.—As the effect of a right acquired by prescription is to vest the title to the same in the claimant as completely as if it had been conveyed to him by the original owner,¹ therefore, where a claimant relies on a title to the right by prescription, upon principle, both the plaintiff and defendant should be permitted to prove their claim under a general allegation of ownership. This rule is followed in some jurisdictions, but in others it has been modified by statute and by court decisions. Upon this subject the general rule of law is that in a suit in equity to adjudicate and quiet the title to a water right or to an easement used in connection therewith, the plaintiff in his complaint or bill may prove his rights under the general allegation of ownership, as discussed in a previous section.²

by voluntarily going to trial without raising the question. *Baldrige v. Leon Lake etc. Co.*, 20 Colo. App. 518, 80 Pac. Rep. 477.

³ *Arnold v. Passavant*, 19 Mont. 575, 49 Pac. Rep. 400.

See, also, *Wixson v. Devine*, 67 Cal. 341, 7 Pac. Rep. 776; *Brossard v. Morgan*, 7 Idaho 215, 61 Pac. Rep. 1031.

¹ For the effect of adverse user amounting to prescription, see Sec. 1057.

For the proof necessary to prove title by adverse possession, see Secs. 1055, 1555.

² See Secs. 1055, 1547.

"Plaintiff pleaded ownership, and the Court in terms found ownership in the plaintiff. Defendant's further objection that there is no finding of ownership by prescription is untenable.

The Court finds ownership and continuous use and occupation for beneficial purposes for the full prescriptive period. This finding of ownership includes all probative facts. Title by prescriptive right can be proved under the general allegation of ownership." *Montecito etc. Co. v. Santa Barbara*, 144 Cal. 578, 77 Pac. Rep. 1113, citing *Cooper v. Miller*, 113 Cal. 238, 45 Pac. Rep. 325; *Adams v. Crawford*, 116 Cal. 495, 48 Pac. Rep. 488; *Gillespie v. Jones*, 47 Cal. 259.

A complaint which clearly sets forth the facts constituting the basis of the claims of the parties to the waters of a stream and the right to have the same pass through the ditch is sufficient, though it is uncertain whether the parties are entitled to the waters as riparian proprietors or by adverse use. *Strong v. Baldwin*, 154 Cal. 150,

Where, however, the plaintiff chooses to set up his claim as having been acquired by adverse user sufficient to amount to a prescriptive right, it is necessary that he plead all of the essentials necessary for the acquisition of the right by that manner, or as prescribed by the statutes for pleadings in such cases.³

Where, however, in answer to the claims set forth by the plaintiff, the defendant relies upon adverse user amounting to prescription, he is held to a much stricter rule in his pleading than is the plaintiff. The weight of authority holds that it is not sufficient to simply set up a general allegation of ownership of the right, but that he must plead his adverse user with all the particularity required for such pleadings in the jurisdiction where the action is pending. The defendant may plead the statute, by reference to the appropriate section thereof;⁴ or, if he chooses, he may plead the facts constituting the limitation or prescriptive right. In doing the latter, however, it is incumbent upon him to plead all the elements entering into a prescriptive right.⁵ Where adverse user is properly pleaded by the

97 Pac. Rep. 178, 129 Am. St. Rep. 141.

See, also, *Sullivan v. Dumphy*, 4 Mont. 505; *Smith v. Duff*, 39 Mont. 382, 102 Pac. Rep. 984, 133 Am. St. Rep. 587; *Gurnsey v. Antelope etc. Co.*, 6 Cal. App. 387, 92 Pac. Rep. 326.

³ For the essentials for the acquisition of a right by prescription, see Secs. 1048-1054.

An allegation that plaintiff enjoyed the use of the water for a certain period, coupled with the allegations that the defendant, during all such period, was proprietor of such canal, does not constitute a plea of adverse possession. *Crawford v. Minnesota etc. Co.*, 15 Mont. 153, 38 Pac. Rep. 713.

See, also, *Shenandoah etc. Co. v. Morgan*, 106 Cal. 409, 39 Pac. Rep. 802; *Schirmer v. Drexler*, 134 Cal. 134, 66 Pac. Rep. 180; *Brossard v. Morgan*, 7 Idaho 215, 61 Pac. Rep. 1031; *Bullerdick v. Hermsmeyer*, 32 Mont. 541, 81 Pac. Rep. 334; *Davies v. Angelo*, 8 Cal. App. 305, 96 Pac. Rep.

909; *Collins v. Gray*, 154 Cal. 131, 97 Pac. Rep. 142; *Rominger v. Squires*, 9 Colo. 327, 12 Pac. Rep. 213.

⁴ But an answer which merely alleges that an action for the taking and diverting of water was barred by the statute of limitations is not a good plea of that statute, as it does not state the section of the statute relied on as required by Comp. Laws Utah, Sec. 3244, nor set out the facts constituting the defense. *Spanish Fork City v. Hopper*, 7 Utah 235, 26 Pac. Rep. 293.

See, also, *Village of Hailey v. Riley*, 14 Idaho 481, 95 Pac. Rep. 686, 17 L. R. A., N. S., 86; *Churchill v. Louie*, 135 Cal. 608, 67 Pac. Rep. 1052; *Alhambra etc. Co. v. Richardson*, 72 Cal. 598, 14 Pac. Rep. 379; *Partridge v. Shepard*, 71 Cal. 70, 12 Pac. Rep. 480.

⁵ "Defendant could have pleaded the statute, as provided in Section 458, Code Civil Procedure, by reference to the appropriate section. He did not do this, but chose to plead the facts

defendant and affirmative relief is prayed for thereon it necessitates a reply by the plaintiff in those jurisdictions whose statutes provide for such a pleading.⁶ In addition to the plea of adverse possession and user, the defendant by a different count may also plead the right of prior appropriation.⁷ Again, he may also plead his right as riparian owner.⁸ One pleading a claim based upon adverse possession and user need not plead the payment of taxes. But the pay-

constituting the limitation or prescriptive right. In doing this it was incumbent on him to plead all the elements entering into a prescriptive right." *Churchill v. Louie*, 135 Cal. 608, 67 Pac. Rep. 1052, holding that a plea in an action for the diversion of water, that defendant has for 11 years openly, notoriously, peaceably, adversely, uninterruptedly, and under a claim of right, used a certain amount of the water, is insufficient as a plea of prescriptive right to authorize the admission of evidence thereof, as it fails to allege that the use was adverse to the plaintiff, or that the plaintiff had notice of the occupancy, or facts sufficient to charge him with notice thereof.

For the elements of prescriptive right, see Secs. 1048-1054.

See, also, *State v. Quantic*, 37 Mont. 32, 94 Pac. Rep. 491; *Spanish Fork City v. Hopper*, 7 Utah 235, 26 Pac. Rep. 293; *Wasatch Irr. Co. v. Fulton*, 23 Utah 466, 65 Pac. Rep. 205; *Grisseza v. Terwilliger*, 144 Cal. 456, 77 Pac. Rep. 1034; *Authers v. Bryant*, 22 Nev. 242, 38 Pac. Rep. 439; *Bauers v. Bull*, 46 Ore. 60, 78 Pac. Rep. 757; *American W. Co. v. Bradford*, 27 Cal. 360, 15 Morr. Min. Rep. 190; *Lux v. Haggin*, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; *Montecito W. Co. v. Santa Barbara*, 144 Cal. 578, 77 Pac. Rep. 1113; *Mathew v. Ferrea*, 45 Cal. 51.

⁶ For necessity of a reply, see Sec. 1551.

Where plaintiff by his complaint claimed all the waters of a certain creek, "being about 60 inches," and the defendant alleged that he had appropriated "all of the water in said creek, being about 50 inches," and that he had acquired the right by adverse user to "the whole of the waters of said creek," plaintiff, by failing to reply to the latter allegation, admitted defendant's right, and it was proper for the Court to render judgment on the pleadings without proof. *State v. Quantic*, 37 Mont. 32, 94 Pac. Rep. 491.

⁷ See, also, Sec. 1550.

Adverse possession and prior appropriation are not inconsistent defenses, and both may be asserted in the same pleading. *Hough v. Porter*, 51 Ore. 318, 372, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

See, also, *State v. Quantic*, 37 Mont. 32, 94 Pac. Rep. 491.

⁸ In a suit to restrain the use of water claims by the defendants, as riparian owners, and by adverse user, are not inconsistent. *Davis v. Chamberlain*, 51 Ore. 304, 98 Pac. Rep. 154.

See, also, *Strong v. Baldwin*, 154 Cal. 150, 97 Pac. Rep. 178, 129 Am. St. Rep. 141.

ment of taxes may be proven under the general allegations of adverse possession.⁹

§ 1553. Practice and procedure—Submission of questions of fact to a jury.—The parties defendant to an action to quiet title to water rights must be served with legal process, or notice of the pendency of the action as provided by the statutes of the State where the action is brought.¹ In Oregon, a defendant desiring an adjudication of his claim against his codefendants, may cause summons to be issued under the original title of the action and have the same served on his codefendants with a copy of his answer, or he may serve a copy of the order of the court, requiring his codefendants to appear and respond to the affirmative matter in the answer within the time therein specified.² In the other jurisdictions a similar proceeding is followed.³ The pleadings of the respective parties having been filed and the case being at issue, or the time for answering having expired and defaults having been entered against non-answering defendants, a hearing must be had by the court and the case tried. The rights of the parties must be adjudicated under the existing laws of the jurisdiction where the action is pending, regardless of the previous allegiance of the parties.⁴ As

⁹ Ball v. Nichols, 73 Cal. 193, 14 Pac. Rep. 831.

For proof necessary to sustain a title by adverse possession, see Secs. 1055, 1555.

¹ For process or notice under statutory adjudications, see Secs. 1567-1584.

"That a Court can not go outside of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities." Sloan v. Byers, 37 Mont. 503, 97 Pac. Rep. 855; Bear Lake County v. Budge, 9 Idaho 703, 75 Pac. Rep. 614, 108 Am. St. Rep. 179; Boise etc. Co. v. Stewart, 10 Idaho 38, 77 Pac. Rep. 25, 321; Combs v. Farmers' etc. Co., 38 Colo.

420, 88 Pac. Rep. 396; Roberson v. People, 40 Colo. 119, 90 Pac. Rep. 79.

² Hough v. Porter, 51 Ore. 318, 372, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

³ For the pleadings necessary to adjudicate rights between codefendants, see Sec. 1550.

⁴ "These laws must govern wherein they differ from the treaty provisions, and, wherein they are harmonious, treaty provisions need not be considered. The laws of the United States and the States and Territories are ample for the protection of the rights of appropriators of water in this Territory, and remedies for impairment or destruction of such rights are adequate, also." Albuquerque etc. Co. v. Gutierrez, 10 N. M. 177, 61 Pac.

to the general practice and procedure in actions of this nature, they must conform to that prescribed by the statutes of the jurisdiction where the action is pending, and which are in existence at the time any proceeding is had. No person has any vested right to any particular mode of procedure for the adjudication, enforcement, or defense of his rights, and if, before the trial of a cause, a new law as to procedure goes into effect, it will from that time govern and regulate the proceedings, unless the statute provides to the contrary.⁵

These actions usually requiring a great amount of time to be tried, owing to the fact of the great number of the parties and their respective rights, in most jurisdictions a court of equity has the power to appoint a referee or commissioner to take the testimony. The referee or commissioner then hears the evidence in the case, has the same transcribed, and reports the same to the court. In some jurisdictions he is given the power to report, also, his findings of fact and conclusions of law. The case is then submitted to the court, which may by its decree confirm the findings and conclusions so found by the referee or commissioner, or the court on the evidence may find new findings of fact and conclusions of law and base its decree thereon.⁶ After the decree and judgment in the case has been rendered, the court, upon a sufficient showing as required by the statute, may set aside the decree and judgment and grant a new trial; upon which a new trial may be had.⁷

In order for the trial judge to become familiar with the situation surrounding the parties to the action, it is the common practice for him to make a personal examination of the premises and to use the information thus acquired in rendering his findings and decree. This practice is allowed by the statutes of some of the States, and in all it seems to be permitted, even where there is no such statute.⁸

Rep. 357; affirmed, 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338.

⁵ Boise etc. Co. v. Stewart, 10 Idaho 38, 77 Pac. Rep. 25, 321.

⁶ For the practice in Colorado, see Sec. 1576.

⁷ For decree and judgment, see Secs. 1557-1564.

But a case will not be reopened for a new trial because petitioner was compelled to change counsel, even if his case was inadequately presented;

and the fact that the petitioner received more than his share of the water in controversy, while others were deprived of their share, would, of itself, prevent the reopening of the case in his behalf. Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

See, also, Bledsoe v. Deckrow, 132 Cal. 312, 64 Pac. Rep. 397.

⁸ The findings of the trial court, based upon conflicting testimony, and

In the majority of the States, in equity cases certain questions of fact may be submitted to a jury. This practice is often followed in actions involving the rights of parties to the use of water and the adjudication of their respective rights. Where this is done the determination of the court as to what interrogatories should be submitted to the jury can not be disturbed.⁹ In such cases where the issues are submitted to the jury, its verdict is merely advisory and the court may adopt its findings in whole or in part, or, in lieu of those not adopted, the court may make findings of its own.¹⁰ Or the court may entirely disregard the verdict of the jury and make its own

aided by a personal inspection of the subject of the controversy, will not be disturbed on appeal. *Winter v. Fulstone*, 20 Nev. 260, 21 Pac. Rep. 201.

See, also, *Promotory Ranch Co. v. Argile*, 28 Utah 398, 79 Pac. Rep. 47; *Power v. Switzer*, 21 Mont. 523, 55 Pac. Rep. 32; *Medano D. Co. v. Adams*, 29 Colo. 317, 68 Pac. Rep. 431; *Leonard v. Shatzer*, 11 Mont. 422, 28 Pac. Rep. 457.

See, also, *Harrington v. Demaris*, 46 Ore. 111, 77 Pac. Rep. 603, 82 Pac. Rep. 14, 1 L. R. A., N. S., 756.

⁹ *Buckers etc. Co. v. Farmers' Ind. D. Co.*, 31 Colo. 62, 72 Pac. Rep. 49; *Davis v. Martin*, 157 Cal. 657, 108 Pac. Rep. 866.

For the procedure in mixed equitable and law actions, see actions to quiet title and damages in same suit, Sec. 1537, and actions for injunction and damages in same suit, Secs. 1538, 1599.

¹⁰ "If the remedy sought be equitable, the Court is not bound to call a jury, and if it does call one, it is merely for the purpose of enlightening its conscience, and not to control its judgment. The decree which it must render upon the law must proceed from its own judgment respect-

ing them, and not from the judgment of others." *Basey v. Gallagher*, 87 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683.

The jury in such cases are the exclusive judges of the credibility of the witnesses and the weight of their testimony. *Bowen v. Webb*, 37 Mont. 479, 97 Pac. Rep. 839.

Error can not be predicated on the refusal of the court in a suit in equity to submit to the jury requested interrogatories, the jury being merely advisory, and the questions to be submitted within the discretion of the trial court. *Davis v. Martin*, 157 Cal. 657, 108 Pac. Rep. 866; *Buckers etc. Co. v. Farmers' Ind. D. Co.*, 31 Colo. 62, 72 Pac. Rep. 49; *Egan v. Estrada*, 6 Ariz. 248, 56 Pac. Rep. 721; *Haggin v. Saile*, 23 Mont. 375, 59 Pac. Rep. 154; *Berry v. Equitable Gold M. Co.*, 29 Nev. 451, 91 Pac. Rep. 537; *Churchill v. Louie*, 135 Cal. 608, 67 Pac. Rep. 1052; *Hoyt v. Hart*, 149 Cal. 722, 87 Pac. Rep. 569; *Bowen v. Webb*, 37 Mont. 479, 97 Pac. Rep. 839; *Kimpton v. Jubilee etc. Co.*, 16 Mont. 379, 41 Pac. Rep. 137, 42 Mont. 102; *Pealer v. Gray's etc. Co.*, 54 Wash. 415, 103 Pac. Rep. 451; *Davis v. Martin*, 157 Cal. 657, 108 Pac. Rep. 866.

findings.¹¹ In an Idaho case¹² the growing tendency in purely equitable actions to submit questions of fact to a jury is deplored as placing the responsibility on the jury instead of the court accepting the full responsibility for the decisions in such cases.¹³

§ 1554. **Proof of claims—Burden of proof.**—In actions to adjudicate water rights, the evidence must disclose the amount of water to which each party is entitled and without this evidence the decree can not establish their titles to any definite quantity of water or settle the relative rights of plaintiffs and defendants.¹

Upon the one asserting a claim of the right to the use of water, regardless upon what he bases his right, rests the burden of proving his claim as set up in his pleadings by a preponderance of all of the evidence admitted in the case on the point in question.² And, al-

¹¹ Findings on issues of fact submitted to a jury in equity cases will not bind the chancellor. *Koch v. Story*, 47 Colo. 335, 107 Pac. Rep. 1093.

¹² *Parke v. Boulware*, 7 Idaho 490, 63 Pac. Rep. 1045.

¹³ "It was within the sound discretion of the Court to put to the jury such questions as it saw fit. It was neither compelled to call a jury at the demand of the plaintiffs, nor to put to them any question of fact for their determination." *Davis v. Martin*, 157 Cal. 657, 108 Pac. Rep. 866.

¹ *Simpson v. Harrah*, 54 Ore. 448, 103 Pac. Rep. 58; *Rodgers v. Overacker*, 4 Cal. App. 333, 87 Pac. Rep. 1107.

² See, also, Sec. 1640.

In a suit to determine rights to waters from a stream, the burden is upon the plaintiffs to prove all the elements essential to their rights claimed under prior appropriation. *Gardner v. Wright*, 49 Ore. 609, 91 Pac. Rep. 286.

See, also, *Ft. Lyon Canal Co. v. Chew*, 33 Colo. 392, 81 Pac. Rep. 37;

Hilgar v. Zabel, 38 Mont. 93, 98 Pac. Rep. 881; *Farmers' etc. Co. v. Riverside Irr. Co.*, 16 Idaho 525, 102 Pac. Rep. 481; *Hague v. Nephi etc. Co.*, 16 Utah 421, 52 Pac. Rep. 765, 41 L. R. A. 311, 67 Am. St. Rep. 634; *Senior v. Anderson*, 138 Cal. 716, 72 Pac. Rep. 349; *Griseza v. Terwilliger*, 144 Cal. 456, 77 Pac. Rep. 1034; *Duckworth v. Watsonville etc. Co.*, 150 Cal. 520, 89 Pac. Rep. 338; *Watts v. Spencer*, 51 Ore. 262, 94 Pac. Rep. 39; *Wellington v. Beck*, 43 Colo. 70, 95 Pac. Rep. 297; *Blake v. Boye*, 38 Colo. 55, 88 Pac. Rep. 470, 8 L. R. A., N. S., 418; *Wutchumna W. Co. v. Pogue*, 151 Cal. 105, 90 Pac. Rep. 362; *Collins v. Gray*, 154 Cal. 131, 97 Pac. Rep. 142; *Smith v. Duff*, 39 Mont. 382, 102 Pac. Rep. 984, 133 Am. St. Rep. 587; *Farmers' etc. Co. v. Riverside Irr. Dist.*, 16 Idaho 525, 102 Pac. Rep. 481; *Davis v. Chamberlain*, 51 Ore. 304, 98 Pac. Rep. 154.

Where plaintiff bases his claim to a water right on prior appropriation and adverse user, and the evidence establishes the right by prior appropriation only, a finding for the plaintiff as to adverse use is not reversible error.

though a plaintiff under a claim of general ownership may prove his title to the right by appropriation, adverse possession and user, or purchase,³ all the essential elements of the acquisition of his right must be proven according to the nature of the claim which he makes to it. Therefore, if the theory of his claim is that of prior appropriation he must prove all of the elements which are necessary to make a prior appropriation, including the beneficial use of all of the water claimed.⁴ Parol proof of the use and possession of the water right for irrigation is held to be *prima facie* evidence of title.⁵ If he bases his claim upon a purchase from an appropriator, he must not only prove a valid appropriation by his grantor, but he must also prove his right to his claim by proving the purchase.⁶ And, again, if he claims his right by adverse possession and user as against others, he must establish by a preponderance of the evidence all of the elements necessary to establish such a claim.⁷ Of course, where either the plaintiff or the defendant sets forth in his pleadings the nature of

San Luis W. Co. v. Estrada, 117 Cal. 168, 48 Pac. Rep. 1075.

A stipulation as to the respective appropriations of the parties to the action will control, and not the evidence showing a contrary state of facts. Water Supply etc. Co. v. Larimer etc. Co., 25 Colo. 87, 53 Pac. Rep. 386; reversing 7 Colo. App. 225, 42 Pac. Rep. 1020.

A non-suit should not be granted if enough of the facts which are set forth in the complaint are established by the evidence, without substantial conflict, to constitute a good cause of action, although other allegations are not proven. Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

For the elimination of the testimony of a witness, whose inconsistencies would justify the same, see Bowen v. Webb, 37 Mont. 479, 97 Pac. Rep. 839.

Testimony given at a former trial by a decedent not involving the same subject is inadmissible. Nevada etc.

Co. v. Canyon etc. Co., 58 Ore. 517, 114 Pac. Rep. 86.

For proof where the claim is by adverse possession and user, see Secs. 1055, 1555.

³ For pleadings, complaint, or bill of plaintiff, see Sec. 1548.

See, also, Hague v. Nephi etc. Co., 16 Utah 421, 52 Pac. Rep. 765, 41 L. R. A. 311, 67 Am. St. Rep. 634.

⁴ For the essential elements of a prior appropriation, see Secs. 706-732.

⁵ Bates v. Hall, 44 Colo. 360, 98 Pac. Rep. 3.

Upon the subject of judicial notice without proof, see Smith v. Duff, 39 Mont. 382, 102 Pac. Rep. 984, 133 Am. St. Rep. 587; Whited v. Cavin, 55 Ore. 98, 105 Pac. Rep. 396; Prescott v. Flathers, 20 Wash. 454, 55 Pac. Rep. 635; Anaheim W. Co. v. Fuller, 150 Cal. 327, 88 Pac. Rep. 978, 11 L. R. A., N. S., 1062.

⁶ For the sale of water rights, see Secs. 994-1032.

⁷ For the necessary elements of a prescriptive right, see Secs. 1048-1054.

his claim to the right, the proof must conform to his pleadings and he must establish his claim to the right upon the theory which he pleads; otherwise, there will be a fatal variance between the pleading and the proof, and a recovery can not be had.⁸ So, where the claim set up is that of a riparian owner, in order to recover, riparian ownership must be proven and a recovery can not be had where the proof is of an appropriation.⁹ And, in order to establish a right to the use of the water by virtue of riparian ownership, the claimant thereto must also furnish proof as to the volume of the stream, the character of the soil, the amount necessary for the irrigation of the same, the number of other riparian proprietors upon the stream, the amount of water needed and used by them, and all other facts and circumstances surrounding each particular case, from which the court may determine the question of the reasonableness of the claim set up, both in respect to itself and as to a like reasonable use of the water by all of the other riparian owners.¹⁰ Again, where the

For the proof of adverse user necessary to establish a right by prescription, see Secs. 1055, 1555.

⁸ Where the complaint alleges an appropriation of water by plaintiffs, but the proof shows that any rights of plaintiffs to the use of the water are not based on an appropriation, but on a contract, there is a substantial and fatal variance. *City and County of Denver v. Walker*, 45 Colo. 387, 101 Pac. Rep. 348.

Where the claim is by prescription, evidence is inadmissible that the plaintiff acquired the right by permission. *Shenandoah etc. Co. v. Morgan*, 106 Cal. 409, 39 Pac. Rep. 802.

See, also, *Miller v. Lake Irr. Co.*, 27 Wash. 447, 67 Pac. Rep. 996.

⁹ *Shenandoah etc. Co. v. Morgan*, 106 Cal. 409, 39 Pac. Rep. 802; *Wutchumna W. Co. v. Pogue*, 151 Cal. 105, 90 Pac. Rep. 362; *Montecito etc. Co. v. Santa Barbara*, 151 Cal. 377, 90 Pac. Rep. 935.

¹⁰ *Jones v. Conn*, 39 Ore. 30, 64 Pac. Rep. 855, 65 Pac. Rep. 1068, 54 L. R.

A. 630, 87 Am. St. Rep. 634; *Boehmer v. Big Rock Creek Irr. Dist.*, 117 Cal. 19, 48 Pac. Rep. 908; *Coleman v. La Franc*, 137 Cal. 214, 69 Pac. Rep. 1011; *Cave v. Tyler*, 133 Cal. 566, 65 Pac. Rep. 1089; *Riverside etc. Co. v. Gage*, 89 Cal. 410, 26 Pac. Rep. 889; *Gutierrez v. Wege*, 145 Cal. 730, 79 Pac. Rep. 449; *Id.*, 151 Cal. 587, 91 Pac. Rep. 395; *Duckworth v. Watsonville*, 150 Cal. 520, 89 Pac. Rep. 338; *Hough v. Porter*, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 112 Pac. Rep. 728, where it was held that where the testimony before the appellate court was not sufficient for the determination of the quantity necessary to supply the requirements of the riparian proprietors, the Court may determine the other points upon which the testimony is adequate and remand the cause to the Court below with permission to take further evidence upon points in question.

Where the evidence was not sufficient to enable the Court to determine the relative rights of the parties to the

claim is that of an appropriation, the plaintiff can not recover upon proof that he is a riparian owner.¹¹

As the available water supply in this Western country becomes each year more scarce, there is one element of proof of claims to the use of water, regardless of the basis of the right upon which it is claimed, which the courts are requiring more and more to be specifically and definitely proven, and that is the amount of the water which is reasonably necessary for the useful and beneficial purpose for which it is claimed. This subject has been discussed in a previous chapter of this work.¹² As we shall discuss when we come to the subject of decrees and judgments,¹³ if more water is claimed by any party to the action than is reasonably necessary for the purpose to which it is applied, a court of equity has the power and it is its duty by its decree to limit the amount of the water to such a quantity as is reasonably necessary for that purpose. Therefore, it devolves upon the party setting up a claim to water, in these actions, to prove the amount of water that is necessary for his purpose. In proving the quantity of water needed, where the appropriation is for irrigation, the party should prove the number of acres for which he claims the water and the quantity of water needed to properly irrigate the same.¹⁴ Upon this subject expert testimony may be introduced.¹⁵ And although the courts have at times doubted the value of expert testimony upon this subject, if admissible at all, it should have the same weight as such testimony has in other cases.¹⁶

waters of the stream, the Court did not err in refusing to determine the quantity of water the respective parties were entitled to use as riparian owners. *Strong v. Baldwin*, 154 Cal. 150, 97 Pac. Rep. 178, 129 Am. St. Rep. 141.

¹¹ *Riverside W. Co. v. Gage*, 89 Cal. 410, 26 Pac. Rep. 889; *San Luis W. Co. v. Estrada*, 117 Cal. 168, 48 Pac. Rep. 1075; *Strong v. Baldwin*, 137 Cal. 432, 70 Pac. Rep. 288.

¹² For the economical use of water and the suppression of waste, see Chap. 49, Secs. 874-916.

¹³ See Secs. 1557-1564.

¹⁴ *Kirk v. Bartholomew*, 2 Idaho 1087, 3 Idaho (Hasb.) 367, 29 Pac. Rep. 40; *Rodgers v. Pitt*, 89 Fed. Rep. 420, 129 Fed. Rep. 932.

¹⁵ *Twaddle v. Winters*, 29 Nev. 88, 85 Pac. Rep. 280, 89 Pac. Rep. 289; *Robertson v. Wilmoth*, 40 Colo. 74, 90 Pac. Rep. 95; *Whited v. Cavin*, 55 Ore. 98, 105 Pac. Rep. 396; *Ison v. Sturgill*, 57 Ore. 109, 109 Pac. Rep. 579.

¹⁶ *Los Angeles v. Hunter*, 156 Cal. 603, 105 Pac. Rep. 755; *Evans Ditch Co. v. Lakeside Ditch Co.*, 15 Cal. App. 119, 108 Pac. Rep. 1027; *Duckworth v. Watsonville etc. Co.*, 158 Cal. 206, 110 Pac. Rep. 927.

§ 1555. **Proof necessary to establish a right by prescription—Burden of proof.**—The burden of proof, in cases where one is claiming a water right or an easement by adverse possession and user that there has been present all the essential elements for the full period of time required by the law, to amount to a prescriptive right in his favor, and to presume a grant to him therefor, including proof of its hostile character, is upon the party making the claim, and his evidence must be clear and convincing.¹ But where there is proof of

¹ "The burden of proving all the essential elements, including its hostile character, is upon the party relying upon it. . . . If he leaves it doubtful whether the enjoyment was adverse, known to the owner, and uninterrupted, it is not conclusive in his favor." *American etc. Co. v. Bradford*, 27 Cal. 360, 15 Morr. Min. Rep. 190.

"The burden of proving an uninterrupted user, with knowledge of the owner, is on the party claiming by prescription." *Ball v. Kehl*, 95 Cal. 606, 30 Pac. Rep. 780; *Morris v. Bean*, 140 Fed. Rep. 433; *Gardner v. Wright*, 49 Ore. 609, 91 Pac. Rep. 286; *Strong v. Baldwin*, 137 Cal. 432, 70 Pac. Rep. 288; *Lavery v. Arnold*, 36 Ore. 84, 57 Pac. Rep. 906, 58 Pac. Rep. 524; *Faulkner v. Rondoni*, 104 Cal. 140, 37 Pac. Rep. 883; *Griseza v. Terwilliger*, 144 Cal. 456, 77 Pac. Rep. 1034; *Bauers v. Bull*, 46 Ore. 60, 78 Pac. Rep. 757; *Higuera v. Del Ponte*, 4 Cal. App. 13, 88 Pac. Rep. 808; *Smith v. Duff*, 39 Mont. 382, 102 Pac. Rep. 984, 133 Am. St. Rep. 587; *Gurnsey v. Antelope Creek etc. Co.*, 6 Cal. App. 387, 92 Pac. Rep. 326; *Smith v. North Canyon W. Co.*, 16 Utah 194, 52 Pac. Rep. 283; *Franz v. Mendonca*, 131 Cal. 205, 63 Pac. Rep. 362; *Alta Land & W. Co. v. Hancock*, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217; *Swank v. Sweetwater etc. Co.*, 15 Idaho 583, 98 Pac. Rep.

297; *Davis v. Angelo*, 8 Cal. App. 305, 96 Pac. Rep. 909; *Strong v. Baldwin*, 154 Cal. 150, 97 Pac. Rep. 178, 129 Am. St. Rep. 141; *San Luis W. Co. v. Estrada*, 117 Cal. 168, 48 Pac. Rep. 1075; *Bathgate v. Irvine*, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158; *Duckworth v. Watsonville etc. Co.*, 150 Cal. 520, 89 Pac. Rep. 338; *Watkins v. Clements*, 98 Tex. 578, 86 S. W. Rep. 733, 70 L. R. A. 964, 107 Am. St. Rep. 673; *Lick v. Diaz*, 30 Cal. 75; *Garwood v. Hastings*, 38 Cal. 216; *DeFrieze v. Quint*, 94 Cal. 653, 30 Pac. Rep. 1, 28 Am. St. Rep. 151; *Jensen v. Hunter*, 108 Cal. 17, 41 Pac. Rep. 14; *Jobling v. Tuttle*, 75 Kan. 351, 89 Pac. Rep. 699, 9 L. R. A., N. S., 960; *Hall v. Blackman*, 8 Idaho 272, 68 Pac. Rep. 19; *Knight v. Cohen*, 7 Cal. App. 43, 93 Pac. Rep. 396; *Watts v. Spencer*, 51 Ore. 262, 94 Pac. Rep. 39; *Edson & Foulke Co. v. Windell*, 160 Cal. 783, 118 Pac. Rep. 243.

"If there is substantial evidence of every element of adverse use, the finding of the Court below is controlling." *Gurnsey v. Antelope etc. Co.*, 6 Cal. App. 387, 92 Pac. Rep. 326, citing *Thomas v. England*, 71 Cal. 456, 12 Pac. Rep. 491; *Humphreys v. Blasingame*, 104 Cal. 40, 37 Pac. Rep. 804; *Abbott v. Pond*, 142 Cal. 393, 76 Pac. Rep. 60; *Franz v. Mendonca*, 146 Cal. 640, 80 Pac. Rep. 1078.

A stipulation may be entered into

an open, notorious, continuous, and adverse use of the water or easement under a claim of right for the period of time prescribed by the statute there is a presumption of a grant.² It is then incumbent upon the party against whom the right is sought, by sufficient affirmative evidence, to rebut such presumption; otherwise, the presumption stands as sufficient proof and establishes the right by prescription.³ And a *prima facie* showing of adverse user having been

between the parties to introduce or show title or right in and to any part of the waters of the stream by adverse use as fully as though pleaded. *Hansen v. Larsen*, 44 Mont. 350, 120 Pac. Rep. 229.

As to the value of evidence of posting a notice of appropriation claiming the water, see *Santa Cruz v. Enright*, 95 Cal. 105, 30 Pac. Rep. 197; *Bathgate v. Irvine*, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158; *Alta etc. Co. v. Hancock*, 85 Cal. 219, 24 Pac. Rep. 645, 20 Am. St. Rep. 217; *Frederick v. Dickey*, 91 Cal. 360, 27 Pac. Rep. 742; *Coonrad v. Hill*, 79 Cal. 593, 21 Pac. Rep. 1099; *Gardiner v. Wright*, 49 Ore. 609, 91 Pac. Rep. 286, where it is said: "The testimony showing the open use of the water under notices posted, growing crops, and general knowledge thereof in the vicinity, while not sufficient to establish ownership, was clearly competent as evidence for the purpose of establishing claim of ownership as well as to indicate open and adverse possession under this defense." Citing *Rowland v. Williams*, 23 Ore. 515, 32 Pac. Rep. 402; *Petrain v. Kiernan*, 23 Ore. 455, 32 Pac. Rep. 158; *Boyce v. Cupper*, 37 Ore. 256, 61 Pac. Rep. 642; *Eastern Oregon Land Co. v. Cole* (Ore.) 92 Fed. Rep. 949; *Fitzgerald v. Brewster*, 31 Neb. 51, 47 N. W. Rep. 475; *Maxwell Land Grant Co. v. Dawson*, 151 U. S. 586, 38 L. Ed. 279, 14 Sup. Ct. Rep. 453.

Evidence of the statements made by the holder of an unrecorded deed, that certain water rights were appurtenant to certain lands was admissible, although such facts were not pleaded. *Shurtleff v. Bracken*, — Cal. —, 124 Pac. Rep. 724.

² "And if there has been the use of an easement for 20 years, unexplained, it will be presumed to be under a claim of right, and adverse, and be sufficient to establish a title by prescription, and to authorize the presumption of a grant, unless contradicted or explained." Washb. Easements, 4th Ed., p. 156.

See, also, *Franz v. Mendonca*, 131 Cal. 205, 63 Pac. Rep. 361; *Id.*, 146 Cal. 640, 80 Pac. Rep. 1078; *Fleming v. Howard*, 150 Cal. 28, 87 Pac. Rep. 908; *Cox v. Forrest*, 60 Md. 79; *Knight v. Cohen*, 7 Cal. App. 43, 93 Pac. Rep. 396; *Ricard v. Williams*, 20 U. S. 7 Wheat. 105, 5 L. Ed. 398; *Kripp v. Curtis*, 71 Cal. 66, 11 Pac. Rep. 879.

See, also, *Jones on Easements*, Sec. 186; 14 Cyc. 1147.

³ Open, visible, continuous, and unmolested use of a way is sufficient to raise a presumption that the use was under an adverse claim of right sufficient to establish a *prima facie* title by prescription, and the burden of proof is on the party alleging that the use was permissive to prove such fact by affirmative evidence. *Fleming v. Howard*, 150 Cal. 28, 87 Pac. Rep.

made by the claimant, the burden of showing that the user was not a substantial interference with the rights of the party against whom the claim is made, or that the user was by his permission is shifted to the latter party.⁴ But before adverse claimants can avail themselves of this rule they must show, in the first instance, that their claim embodies all of the essential elements necessary to acquire the right by prescription.⁵ This includes the payment of taxes assessed against the property during the prescriptive period.⁶ There is but one exception to this rule, and that is upon the question of taxes. If no taxes upon the property are to be found assessed, it need not be found that the party claiming by adverse possession has paid the taxes, "and the burden of showing that none have been assessed is not upon the claimant by possession."⁷

§ 1556. **The findings of fact and conclusions of law.**—From the evidence admitted in the case the trial court must make findings of

908; Jones on Easements, Sec. 186; Coventon v. Seufert, 23 Ore. 548, 32 Pac. Rep. 508; Franz v. Mendonca, 131 Cal. 305, 63 Pac. Rep. 361; Gurnsey v. Antelope etc. Co., 6 Cal. App. 387, 92 Pac. Rep. 326.

⁴ "Having established these facts, he made a *prima facie* showing of adverse user; and, this having been established, the burden of showing that such user was not a substantial interference with the rights of others was thereby shifted to the parties questioning such claim." Hough v. Porter, 51 Ore. 318, 372, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

"The burden is in the first instance upon the plaintiff to prove his title by prescription. After showing the continuous occupancy and use of the water as though he were the owner, for more than five years, he establishes a *prima facie* case. It then devolves upon the defendant to show that the use was permissive or without the knowledge of said defendant." Gurn-

sey v. Antelope Cr. etc. Co., 6 Cal. App. 387, 92 Pac. Rep. 326.

See, also, Goodwin v. Scheerer, 106 Cal. 695, 40 Pac. Rep. 18; Gardner v. Wright, 49 Ore. 609, 91 Pac. Rep. 286; Coventon v. Seufert, 23 Ore. 548, 32 Pac. Rep. 508; Fleming v. Howard, 150 Cal. 28, 87 Pac. Rep. 908; Rowland v. Williams, 23 Ore. 515, 32 Pac. Rep. 402; Anaheim Union W. Co. v. Ashcroft, 153 Cal. 152, 94 Pac. Rep. 613; Bauers v. Bull, 46 Ore. 60, 78 Pac. Rep. 757; Horbach v. Boyd, 64 Neb. 129, 89 N. W. Rep. 644; Law v. McDonald, 9 Hun, 23; Knight v. Cohn, 7 Cal. App. 43, 93 Pac. Rep. 396.

⁵ Smith v. Duff, 39 Mont. 382, 102 Pac. Rep. 984, 133 Am. St. Rep. 587.

⁶ Swank v. Sweetwater etc. Co., 15 Idaho 583, 98 Pac. Rep. 297.

⁷ Oneto v. Restano, 78 Cal. 374, 20 Pac. Rep. 743; Heilbron v. Last Chance D. Co., 75 Cal. 117, 17 Pac. Rep. 65; Ball v. Nichols, 73 Cal. 193, 14 Pac. Rep. 831; Swank v. Sweetwater etc. Co., 15 Idaho 583, 98 Pac. Rep. 297.

fact, and from which it must draw its conclusions of law. As the decree as to the respective rights of the parties to the action is based upon the findings of fact, they should be made as definite and certain as possible.¹ The Court must make specific findings both as to the priority of right of the respective parties and of the quantity of water to which each party is entitled. As to the quantity of water to which each party is entitled, it should be based upon some standard recognized for the measurement of water,² and must be definite and certain both as to the quantity of water to which each party is entitled, and also as to the time or times when he is entitled to its use.³ The findings of fact must be consistent with themselves. That is to say, some particular finding must not be antagonistic with some other upon the same subject.⁴ The Court should not confuse

¹ For decrees in actions adjudicating water rights, see Secs. 1557-1564.

² For the measurement of water, see Secs. 888-900.

³ *Lakeside D. Co. v. Crane*, 80 Cal. 181, 22 Pac. Rep. 76; *Duckworth v. Watsonville etc. Co.*, 150 Cal. 520, 89 Pac. Rep. 338; *Id.*, 158 Cal. 206, 110 Pac. Rep. 927; *Gurnsey v. Antelope etc. Co.*, 6 Cal. App. 387, 92 Pac. Rep. 326; *Consolidated etc. Co. v. New Loveland etc. Co.*, 27 Colo. 521, 62 Pac. Rep. 364; *Anderson v. Cook*, 25 Mont. 330, 64 Pac. Rep. 873, 65 Pac. Rep. 113, 66 Pac. Rep. 504; *Salt Lake City v. Salt Lake City etc. Co.*, 24 Utah 249, 67 Pac. Rep. 672, 25 Utah 441, 71 Pac. Rep. 1069, 61 L. R. A. 648; *Kimpton v. Jubilee etc. Co.*, 16 Mont. 379, 41 Pac. Rep. 137, 42 Mont. 102; *Miller & Lux v. Enterprise etc. Co.*, 145 Cal. 652, 79 Pac. Rep. 439.

A judgment based upon indefinite findings is invalid. *Wallace v. Farmers' D. Co.*, 130 Cal. 578, 62 Pac. Rep. 1078.

See, also, *Elliot v. Whitmore*, 8 Utah 253, 30 Pac. Rep. 984.

A finding that one riparian owner was entitled to the use of the water for two weeks in June, while vague

and indefinite, was held not to be the subject of complaint by that owner, for its definiteness or lack of it can not affect his rights. *Featherman v. Hennessy*, 43 Mont. 310, 115 Pac. Rep. 983.

Where there are no findings upon the main questions that can not be finally determined, nothing remains for the Supreme Court to do but to reverse the judgment and to remand the case for a new trial. *Patterson v. Ryan*, 37 Utah 410, 108 Pac. Rep. 1118.

⁴ *Authers v. Bryant*, 22 Nev. 242, 38 Pac. Rep. 439; *Johnson v. Bielenberg*, 14 Mont. 506, 37 Pac. Rep. 12; *Hayes v. Silver Creek etc. Co.*, 136 Cal. 238, 68 Pac. Rep. 704.

But see *Mesnager v. Engelhardt*, 108 Cal. 68, 41 Pac. Rep. 20.

Findings of fact by the trial court should be construed together, so that all will sustain the decree, but where that is impossible, general findings inconsistent with specific findings must be rejected. *Featherman v. Hennessy*, 43 Mont. 310, 115 Pac. Rep. 983.

See, also, *Davis v. Martin*, 157 Cal. 657, 108 Pac. Rep. 866; *Goon v. Proctor*, 27 Mont. 526, 71 Pac. Rep. 1003;

its findings of fact with its conclusions of law. And where a finding of fact is stated under the head of "conclusions of law," it will be treated by the Court on appeal as a finding of fact, although it may be misplaced.⁵

From the reported cases it seems that the trial courts have at times had considerable difficulty in formulating their findings and in rendering their decree adjudicating the water rights among the respective parties to the action. In some instances this duty has been shirked by the Court, which left the rights undetermined and subject to future litigation. This action by the trial courts has been criticised by the Supreme Courts on appeal, which hold that, however great their intrinsic difficulties, the trial courts must deal with them in accordance with the law and the evidence, and make its findings of fact, upon which it must base its decree.⁶ Findings by the trial court supported by the evidence are conclusive on appeal.⁷ But where not supported by the evidence the findings and the judgment based thereon will be set aside and reversed, and either a new trial granted or a mandatory judgment ordered.⁸

§ 1557. The decrees and judgments—On rights by appropriation.—The decree and judgment of the Court must be rendered in an action to adjudicate water rights, and must be based upon the

Buckers Irr. etc. Co. v. Farmers' etc. Co., 31 Colo. 62, 72 Pac. Rep. 49; *Lost Creek Irr. Co. v. Rex*, 26 Utah 485, 73 Pac. Rep. 660; *Rose v. Mesmer*, 142 Cal. 322, 75 Pac. Rep. 905; *Beaverhead Canal Co. v. Dillon etc. Co.*, 34 Mont. 135, 85 Pac. Rep. 880.

⁵ *Santa Paula Waterworks v. Peralta*, 113 Cal. 38, 45 Pac. Rep. 168.

⁶ *Bear River etc. Co. v. New York etc. Co.*, 8 Cal. 327, 68 Am. Dec. 325, 4 Morr. Min. Rep. 526; *Butte etc. Co. v. Vaughn*, 11 Cal. 143, 70 Am. Dec. 769, 4 Morr. Min. Rep. 552.

See, also, opinion of Mr. Justice Shaw, in *Katz v. Walkinshaw*, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

The word "about," when used in

a finding of statements of courses or distances, is discarded as without significance, if there are no other words necessary to retain it. *Featherman v. Hennessy*, 43 Mont. 310, 115 Pac. Rep. 983.

See, also, for decrees apportioning subterranean waters, Sec. 1561.

⁷ *Cache La Poudre etc. Co. v. Windsor etc. Co.*, 25 Colo. 53, 52 Pac. Rep. 1104; *Cooper v. Shannon*, 36 Colo. 98, 85 Pac. Rep. 175, 118 Am. St. Rep. 95; *Boyd v. Huffine*, — Mont. —, 120 Pac. Rep. 228; *McDonell v. Huffine*, — Mont. —, 120 Pac. Rep. 792; *Wolff v. Pomponia*, — Mont. —, 120 Pac. Rep. 142.

⁸ *Munsee v. McKellar*, — Utah —, 116 Pac. Rep. 1024.

findings of fact and conclusions of law found by the Court.¹ As the main purpose of such an action to quiet title is to determine the respective rights of the parties to the use of the water, or their rights in a ditch or canal,² the decree should definitely award the respective rights to the parties to the action. Therefore, in order to have a decree conclusive upon the subject by its future construction, it must be sufficiently definite and certain as to the parties, the order of their respective priorities, the quantity of water which each is entitled to use, the times when they are entitled to use the water, and any other subject which the evidence in each particular case may develop.³ A decree attempting to adjudicate the rights between the parties which is uncertain and indefinite in fixing those rights, leaves the controversy between the parties unsettled and unadjudicated, their respective rights undetermined, and subject to future litigation, or reversal or modification upon appeal.⁴ Therefore, the rendition of such a decree and judgment, unless corrected upon appeal, defeats the very purpose for which the action was brought.⁵ A decree and judgment must be sufficiently certain to constitute an estoppel between the parties and to be enforced by the Court.⁶

¹ For findings of fact and conclusions of law, see Sec. 1556; *Wutchumna W. Co. v. Ragle*, 148 Cal. 759, 84 Pac. Rep. 162.

² For decrees and judgments in actions to quiet title to a ditch or canal, see Sec. 1560.

³ For decree and judgment as *res judicata*, see Secs. 1563, 1564.

"A practical view ought to be taken of all the conditions, surroundings, and situations. The rights of all parties must be protected by the decree. The difficulty of enforcing it without the necessity of bringing independent suits should be avoided if possible. Certainty in its terms, positiveness in its requirements, justice in its conclusions, will materially aid in the accomplishment of such a purpose." Judge Hawley in *Union M. & M. Co. v. Dangberg*, 81 Fed. Rep. 73.

⁴ For appeal in actions to quiet title, see Sec. 1565.

Becker v. Marble Creek Irr. Co., 15 Utah 225, 49 Pac. Rep. 892.

⁵ See, also, decrees as to the quantity of water awarded, Sec. 1558.

A decree establishing the rights of an appropriator of water, which limits the use of the water until the appropriator establishes a right to connect with a canal of a former appropriator, is not void on the ground that it is dependent on a contingency. *Salt Lake City v. Salt Lake City etc. Co.*, 24 Utah 249, 67 Pac. Rep. 672, 25 Utah 441, 71 Pac. Rep. 1069, 61 L. R. A. 648.

⁶ *Powers v. Perry*, 12 Cal. App. 77, 106 Pac. Rep. 595; *Rogers v. Overacker*, 4 Cal. App. 333, 87 Pac. Rep. 1107; *Riverside W. Co. v. Sargent*, 112 Cal. 230, 44 Pac. Rep. 560; *Stein-*

In the first place the decree must state the names of the parties who are entitled to the use of the water, and as between them their respective priorities.⁷ In all cases the decree should be within the pleadings and the issues joined thereunder.⁸ In fact, in the future construction of decrees resort may be had to the pleadings and the issues joined in order to obtain a true interpretation of the decree,⁹ although the general rule as to the construction of decrees and judgments is that the language of the same is conclusive.¹⁰ As is the

berger v. Meyer, 130 Cal. 156, 62 Pac. Rep. 483.

⁷ It is no objection that the date fixed was arbitrarily selected so long as the priority was not affected. McDonald v. Lannen, 19 Mont. 78, 47 Pac. Rep. 648.

The court must determine the date and amount of each appropriation, and from these facts determine the priority of right as between the parties, as declared by section 3159 of the Revised Statutes of Idaho of 1887, to wit: "As between appropriators, the one first in time is first in right." Geertson v. Barrack, 2 Idaho 1066, 3 Idaho 344, 29 Pac. Rep. 42.

See, also, Kirk v. Bartholomew, 2 Idaho 1087, 3 Idaho (Hasb.) 367, 29 Pac. Rep. 40; Burnham v. Freeman, 11 Colo. 601, 19 Pac. Rep. 761; Arnett v. Linhart, 21 Colo. 188, 40 Pac. Rep. 355.

A decree inconsistent with the finding of ownership is erroneous. Arroyo etc. Co. v. Dorman, 137 Cal. 611, 70 Pac. Rep. 737.

A judgment may award the use of water to Indians, according to rights acquired by prescription, on condition that they pay their *pro rata* share of the expenses of the maintenance of a common ditch. Biggs v. Utah etc. Co., 7 Ariz. 331, 64 Pac. Rep. 494.

Riverside etc. Co. v. Sargent, 112 Cal. 230, 44 Pac. Rep. 560.

⁸ Hayes v. Silver Creek etc. Co., 136

Cal. 238, 68 Pac. Rep. 704; Buckers etc. Co. v. Farmers' etc. Co., 31 Colo. 62, 72 Pac. Rep. 49; Miller v. Dondero, 139 Cal. 643, 73 Pac. Rep. 583; Hector Min. Co. v. Valley View Min. Co., 28 Colo. 315, 64 Pac. Rep. 205.

Where, by decree, the court attempted to establish plaintiff's title to a definite amount of water, and to settle the rights of the parties, where no claim was made to the water by the pleadings, the decree is erroneous. Simpson v. Harrah, 54 Ore. 448, 103 Pac. Rep. 58.

See, also, Drake v. Russian River L. Co., 10 Cal. App. 654, 103 Pac. Rep. 167.

⁹ Pomona etc. Co. v. San Antonio W. Co., 152 Cal. 618, 93 Pac. Rep. 881.

A judgment and decree adjudicating rights and priorities to the use of waters of a stream carries with it and adjudicates and decrees the rights and priorities of the waters of the tributaries to such stream above the points of diversion. Josslyn v. Daly, 15 Idaho 137, 96 Pac. Rep. 568.

¹⁰ In an action involving the construction of a decree, evidence as to what the parties to the decree understood its scope to be is inadmissible; the decree itself determining that matter. Hartson v. Dill, 151 Cal. 137, 90 Pac. Rep. 530.

See, also, Bates v. Hall, 44 Colo. 360, 98 Pac. Rep. 3.

Where a decree adjudicating water

case in other actions, where the issues are not properly drawn, or any of the pleadings admit certain rights of the adverse parties, a decree and judgment may be rendered on the pleadings.¹¹ But where by the pleadings of the respective parties material questions of fact are in issue which have to be determined from evidence before judgment can be rendered, a motion for a judgment on the pleadings is properly denied.¹²

Judgment may also be rendered on default for the failure to answer after the service of process within the time allowed by the statute. And ordinarily a judgment by default will not be disturbed.¹³ But it is held in a recent Oregon case that water suits being *sui generis*, the Court may exercise its discretion and set them aside, especially where it was apparent that the quantity of water awarded the plaintiff was far greater than necessary for his use.¹⁴

Again, a decree and judgment may be entered by consent of the parties to the suit.¹⁵

The relative priorities of the respective parties having been established by the Court, the beneficial use of the water, as well as the quantity of water to the use of which each party to the action is

rights is susceptible of different meanings, one of which is in accordance with the law by recognizing a valid appropriation only on the application of the water to a beneficial use, and the other would disregard the law in that respect, the former interpretation must be adopted. *Crawford etc. Co. v. Needle Rock etc. Co.*, 50 Colo. 176, 114 Pac. Rep. 655.

See, also, *Drach v. Isola*, 48 Colo. 134, 109 Pac. Rep. 748.

¹¹ *State v. Quantic*, 37 Mont. 32, 94 Pac. Rep. 491; *Combs v. Farmers' etc. Co.*, 38 Colo. 420, 88 Pac. Rep. 396.

¹² *Cache La Poudre etc. Co. v. Hawley*, 43 Colo. 32, 95 Pac. Rep. 317.

See, also, *Norman v. Corbley*, 32 Mont. 195, 79 Pac. Rep. 1059.

¹³ The failure on the part of some of the defendants affirmatively to assert their rights can not affect the interest of others in the proceeding, but will preclude those in default from

subsequently asserting their claims as to matters in controversy against the rights there determined. *Hough v. Porter*, 51 Ore. 318, 372, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

Where the plaintiff asks for a dismissal of the action after the defendant has filed his answer and cross-complaint, the court has no right to dismiss such action, but is required to enter judgment upon the merits of the issue presented by the cross-complaint. *Frost v. Idaho Irr. Co.*, 19 Idaho 372, 114 Pac. Rep. 38.

See, also, *Islais etc. Co. v. Allen*, 132 Cal. 432, 64 Pac. Rep. 713.

¹⁴ *Whited v. Cavin*, 55 Ore. 98, 105 Pac. Rep. 396.

See, also, *State v. Quantic*, 37 Mont. 32, 94 Pac. Rep. 491.

¹⁵ *People's Ditch Co. v. Fresno etc. Co.*, 152 Cal. 87, 92 Pac. Rep. 77.

entitled, the functions of the Court have reached their limit; and it is therefore held not to be within the province of the Court to dictate how or when the right acquired by appropriation should be exercised so long as such use is within the limits of the appropriation.¹⁶ A decree adjudicating a water 'right does not in and of itself adjudicate the rights to a ditch or canal, and *vice versa*.¹⁷ A decree may also be rendered giving a party an inchoate or contingent right to the use of water and enjoin adverse claims injurious thereto, but the judgment should not declare that the plaintiff was absolutely entitled to the water.¹⁸

§ 1558. The decrees and judgments—On rights by appropriation—Quantity of water.—After the Court has decided what parties are entitled to water rights, the next principal question to be decided by the Court is the quantity of water to which each party is entitled. And in this respect the decree should be made as definite and certain as the use of language can make it.¹ Where a standard of measurement has been adopted by the statutes of the State and the evidence before the Court is sufficient for the Court to render a decree in that standard, the decree should state the quantity of water awarded to each party in that standard. However, where the evidence is not sufficient for the Court to adopt such a standard in its decree, but is sufficient for the rendition of the decree upon some other basis or standard of measurement, the Court may render its decree in such other basis or standard.² The principal object of

¹⁶ *McGinness v. Stanfield*, 6 Idaho 372, 55 Pac. Rep. 1020; *Santa Paula Waterworks v. Peralta*, 113 Cal. 38, 45 Pac. Rep. 168; *Sloan v. Byers*, 37 Mont. 305, 97 Pac. Rep. 855; *Wutchumna W. Co. v. Ragle*, 148 Cal. 759, 84 Pac. Rep. 162.

For decrees as to the quantity of water, see Sec. 1558.

¹⁷ *Park v. Boulware*, 7 Idaho 490, 63 Pac. Rep. 1045; *Nevada etc. Co. v. Kidd*, 37 Cal. 282.

¹⁸ *Merritt v. Los Angeles*, — Cal. —, 120 Pac. Rep. 1064.

¹ *Authers v. Bryant*, 22 Nev. 242, 38 Pac. Rep. 439.

² A decree finding that a land owner is entitled to enough water to irrigate a certain number of acres of land should specify, as nearly as may be approximated, the amount of water necessary for that purpose by an approved mode of measurement. *Holman v. Pleasant Grove City*, 8 Utah 78, 30 Pac. Rep. 72.

"Rev. Codes, Sec. 3241, prescribes the measurement of water as 'a cubic foot of water per second of time shall be the legal standard for the measurement of water in this State.' This statute is the measurement of water which should be recognized by the

the Court in this respect is that the decree be so definite and certain as to the quantity of water awarded to each party that the matter may be deemed finally settled and adjudicated, and that each party may know exactly what quantity or what proportion of the stream he is entitled to.³

A decree so indefinite and uncertain that it is impossible to determine the quantity or proportion of water attempted to be awarded is fatally defective.⁴ In awarding the quantity of water to

court in entering a decree of distribution; and in this case the court should have found the date of the appropriation of the respective parties to this suit and the quantity appropriated and beneficially used by each of such parties, and determined such questions by the measurement provided by the statute." *Lee v. Hanford*, — Idaho —, 121 Pac. Rep. 558.

³ "The decisions of this court establish that in cases like the present the findings and judgment must fix the extent of the superior right, viz., the quantity of water to be allowed to the party whose claim is paramount; otherwise, the judgment fails to attain the certainty necessary to an estoppel upon the main subject of the litigation." *Riverside W. Co. v. Sargent*, 112 Cal. 230, 44 Pac. Rep. 560.

"Indeed, as the judgment now stands, it can only serve the single purpose of furnishing the groundwork for future litigation, and plaintiff is certainly entitled to something more. He is entitled to a plain and explicit adjudication declaring what his rights are to these waters, and what defendants' rights are to the waters, if they have any." *Steinberger v. Meyer*, 130 Cal. 156, 62 Pac. Rep. 483.

⁴ A decree that defendant have the use of "one good irrigation stream of water" for a certain length of time is fatally defective, for uncertainty in the quantity of water to which the

defendant is entitled. *Smith v. Phillips*, 6 Utah 376, 23 Pac. Rep. 932.

So, a decree that the defendant is entitled to maintain said ditch, and to run therein at all seasons of the year sufficient of the waters of said stream for his culinary and domestic purposes, and that the plaintiff is the owner and entitled to the use of the waters of said stream, subject to the rights of the defendant, was held to be uncertain, and that the same should be modified by finding the quantity of water, in second-feet, or the fractional part of the stream in question, that defendant is entitled to for his culinary and domestic purposes, and decreeing the same to him. *Nephi Irr. Co. v. Vickers*, 15 Utah 374, 49 Pac. Rep. 301.

So a decree, without any definite finding of the amount appropriated, but only that plaintiffs had appropriated enough to irrigate certain portions of their lands, is too indefinite to be sustained. *Walsh v. Wallace*, 26 Nev. 299, 67 Pac. Rep. 914, 99 Am. St. Rep. 692.

So, also, a decree giving "sufficient water for household purposes" is indefinite. *Powers v. Perry*, 12 Cal. App. 77, 106 Pac. Rep. 595.

See, also, *Logan v. Guichard*, 159 Cal. 562, 114 Pac. Rep. 989.

See, also, *Authers v. Bryant*, 22 Nev. 242, 38 Pac. Rep. 439; *Nephi Irr. Co. v. Jenkins*, 8 Utah 369, 31

the respective parties, the Court is not required to attain mathematical exactness in measuring the flow of the water. But it should be determined by a reasonable approximation to substantial accuracy.⁵ And with the modern scientific methods of measuring water this can be readily attained.

It therefore follows, as well stated by the Nevada Court, "No subject is perhaps so prolific of controversies as the use of water by different claimants for irrigation purposes, and a decree concerning it should be as certain as the use of language can make it."⁶

Pac. Rep. 986; *In re Huntley*, 85 Fed. Rep. 889, 29 C. C. A. 468; *Barrows v. Fox*, 98 Cal. 63, 32 Pac. Rep. 811; *Lakeside D. Co. v. Crane*, 80 Cal. 181, 22 Pac. Rep. 76; *Dougherty v. Haggin*, 56 Cal. 522; *Id.*, 61 Cal. 305; *Riverside W. Co. v. Sargent*, 112 Cal. 230, 44 Pac. Rep. 560; *Drake v. Earhart*, 2 Idaho 750, 23 Pac. Rep. 541; *Power v. Switzer*, 21 Mont. 523, 55 Pac. Rep. 32; *Kleinschmidt v. Greiser*, 14 Mont. 484, 37 Pac. Rep. 5, 43 Am. St. Rep. 652; *Springville v. Holley*, 6 Utah 378, 23 Pac. Rep. 933; *Johnson v. Bielenberg*, 14 Mont. 506, 37 Pac. Rep. 12; *Alhambra W. Co. v. Richardson*, 72 Cal. 598, 14 Pac. Rep. 379; *Lillis v. Emigrant D. Co.*, 95 Cal. 553, 30 Pac. Rep. 1108; *Stewart v. Taylor*, 68 Cal. 75, 8 Pac. Rep. 605; *Wallace v. Farmers' D. Co.*, 130 Cal. 578, 62 Pac. Rep. 1078; *Welsh v. Bardshar*, 137 Cal. 154, 69 Pac. Rep. 977; *Lost Creek Irr. Co. v. Rex*, 26 Utah 485, 73 Pac. Rep. 660; *Loo Chit Suim v. Wong Kim*, 5 Hawn. 130, 200; *Hawaiian etc. Co. v. Wailuku Sugar Co.*, 14 Hawn. 50; *Id.*, 15 Hawn. 677; *Powers v. Perry*, 12 Cal. App. 77, 106 Pac. Rep. 595; *Patterson v. Ryan*, 37 Utah 410, 108 Pac. Rep. 1118; *Simpson v. Harrah*, 54 Ore. 448, 103 Pac. Rep. 58; *Rogers v. Overacker*, 4 Cal. App. 333, 87 Pac.

Rep. 1107; *Tanner v. Provo Bench etc. Co.*, — Utah —, 121 Pac. Rep. 584.

⁵ *Union M. & M. Co. v. Dangberg*, 81 Fed. Rep. 73; *Combs v. Agricultural D. Co.*, 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; *Neil v. Tolman*, 12 Ore. 289, 7 Pac. Rep. 103.

See, also, for the measurement of water, Secs. 888-900.

⁶ *Authers v. Bryant*, 22 Nev. 242, 38 Pac. Rep. 439.

See, also, *Gurnsey v. Antelope Creek etc. Co.*, 6 Cal. App. 387, 92 Pac. Rep. 326; *Buckers etc. Co. v. Farmers' etc. Co.*, 31 Colo. 62, 72 Pac. Rep. 49; *Stethem v. Skinner*, 11 Idaho 374, 82 Pac. Rep. 451; *White v. Nuckolls*, 49 Colo. 170, 112 Pac. Rep. 329; *City of Telluride v. Blair*, 33 Colo. 353, 80 Pac. Rep. 1053; *Hector Min. Co. v. Valley View Min. Co.*, 28 Colo. 315, 64 Pac. Rep. 205.

See, also, *Bennett v. Nourse*, — Idaho —, 125 Pac. Rep. 1038.

"The point is made that the decree should have permitted the defendants to divert the water, on condition that they returned it to the river above plaintiffs' lands, no less diminished than it would have been in its natural flow to the point of return. It may be that a decree so limited would have been proper if the evidence had shown that the defendants were able and willing to make

A decree based merely upon findings as to the width, depth, and grade of a ditch, or upon the capacity of the ditch to carry water, is erroneous. The quantity of water should be stated in some definite standard of measurement, and where not so stated the decree will be set aside. The capacity of ditches and canals is too liable to change, both from natural and human agencies, to be made a standard for the measurement of water.⁷ However, a decree has been upheld, where water was awarded sufficient to irrigate a certain number of acres, and where from the data given in the decree the quantity of water might be measured by taking into consideration the width, depth, and length of the ditch, although the statute required the measurement of the water to be given in cubic feet.⁸

In all cases the Court by its decrees should limit the rights of the respective parties to the quantity of water which is reasonably necessary for the beneficial use or purpose to which it is applied. Therefore, no greater quantity of water should be awarded to any party than is needed for the purpose for which the appropriation was made. Under no method for the adjudication of water rights, especially in these later days, when practically all of the water supply is needed and claimed by various parties, will waste be tolerated by the Court by its awarding to one party more water than he needs.

such return of the water." *Huffner v. Sawday*, 153 Cal. 86, 94 Pac. Rep. 424; citing *Gould v. Eaton*, 117 Cal. 539, 49 Pac. Rep. 577, 38 L. R. A. 181; *Montecito Valley Co. v. Santa Barbara*, 144 Cal. 578, 77 Pac. Rep. 1113.

The decree may limit the use of the water to the irrigation season. *Twaddle v. Winters*, 29 Nev. 88, 85 Pac. Rep. 280, 89 Pac. Rep. 289.

Or, "during the dry season of the year." *Daly v. Ruddell*, 137 Cal. 671, 70 Pac. Rep. 784.

The *pro rata* interests of the owners of a mutual ditch using the water in severalty and the right to change a point of diversion may be decreed in the same action. *Hallett v. Carpenter*, 37 Colo. 30, 86 Pac. Rep. 317.

⁷ *Riverside W. Co. v. Sargent*, 112 177—Kin. on Irr.

Cal. 230, 44 Pac. Rep. 560; *Minnie Maud etc. Co. v. Grames*, 29 Utah 225, 81 Pac. Rep. 893; *Lakeside D. Co. v. Crane*, 80 Cal. 181, 22 Pac. Rep. 76.

See, also, *Gotelli v. Cardelli*, 26 Nev. 382, 69 Pac. Rep. 8; *Twaddle v. Winters*, 29 Nev. 88, 85 Pac. Rep. 280, 89 Pac. Rep. 289; *Hufford v. Dye*, — Cal. —, 121 Pac. Rep. 400.

⁸ *Broadmoor etc. Co. v. Brookside etc. Co.*, 24 Colo. 541, 52 Pac. Rep. 792; *Holman v. Pleasant Grove City*, 8 Utah 78, 30 Pac. Rep. 72; *McLure v. Koen*, 25 Colo. 284, 53 Pac. Rep. 1058; *Posachane W. Co. v. Standart*, 97 Cal. 476, 32 Pac. Rep. 532; *Frey v. Lowden*, 70 Cal. 550, 11 Pac. Rep. 838; *Bates v. Hall*, 44 Colo. 360, 98 Pac. Rep. 3.

And such a decree is subject to modification by limiting the quantity of water to the amount actually needed.⁹ Or, as sometimes held,

⁹ For the economical use of water and the suppression of waste, see Chap. 49, Secs. 874-916.

Though defendants' ditch when a decree was entered would carry 3.2 cubic feet per second, and their land if irrigated would require that amount, if they brought a less amount of land under irrigation so as to require only 1.6 feet per second, a decree adjudicating to them the right to apply the greater amount was voidable on proper attack. *Drach v. Isola*, 48 Colo. 134, 109 Pac. Rep. 748.

"Alexander Twaddle testified that there were times during the summer, evidently short periods after the land had been irrigated, when it was not necessary to use as much water as the upper ditch full. On such occasions, and whenever it was not needed by the plaintiffs, it should be turned to the defendants, if they have any beneficial use for it, and not permitted to waste. It may be implied by the law; but it is better to have the decrees specify, and especially so in this case, in view of the testimony stated and of the perpetual injunction that the award of water is limited to a beneficial use at such times as it is needed." *Twaddle v. Winters*, 29 Nev. 88, 85 Pac. Rep. 280, 89 Pac. Rep. 289.

No waste of water should be countenanced by the courts, and decrees for its use should be withheld in the absence of evidence showing, *inter alia*, with reasonable certainty, the quantity continuously applied to some beneficial use. *X. Y. Irr.-Ditch Co. v. Buffalo Creek Irr. Co.*, 25 Colo. 529, 55 Pac. Rep. 720; *aff'g Id.*, 9 Colo. App. 436, 49 Pac. Rep. 264.

Id., *Lost Creek Irr. Co. v.*

Bex, 26 Utah 485, 73 Pac. Rep. 660; *City of Telluride v. Blair*, 33 Colo. 353, 80 Pac. Rep. 1053; *Longmire v. Smith*, 26 Wash. 439, 67 Pac. Rep. 246, 58 L. R. A. 308; *Kirk v. Bartholomew*, 2 Idaho 1087, 3 Idaho (Hasb.) 367, 29 Pac. Rep. 40; *Rodgers v. Pitt*, 89 Fed. Rep. 420, 129 Fed. Rep. 932; *Hall v. Carter*, 33 Tex. Civ. App. 230, 77 S. W. Rep. 19; *Nevada D. Co. v. Canyon etc. Co.*, 58 Ore. 517, 114 Pac. Rep. 86, where it was held that an allowance of one inch an acre for irrigation in adjusting priorities will not be increased to allow for seepage and evaporation; that amount being intended to include such loss.

See, also, *Woods v. Sargent*, 43 Colo. 268, 95 Pac. Rep. 932; *Gerber v. Nampa & Meridan Irr. Co.*, 19 Idaho 765, 116 Pac. Rep. 104.

See, also, *Medano v. Adams*, 29 Colo. 317, 68 Pac. Rep. 431; *Gotelli v. Cardelli*, 26 Nev. 382, 69 Pac. Rep. 8.

If a decree adjudicating water rights was subject to two constructions, one of which would recognize a valid appropriation only upon a beneficial user of the water, as required by law, and the other of which would not, equity and public policy would demand the former construction. *Drach v. Isola*, 48 Colo. 134, 109 Pac. Rep. 748.

"There is a great conflict in the testimony as to the duty of water on this land, namely, the actual amount needed for the use to which it is to be applied, and this is the limit to which a party is entitled, regardless of the fact that he may have actually diverted much more water for a long period of time." *Little Walla Walla Irr. Union v. Finis Irr. Co.*, — Ore. —, 124 Pac. Rep. 666.

since a right to the use of water is limited in time and volume to the extent of the needs of the party in whose favor such right is established for the purpose named, the law reads this limitation into decrees establishing such rights.¹⁰ It is even held in a recent case that where a quantity of water was awarded to the plaintiff, as against non-answering defendant, far greater than was necessary for his use, the decree will be modified by reducing the quantity of water originally awarded.¹¹ In rendering its decree as to the quantity of water, the Court should take into consideration all the facts and circumstances bearing upon the rights of the parties of each particular case. No fixed rule can be laid down as to the quantity of water necessary to any beneficial use or purpose or the amount and kind of evidence necessary to support a decree for the adjudication of water rights, but each decree must depend for its support upon the evidence admitted in that particular case.¹² In any event, the most that ditch owners are entitled to have awarded at any time is that the amounts to which they are respectively entitled shall flow to the head of their ditches.¹³

¹⁰ *White v. Nuckolls*, 49 Colo. 170, 112 Pac. Rep. 329; *Medano D. Co. v. Adams*, 29 Colo. 317, 68 Pac. Rep. 431.

¹¹ *Whited v. Cavin*, 55 Ore. 98, 105 Pac. Rep. 396.

¹² *X. Y. Irr. Ditch Co. v. Buffalo Creek Irr. Co.*, 25 Colo. 529, 55 Pac. Rep. 720; affirming *Id.*, 9 Colo. App. 438, 49 Pac. Rep. 264.

See, also, *Kirk v. Bartholomew*, 2 Idaho 1087, 3 Idaho (Hasb.) 367, 29 Pac. Rep. 40; *Geertson v. Barrack*, 2 Idaho 1066, 3 Idaho 344, 29 Pac. Rep. 42; *Huffner v. Sawday*, 153 Cal. 86, 94 Pac. Rep. 424; *Gould v. Eaton*, 117 Cal. 539, 49 Pac. Rep. 577, 28 L. R. A. 181.

Where the decree does not comply with the record in the case the Supreme Court may modify the decree so as to make it comply with the record. *Becker v. Marble Creek Irr. Co.*, 15 Utah 225, 49 Pac. Rep. 892, 1119.

See, also, appeal in actions adjudicating water rights, Sec. 1565.

¹³ *Kelly v. Hynes*, 41 Mont. 1, 108 Pac. Rep. 785; *Sayre v. Johnson*, 33 Mont. 15, 81 Pac. Rep. 389; *Featherman v. Hennessy*, 42 Mont. 535, 113 Pac. Rep. 751.

A decree which does not designate the point of measurement is imperfect and may, upon application, be modified in that particular. *Stickney v. Hanrahan*, 7 Idaho 424, 63 Pac. Rep. 189.

But see *Riverside Heights W. Co. v. Riverside Trust Co.*, 148 Cal. 457, 83 Pac. Rep. 1003, where it is held that a judgment fixing the rights of users of water from an irrigation canal with reference to the amount of water flowing in the canal is not indefinite for failure to fix the place of measurement of the water, but means the amount received at its head for use below.

However, a decree that a party was

A decree was sustained where it was found that the plaintiffs were entitled to all the water of a small stream, which was much less than the amount claimed; and the claim being in inches, a failure to find under what pressure the water was measured was not prejudicial to the defendant, who claimed as a riparian owner in a State where riparian rights were not recognized.¹⁴

A judgment and decree adjudicating the rights of priorities to the use of the waters of the main stream carries with it and adjudicates the same as to the waters of the tributaries of such stream above the respective places and points of diversion.¹⁵

In the absence of both statute and contract, where an economy in the use of water may be made, the Court may decree the rotation of water among the several users, and also in cases involving prior and subsequent appropriations.¹⁶ Where by the data given in the decree the water for a certain number of acres is incapable of being approximately ascertained, such decree will be reversed on appeal.¹⁷ Again, as the law favors periodical appropriations,¹⁸ a decree may also award a certain amount of water to be used during certain periods of time, as for so many days or hours during a week,¹⁹ or

entitled to "150 inches, statutory measurement," was held void for uncertainty, where it nowhere appeared what statutory measurement was referred to, and the term inch being indefinite. *In re Huntley*, 85 Fed. Rep. 889, 29 C. C. A. 468.

And, for the same reason, a verdict and judgment that the plaintiff was entitled to "forty inches, miner's measurement." *Dougherty v. Haggin*, 56 Cal. 522, *Id.*, 61 Cal. 305.

See, also, *Elmer v. McCune*, 29 Utah 320, 81 Pac. Rep. 159; *Driskill v. Rebbe*, 22 S. D. 242, 117 N. W. Rep. 135.

But see *Miller v. Dondero*, 139 Cal. 643, 73 Pac. Rep. 583, where a decree in inches measured under a four-inch pressure was upheld.

See, also, *Bledsoe v. Deckrow*, 132 Cal. 312, 64 Pac. Rep. 397; *Frey v. Lowden*, 70 Cal. 550, 11 Pac. Rep. 838; *Alhambra etc. Co. v. Richard-*

son, 95 Cal. 490, 30 Pac. Rep. 577; *Fluke v. Ford*, 35 Colo. 112, 84 Pac. Rep. 469.

For the miner's inch as a standard of measurement, see Secs. 889-891.

¹⁴ *Drake v. Earhart*, 2 Idaho 750, 23 Pac. Rep. 541.

¹⁵ *Josslyn v. Daly*, 15 Idaho 137, 96 Pac. Rep. 568.

¹⁶ *McCoy v. Huntley*, — Ore. —, 119 Pac. Rep. 481.

See, also, *Hufford v. Dye*, — Cal. —, 121 Pac. Rep. 400.

See, also, for rotation of water as a matter of economy, Secs. 909, 910.

¹⁷ *Nephi Irr. Co. v. Vickers*, 15 Utah 374, 49 Pac. Rep. 301; *Smith v. Phillips*, 6 Utah 376, 23 Pac. Rep. 932.

¹⁸ For periodical appropriations, see Sec. 786.

¹⁹ *Santa Paula Waterworks v. Peralta*, 113 Cal. 38, 45 Pac. Rep. 168; *Cave v. Crafts*, 53 Cal. 135; *Rodgers*

during certain months of the year,²⁰ or during certain hours of the day.²¹

§ 1559. **Decrees and judgments—Apportioning the water between riparian proprietors.**—As we have seen in previous sections of this chapter, in those States which adhere to the common law doctrine of riparian rights, an action in equity will lie to adjudicate the right to use the water and to apportion the same between the owners of lands through which or adjoining which the natural streams flow.¹ Where it has been determined by the Court that certain parties by virtue of their riparian ownership are entitled to the use of water, the Court must make its findings to that effect and render a decree apportioning the use of the water among the respective owners on the same stream. And, as is the case with other decrees in actions of this nature,² a decree apportioning the rights to the use of the water among the respective riparian owners must depend upon the facts and circumstances developed by the evidence of each particular case, and must be definite and certain as to the quantity of water awarded to each of the parties.³ In addition to

v. Pitt, 89 Fed. Rep. 420, 129 Fed. Rep. 932; *Rose v. Mesmer*, 142 Cal. 322, 75 Pac. Rep. 905; *Union M. & M. Co. v. Dangberg*, 81 Fed. Rep. 73; *Lytle Creek W. Co. v. Perdew*, 65 Cal. 447, 2 Pac. Rep. 732, 4 Pac. Rep. 426; *McGillivray v. Evans*, 27 Cal. 92, 11 Morr. Min. Rep. 209.

Sunday water and night water may be designated in a decree. *Hawaiian etc. Co. v. Wailuku Sugar Co.*, 15 Haw. 675; *Id.*, 14 Haw. 50.

²⁰ *Town of Suisun v. De Freitas*, 142 Cal. 350, 75 Pac. Rep. 1092.

²¹ *Craig v. Crafton W. Co.*, 141 Cal. 178, 74 Pac. Rep. 762; *Frey v. Lowden*, 70 Cal. 550, 11 Pac. Rep. 838; *Steinberger v. Meyer*, 130 Cal. 156, 62 Pac. Rep. 483; *Miller v. Thompson*, 139 Cal. 643, 73 Pac. Rep. 583; *Rose v. Mesmer*, 142 Cal. 322, 75 Pac. Rep. 905; *Bledsoe v. Deckrow*, 132 Cal. 312, 64 Pac. Rep. 397.

¹ See actions to apportion the use of waters among riparian proprietors, Sec. 1538.

For actions to determine the rights as between appropriators and riparian proprietors, see Sec. 1540.

For pleadings by riparian proprietors, see Sec. 1548.

² See Secs. 1558, 1559, 1560, 1564.

³ Where a judgment was held uncertain, see *Steinberger v. Meyer*, 130 Cal. 156, 62 Pac. Rep. 483; *Wallace v. Farmers' D. Co.*, 130 Cal. 578, 62 Pac. Rep. 1078; *Strong v. Baldwin*, 154 Cal. 150, 97 Pac. Rep. 178, 129 Am. St. Rep. 141; *Caviness v. La Grande Irr. Co.* — Ore. —, 119 Pac. Rep. 731.

A party in a suit between lower and upper riparian proprietors to determine their rights to the waters of a stream can not complain of a judgment because it gives him no more than the law allows, independent of

this, decrees in these actions must be rendered with a view to the adjustment of the relative rights of all the riparian owners upon the same stream where those rights would be affected by a decree. It is the duty of the Court of equity to determine the respective rights of the parties so as to give to each the just proportion to which he may be entitled.⁴ Where the water awarded to each party is stated as a certain quantity of the water flowing in the stream, it should be stated definitely in some recognized standard for the measurement of water, as in cubic feet per second of time, or acre feet, or inches, where the pressure is named.⁵ But other standards for the apportionment of waters are also recognized. The decree may award a certain proportion of the entire flow of the stream during all of the time.⁶ Or, as is the case with appropriators, the Court may apportion the water of the stream among the respective riparian owners thereon, by decreeing that each use all of the water of the stream during different and definite periods of time. This is the more common practice where the stream is small and to divide it would injure the rights of all.⁷ So, where two riparian owners owned land upon a very small stream, where the flow could not be divided so that

the judgment. *Filippini v. Hewlett*, — Cal. —, 121 Pac. Rep. 376.

⁴ *Anaheim W. Co. v. Semitropic W. Co.*, 64 Cal. 185, 30 Pac. Rep. 623; *Meng v. Coffey*, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697.

⁵ For the measurement of water, see Secs. 888-900.

Lone Tree Ditch Co. v. Cyclone D. Co., 15 S. D. 519, 91 N. W. Rep. 352; *Id.*, 26 S. D. 307, 128 N. W. Rep. 596; *Sanders v. Wilson*, 34 Wash. 659, 76 Pac. Rep. 280.

⁶ *Verdugo W. Co. v. Verdugo*, 152 Cal. 655, 93 Pac. Rep. 1021; *Harris v. Harrison*, 93 Cal. 676, 29 Pac. Rep. 325; *Nesalhous v. Walker*, 45 Wash. 621, 88 Pac. Rep. 1032; *Charnock v. Higuerra*, 111 Cal. 473, 44 Pac. Rep. 171, 32 L. R. A. 190, 52 Am. St. Rep. 195.

⁷ *Wiggins v. Muscupiabe etc. Co.*, 113 Cal. 182, 45 Pac. Rep. 160, 32

L. R. A. 667, 54 Am. St. Rep. 337; *Craig v. Crafton W. Co.*, 141 Cal. 178, 74 Pac. Rep. 762; *Harris v. Harrison*, 93 Cal. 676, 29 Pac. Rep. 325; *Smith v. Corbit*, 116 Cal. 587, 48 Pac. Rep. 725; *Anderson v. Cook*, 25 Mont. 330, 64 Pac. Rep. 873, 65 Pac. Rep. 113, 66 Pac. Rep. 504; *Hough v. Porter*, 51 Ore. 318, 372, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

The extent of a riparian owner's right to use water for irrigation is indefinite, uncertain, and subject to fluctuation, as it must always be dependent on the future like needs of other riparian owners; there is no priority of right between them, and no riparian ownership of a definite amount of water, as against other riparian owners. Hence, no definite amount can be decreed for the use of any one riparian owner. *Little Walla Walla Irr. Union v. Finis Irr. Co.*, — Ore. —, 124 Pac. Rep. 666.

either owner could receive any material benefit, the Court held that the only way to preserve the rights and to render them beneficial, was to decree to the parties the use of the full flow of the stream during alternating periods of time.⁸ It is held in an Oregon case that for the protection of the rights of the several riparian proprietors that a Court of equity may apportion the flow of the stream, after the natural wants of the several proprietors have been satisfied, in such a manner as may be just and equitable under the circumstances.⁹ As we have discussed in a previous portion of this work, riparian proprietors, as between themselves, have a right to a reasonable quantity of water flowing by their lands, with reference to the same rights of all the other proprietors upon the stream.¹⁰ Therefore, a Court of equity in making the apportionment of the use of the water must follow this rule, and so apportion the water as will give a reasonable use of the water to each proprietor, as the facts and circumstances of the case will warrant.¹¹

⁸ *Harris v. Harrison*, 93 Cal. 676, 29 Pac. Rep. 325.

See, also, *Gutierrez v. Wege*, 151 Cal. 587, 91 Pac. Rep. 395; *Wutchumna W. Co. v. Pogue*, 151 Cal. 105, 90 Pac. Rep. 362; *Metcalf v. Faucher*, — Tex. Civ. App. —, 99 S. W. Rep. 1038; *Wiggins v. Muscupiabe etc. Co.*, 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337; *Lux v. Haggin*, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; *Smith v. Corbit*, 116 Cal. 587, 48 Pac. Rep. 725; *Meng v. Coffey*, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697; *Craig v. Crafton W. Co.*, 141 Cal. 178, 74 Pac. Rep. 762; *Anderson v. Bassman*, 140 Fed. Rep. 14, 140 Fed. Rep. 10; *Rogers v. Overacker*, 4 Cal. App. 333, 87 Pac. Rep. 1107; *Williams v. Altnow*, 51 Ore. 275, 95 Pac. Rep. 200, 97 Pac. Rep. 539; *Riverside W. Co. v. Gage*, 89 Cal. 410, 26 Pac. Rep. 889; *San Luis W. Co. v. Estrada*, 117 Cal. 182, 48 Pac. Rep. 1075; *Montecito etc. Co. v. Santa Barbara*, 151 Cal. 377, 90

Pac. Rep. 935; *Mace v. Mace*, 40 Ore. 586, 67 Pac. Rep. 660, 68 Pac. Rep. 737.

⁹ *Jones v. Conn*, 39 Ore. 30, 64 Pac. Rep. 855, 65 Pac. Rep. 1068, 54 L. R. A. 630, 87 Am. St. Rep. 634.

¹⁰ For the rights of riparian proprietors as between each other, see Secs. 490-495, 508-513.

¹¹ *Rogers v. Overacker*, 4 Cal. App. 333, 87 Pac. Rep. 1107; *Jones v. Conn*, 39 Ore. 30, 64 Pac. Rep. 855, 65 Pac. Rep. 1068, 54 L. R. A. 360, 87 Am. St. Rep. 634; *Montecito etc. Co. v. Santa Barbara*, 151 Cal. 377, 90 Pac. Rep. 935; *Riverside W. Co. v. Sargent*, 112 Cal. 230, 44 Pac. Rep. 560; *Mentone Irr. Co. v. Redlands etc. Co.*, 155 Cal. 323, 100 Pac. Rep. 1082, 22 L. R. A., N. S., 382, 17 Am. & Eng. Ann. Cas. 1222.

However, where the pleadings were not drawn with the object of determining the rights between the parties, and there was no evidence before the court from which it could have adjudged the respective rights of the

§ 1560. **Decrees and judgments**—In actions to quiet title to ditches and canals.—When in actions to quiet title to ditches and canals or easements therefor, the Court has determined from the evidence in the case that certain parties have rights in such property it should, by proper decree, set forth specifically the respective rights of such parties; and, in the same action, it may enjoin the interference with those rights by the other parties to the action.¹ And, although the right to a ditch or canal and a water right are separate species of property,² and a decree awarding certain rights to the use of water does not in itself concern those in a ditch or canal, or the reverse,³ where the pleadings are properly drawn to that effect, the Court may, in the same action, adjudicate both the water rights and the right to the ditch or canal used in connection therewith, and render a decree quieting the title in the respective owners to both.⁴

parties, it is not error for the court not to have determined their respective riparian rights. *Coleman v. Le Franc*, 137 Cal. 214, 69 Pac. Rep. 1011.

In determining the quantity of land tributary to and lying along a stream which a single proprietor may irrigate, the principle of equality of right with others should control, irrespective of the accidental matter of governmental subdivisions of the land. *Clark v. Allaman*, 71 Kan. 206, 80 Pac. Rep. 571, 70 L. R. A. 971.

¹ For actions to quiet title to ditches and canals, see Sec. 1541.

Hoyt v. Hart, 149 Cal. 722, 87 Pac. Rep. 569; *Bashore v. Mooney*, 4 Cal. App. 276, 87 Pac. Rep. 553; *Shaw v. Proffitt*, 57 Ore. 192, 109 Pac. Rep. 584; *Crawford v. Minnesota etc. Co.*, 15 Mont. 153, 38 Pac. Rep. 713.

One's right to an irrigation ditch can not be adjudicated in a suit to which he is not a party. *Ruhnke v. Aubert*, 58 Ore. 6, 113 Pac. Rep. 38.

² See Secs. 764, 834.

³ *Parke v. Boulware*, 7 Idaho 490,

63 Pac. Rep. 1045; *Nevada etc. Co. v. Kidd*, 37 Cal. 282.

⁴ *Fudickar v. East Riverside Irr. Dist.*, 109 Cal. 29, 41 Pac. Rep. 1024; *Smith v. Hawkins*, 127 Cal. 119, 59 Pac. Rep. 295; *San Jose etc. Co. v. San Jose Ranch Co.*, 129 Cal. 673, 62 Pac. Rep. 269; *Village of Hailey v. Riley*, 14 Idaho 481, 95 Pac. Rep. 686, 17 L. R. A., N. S., 86; *Collins v. Gray*, 154 Cal. 131, 97 Pac. Rep. 142; *Hayward v. Mason*, 54 Wash. 649, 104 Pac. Rep. 139; *Id.* 54 Wash. 653, 104 Pac. Rep. 141; *Smith Canal or Ditch Co. v. Colorado etc. Co.*, 34 Colo. 485, 82 Pac. Rep. 940, 3 L. R. A., N. S., 1148; *Feeney v. Chester*, 7 Idaho 324, 63 Pac. Rep. 192; *Arroyo Ditch Co. v. Dorman*, 137 Cal. 611, 70 Pac. Rep. 737; *Board of Regents v. Hutchinson*, 46 Ore. 57, 78 Pac. Rep. 1028; *Blake v. Boye*, 38 Colo. 55, 88 Pac. Rep. 470, 8 L. R. A., N. S., 418; *Collins v. Gray*, 154 Cal. 131, 97 Pac. Rep. 142; *Fluke v. Ford*, 35 Colo. 112, 84 Pac. Rep. 469.

For decrees quieting title to water rights, see Secs. 1557, 1558.

In its decree quieting the title to ditches and canals, the Court should be as definite and certain in the description as to the rights awarded to the respective parties as is possible. The ditch and canal should be described with sufficient certainty, the lands over which it runs, and the particular rights awarded to each of the parties.⁵

§ 1561. Decrees and judgments—Apportioning the subterranean waters among the owners of the land.—As we have seen in other sections of this work, the right to the use of water flowing or percolating through subterranean water-bearing strata is first in the land owners of the lands through which such waters flow or percolate, for use on such lands;¹ and, second, should there be a surplus of water over and above the needs of such land owners on their lands, others may appropriate such waters and conduct them to distant lands.² But as between the land owners themselves, as was said upon the rehearing of the case of *Katz v. Walkinshaw*,³ “Disputes between overlying land owners, concerning water for use on the land, to which they have an equal right, in cases where the supply is not sufficient for all, are to be settled by giving to each a fair and just proportion.” This rule is based upon the analogous rule adopted by the courts for the apportionment of waters of a stream among the various riparian owners on the same stream.⁴ And, in a suit to adjudicate such rights, it is held that the Court by decree may make reasonable regulations for the use of the water by the parties to the action, fixing the time when each may take it, and the quantity to be taken, provided that such decree be adequate to protect the land owner having a paramount right to the use of the water, and to prevent the destruction of that right.⁵

⁵ See cases cited *supra*.

¹ For rights to subterranean waters, see Secs. 1148-1211.

For actions to apportion such waters, see Sec. 1539.

See, also, *Katz v. Walkinshaw*, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

² *Burr v. Maclay Rancho W. Co.*, 154 Cal. 428, 98 Pac. Rep. 260.

³ *Supra*.

⁴ For decrees apportioning waters among riparian owners, see Sec. 1559.

For the correlative rights of land owners, see Secs. 1198-1200.

⁵ *Burr v. Maclay Rancho W. Co.*, 154 Cal. 428, 98 Pac. Rep. 260, where it is held that a judgment, fixing the rights of adjoining land owners to take percolating water from a common underlying basin, should be so framed as to prevent a depletion of the basin, limiting the amount taken

From the reported cases it seems that the trial courts have had considerable difficulty in making their findings upon which to base their decrees in cases involving the rights of the respective parties to subterranean waters percolating or flowing through underground strata. This is due to the fact that, as said by Mr. Justice Brewer, in the case of *Kansas v. Colorado*: "The underground movement of water will always be a problem of uncertainty."⁶ In some cases the trial Court shirked the duty of making its findings and by decree apportioned the water among those who were entitled to its use.⁷ By this action the very purpose of the action is defeated, and subjects the parties to future litigation in order to determine their respective rights. It is the duty of the Court in these cases to make its findings, upon which it must make its awards of the quantity of water each party is entitled to use, and not shirk this duty, however great the intrinsic difficulty. And, as said by Mr. Justice Shaw, in *Katz v. Walkinshaw*:⁸ "The objection that this rule of correlative rights will throw upon the Court a duty impossible of performance—that of apportioning an insufficient supply of water among a large number of users—is largely conjectural. No doubt cases can be imagined where the task would be extremely difficult, but, if the rule is the only just one—as we think has been shown—the difficulty in its application in extreme cases is not a sufficient reason for abandoning it, and leaving property without any protection of the law."

§ 1562. Decrees and judgments—For costs.—Upon the subject of judgment for costs in cases for the adjudication of water rights, the general rule, as in other cases, is that the party ultimately defeated is liable for the costs in the action, so far as they are legiti-

by all the consumers to a quantity, as near as may be, equal to the average constant supply from the rainfall.

See, also, *Verdugo etc. Co. v. Verdugo*, 152 Cal. 655, 93 Pac. Rep. 1021; *McClintock v. Hudson*, 141 Cal. 275, 74 Pac. Rep. 849; *Cohen v. La Canada etc. Co.*, 142 Cal. 437, 76 Pac. Rep. 47; *Hudson v. Dailey*, 156 Cal. 617, 105 Pac. Rep. 748; *Miller v. Bay Cities W. Co.*, 157 Cal. 256, 107 Pac. Rep. 115, 27 L. E. A., N. S., 772;

Mentone Irr. Co. v. Redlands etc. Co., 155 Cal. 323, 100 Pac. Rep. 1082, 22 L. E. A., N. S., 382, 17 Am. & Eng. Ann. Cas. 1222; *Le Quime v. Chambers*, 15 Idaho 405, 98 Pac. Rep. 415, 22 L. E. A., N. S., 76.

⁶ *Kansas v. Colorado*, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655.

⁷ *Montecito W. Co. v. Santa Barbara*, 144 Cal. 578, 77 Pac. Rep. 1113.

⁸ *Supra*.

mate and properly taxed.¹ In these equitable actions, however, especially where there is a large number of parties, the assessment of costs is left largely to the discretion of the Court. Therefore, oftentimes, the costs of such actions are prorated between the parties according to their respective rights as awarded in the action.² Again, in a recent Oregon case, it was held that, where the parties were numerous and it would be difficult, if not impracticable, to equitably adjust the costs in the lower court, and all the parties were materially benefited by having their rights definitely determined, costs were properly denied to all parties.³ Again, the actual costs incurred by the Court are sometimes prorated by the Court equitably between the respective parties, and the individual costs of each party must be paid by the party incurring them.⁴ And, where both plaintiff and defendants failed to make a case, it is held that each should pay his own costs.⁵ But, as the majority of these cases require considerable time of the Court, and a great deal of testimony must be introduced, a portion of which must be based upon surveys of the premises and the measurement of the water, there are always certain legitimate expenses which must be paid by some one. As was said in an Idaho case: "Every person who appropriates water under the laws of this State must remember that it is sure to cost something for the adjudication of such rights, and that they

¹ *Senior v. Anderson*, 130 Cal. 290, 62 Pac. Rep. 563; *Bathgate v. Irvine*, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158; *Jones v. Conn*, 39 Ore. 30, 64 Pac. Rep. 855, 65 Pac. Rep. 1068, 54 L. R. A. 630, 87 Am. St. Rep. 634.

² *Bathgate v. Irvine*, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158; *Hoyt v. Hart*, 149 Cal. 722, 87 Pac. Rep. 569.

The trial court having discretionary power in taxing costs, a decree in respect thereto will not be disturbed unless the discretion is abused. *Gardner v. Wright*, 49 Ore. 609, 91 Pac. Rep. 286.

³ *Hough v. Porter*, 51 Ore. 318, 372,

95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

See, also, *Rutherford v. Lucerne etc. Co.*, 12 Wyo. 299, 75 Pac. Rep. 445; *Gutierrez v. Wege*, 145 Cal. 730, 79 Pac. Rep. 449; *Southside Imp. Co. v. Burson*, 147 Cal. 401, 81 Pac. Rep. 1107.

⁴ *Hunning v. Porter*, 6 Ariz. 171, 54 Pac. Rep. 584; *Boise etc. Co. v. Stewart*, 10 Idaho 38, 77 Pac. Rep. 25, 321.

⁵ *Patterson v. Nurnberg*, 17 Colo. App. 223, 68 Pac. Rep. 134.

See, also, *Ison v. Sturgill*, 57 Ore. 109, 109 Pac. Rep. 579, 110 Pac. Rep. 535.

must pay the costs." ⁶ Therefore, a number of the States have provided by special statutes as to what expenses connected with the trial of these cases may be assessed as legitimate costs, and by whom they must be paid. Upon the question of the assessment of expenses incurred for surveys of the premises and for the measurements of water, the rule is that, where such surveys and measurements are made under an order of the trial Court, the expenses therefor may be properly taxed as costs against the appropriators and claimants of the water who are parties to the action. ⁷ Where, however, in an action to quiet title, the surveys and maps were prepared by experts, by direction of one of the parties alone, and not by order of the Court, it is held error to assess the expenses for the same as costs. ⁸

§ 1563. The decree and judgment—As *res judicata*—Rights by appropriation, etc.—As we have discussed in previous sections, ¹ the decrees and judgments in actions to determine and settle water rights, and to quiet title thereto in the parties to whom such rights are awarded by the Court, should be so definite and certain as to the exact rights of each party as to constitute an estoppel between the parties, ² and to be a full, complete, and definite adjudication of the entire subject matter, as between the parties to the action. In other words, it must be *res judicata*, or the subject must be fully adjudicated, so as to leave the subject in such a condition of settlement that another action can not be maintained between the same parties concerning the same rights.

⁶ Boise etc. Co. v. Stewart, 10 Idaho 38, 77 Pac. Rep. 25, 321.

The legislature has no authority to compel a county to pay the costs, disbursements, and attorney's fees in an action to settle the right to the use of water, when such county is not a proper party to such action. Bear Lake County v. Budge, 9 Idaho 703, 75 Pac. Rep. 614, 108 Am. St. Rep. 179.

⁷ And this may be done even though the maps, plats, etc., be not introduced in evidence. Farmers' Co-op. D. Co. v. Riverside Irr. Dist., 16

Idaho 525, 102 Pac. Rep. 481, 14 Idaho 450, 94 Pac. Rep. 761; Boise City etc. Co. v. Stewart, 10 Idaho 38, 77 Pac. Rep. 25, 321.

⁸ Bathgate v. Irvine, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158; Senior v. Anderson, 130 Cal. 290, 62 Pac. Rep. 563.

¹ For decrees and judgments, see Secs. 1557-1562.

² Powers v. Perry, 12 Cal. App. 77, 106 Pac. Rep. 595; Handy D. Co. v. South Side D. Co., 26 Colo. 333, 58 Pac. Rep. 30; Davis v. Chamberlain, 51 Ore. 304, 98 Pac. Rep. 154.

In order to constitute such a decree and judgment *res judicata*, and, on that account, to bar a subsequent action, there must be a concurrence of the three conditions following, namely: First, the identity of the rights sued for; second, the identity of the cause of action; and, third, the identity of the persons and parties to the action. Therefore, where these conditions are present, former decrees which are final and unreversed are *res judicata* of the subject matter of the suits as then decided between the parties thereto and their successors in interest, and that, too, whether the Court based its decree upon a correct or erroneous view either of the law or of the facts. As was held in a recent case decided by the Supreme Court of the United States, a decree determining the rights of an irrigation canal company in the water of a river, as against the owners of other irrigation canals taking water from the same river, and against all persons claiming under them, is *res judicata* as to such canal owners and the water users under such canals in a subsequent controversy over the respective rights of the appropriators of the waters of such river.³ A judgment and decree may also become conclusive by lapse of time, although it might have been subject to modification and correction, if proceedings had been promptly taken in time for that purpose.⁴ They are not conclusive as to matters which might have been decided therein, but only as to such matters

³ *Montezuma C. Co. v. Smithville Canal Co.*, 218 U. S. 317, 54 L. Ed. 1074, 31 Sup. Ct. Rep. 67; *aff'g Id.*, 11 Ariz. 99, 89 Pac. Rep. 512; *Union M. & M. Co. v. Dangberg*, 81 Fed. Rep. 73; *Neil v. Tolman*, 12 Ore. 289, 7 Pac. Rep. 103; *Louden etc. Co. v. Handy D. Co.*, 22 Colo. 102, 43 Pac. Rep. 535; *Hall v. Lincoln*, 10 Colo. App. 360, 50 Pac. Rep. 1047; *Consolidated etc. Co. v. New Loveland etc. Co.*, 27 Colo. 521, 62 Pac. Rep. 364; *Hartson v. Dill*, 151 Cal. 137, 90 Pac. Rep. 530; *Farmers' Union D. Co. v. Rio Grande Canal Co.*, 37 Colo. 512, 86 Pac. Rep. 1042; *Campbell v. Flannery*, 32 Mont. 119, 79 Pac. Rep. 702, 80 Pac. Rep. 240; *Alamosa Creek C. Co. v. Nelson*, 42 Colo. 140, 93 Pac. Rep. 1112; *Cache*

La Poudre Res. Co. v. Water Supply etc. Co., 25 Colo. 161, 53 Pac. Rep. 331, 46 L. R. A. 175, 71 Am. St. Rep. 131; *Spring Hill Irr. Co. v. Lake Irr. Co.*, 42 Wash. 379, 85 Pac. Rep. 6; *Drach v. Isola*, 48 Colo. 134, 109 Pac. Rep. 748; *Boulder etc. Co. v. Lower Boulder D. Co.*, 22 Colo. 115, 43 Pac. Rep. 540; *Hawaiian etc. Co. v. Wailuku Sugar Co.*, 14 Haw. 50, *Id.*, 15 Haw. 675.

⁴ *Montrose C. Co. v. Loutsenhizer D. Co.*, 23 Colo. 233, 48 Pac. Rep. 532; *Louden Irr. Co. v. Handy D. Co.*, 22 Colo. 102, 43 Pac. Rep. 535; *Boulder etc. Co. v. Lower Boulder D. Co.*, 22 Colo. 115, 43 Pac. Rep. 540; *Broadmoor etc. Co. v. Brookside etc. Co.*, 24 Colo. 541, 52 Pac. Rep. 792.

which were in fact decided.⁵ A decree and judgment is not *res judicata* as to the persons who were not made parties to the action, or as to their rights.⁶ Neither is it binding on persons who were made parties to the action, but who were not served with legal process, and who did not appear in the action; such adjudication being as to them without due process of law.⁷ As to the subject matter of the action, the judgment and decree will be deemed *res judicata* only to the extent of the matters definitely decided by it. And, as to these matters thus determined, "the judgment is, as a plea in bar or as evidence, conclusive between the same parties, upon the same matter, everywhere."⁸ But it can not be regarded as ad-

⁵ *Union M. & M. Co. v. Dangberg*, 81 Fed. Rep. 73; *Kidd v. Laird*, 15 Cal. 161, 76 Am. Dec. 472, 4 Morr. Min. Rep. 571.

Where, upon appeal, the decree of the trial court is reversed, and the cause is remanded for further proceedings upon amended pleadings, nothing has become *res judicata*, or the law of the case, except that the pleadings and evidence on the first appeal did not authorize the decree. *Johnson v. Sherman etc. Co.*, 71 Neb. 452, 98 N. W. Rep. 1096.

See, also, *Burr v. MacLay Rancho Co.*, 160 Cal. 268, 116 Pac. Rep. 715.

⁶ One not a party to a suit to determine contract rights in an irrigation ditch is not bound by the decree rendered therein, and his rights must be determined as if such suit had not been instituted. *Carns v. Dalton*, 56 Ore. 596, 110 Pac. Rep. 170.

All who are neither parties to the judgment nor privies to such parties are not bound by such judgment. *Stocker v. Kirtley*, 6 Idaho 795, 59 Pac. Rep. 891.

See, also, *Burr v. MacLay Rancho Co.*, 160 Cal. 268, 116 Pac. Rep. 715; *State ex rel. McConihe v. Steiner*, 58 Wash. 578, 109 Pac. Rep. 57; *Community Ditch or Acequia of Tularosa*

Townsite v. Tularosa Community Ditch, 16 N. M. 200, 114 Pac. Rep. 285.

See, also, *Lower Latham D. Co. v. Loudon Irr. C. Co.*, 27 Colo. 267, 60 Pac. Rep. 629, 83 Am. St. Rep. 80; *Tucker v. Jones*, 8 Mont. 225, 19 Pac. Rep. 571; *Hackett v. Larimer & Weld Res. Co.*, 48 Colo. 178, 109 Pac. Rep. 965.

⁷ *Nichols v. McIntosh*, 19 Colo. 22, 34 Pac. Rep. 278.

See, also, *Farm Investment Co. v. Carpenter*, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918.

The remedy by due course of law guaranteed by both the Federal and State constitutions requires, before there is a judicial determination affecting the right to life, liberty, or property, that process to obtain jurisdiction must be issued and personally served when practicable; constructive service can only be made effective when actual service is impracticable. *Bear Lake County v. Budge*, 9 Idaho 703, 75 Pac. Rep. 614, 108 Am. St. Rep. 179.

See, also, for process in statutory adjudications, Secs. 1574-1580.

⁸ *Wixson v. Devine*, 67 Cal. 341, 7 Pac. Rep. 776.

judicating rights by implication, unless they were necessarily included in the subject matter actually decided. So, where the Court found that the defendant had acquired a right to divert sufficient water to fill a ditch without specifying the number of feet which might be diverted or the capacity of the ditch, it was held that this was not an adjudication.⁹ So, also, a judgment or decree is not *res judicata* as to the rights purchased by one of the parties to the action, subsequent to the decree from a stranger to the suit.¹⁰ Again, where a decree was based upon the riparian right of the plaintiff, it was held that it would not protect him in any rights based on prior appropriation.¹¹ And, again, the fact that a stipulation for the dismissal of a cause provided that each party should pay his own costs does not make the judgment entered thereon one upon the merits of the case, which will conclude the parties.¹² But a judgment which adjudicates the rights and priorities in and to the waters of a stream is held to also adjudicate the rights and priorities to its tributaries above the point of diversion of those awarded the rights to the use of the water.¹³ In order for a party to avail himself of a former decree he must plead the former decree; it being in the nature of an estoppel.¹⁴ A judgment and de-

See, also, *Ryan v. Quinlan*, — Mont. —, 124 Pac. Rep. 512.

But see *Flannery v. Campbell*, 30 Mont. 172, 75 Pac. Rep. 1109.

⁹ *Lillis v. Emigrant D. Co.*, 95 Cal. 553, 30 Pac. Rep. 1108.

That the decree must be definite and certain as to the quantity of water, see Secs. 1558, 1559.

See, also, *Stafford v. Hornbuckle*, 3 Mont. 485; *Powers v. Perry*, 12 Cal. App. 77, 106 Pac. Rep. 595; *New Loveland etc. Co. v. Consolidated etc. Co.*, 27 Colo. 526, 62 Pac. Rep. 366, 52 L. R. A. 266; *Oppenlander v. Left Hand D. Co.*, 18 Colo. 142, 31 Pac. Rep. 854; *Buckers Irr. etc. Co. v. Platte Valley Irr. Co.*, 28 Colo. 187, 63 Pac. Rep. 305; *Water Supply etc. Co. v. Larimer & W. Res. Co.*, 25 Colo. 87, 53 Pac. Rep. 386; *rev'g* 7 Colo. App. 225, 42 Pac. Rep. 1020; *Sloan v. By-*

ers, 37 Mont. 503, 97 Pac. Rep. 855; *Colorado etc. Co. v. Larimer & W. etc. Co.*, 26 Colo. 47, 56 Pac. Rep. 185; *Putnam v. Curtis*, 7 Colo. App. 437, 43 Pac. Rep. 1056; *Larimer & W. etc. Co. v. Wyatt*, 23 Colo. 480, 48 Pac. Rep. 528; *Collins v. Gray*, 154 Cal. 131, 97 Pac. Rep. 142; *Neil v. Tolman*, 12 Ore. 289, 7 Pac. Rep. 103.

¹⁰ *Josslyn v. Daly*, 15 Idaho 137, 96 Pac. Rep. 568.

¹¹ *Davis v. Chamberlain*, 51 Ore. 304, 98 Pac. Rep. 154.

¹² *Rincon etc. Co. v. Anaheim etc. Co.*, 115 Fed. Rep. 543.

¹³ *Josslyn v. Daly*, 15 Idaho 137, 96 Pac. Rep. 568.

¹⁴ *Davis v. Chamberlain*, 51 Ore. 304, 98 Pac. Rep. 154; *Spring Hill Irr. Co. v. Lake Irr. Co.*, 42 Wash. 379, 85 Pac. Rep. 6.

cree finally adjudicating the rights between the parties thereto is not subject to collateral attack;¹⁵ neither can it be attacked by one who has had the benefit of it for a number of years.¹⁶

§ 1564. The decree and judgment—As *res judicata*—As to riparian rights.—The doctrine of appropriation may be deemed a doctrine of fixed rights, and decrees and judgments rendered in actions to adjudicate water rights may award a definite and certain quantity of water to the respective parties, and such decrees are deemed *res judicata* as finally settling the rights between such parties.¹ The common law of riparian rights as to the use of the water by riparian owners is not a doctrine of fixed rights, but depends upon the relative or correlative rights of all the riparian owners upon the same stream.² Therefore, a different proposition confronts the Court, when it comes to the construction of judgments and decrees in cases where they apportion the rights to use the water among the riparian owners on a stream, in those jurisdictions which adhere to the modified common law rule of riparian rights. Such judgments and decrees can be regarded, except in very exceptional cases, as *res judicata* only so long as the conditions upon which they were rendered remain the same. And, as the rights of all of the riparian proprietors are equal, regardless of the date of acquiring title or their location on the stream, and no proprietor can use the water for irrigation to the injury of the correlative rights of the other proprietors above or below him on the stream, these conditions are continually changing, owing to the rights of new owners, or the extended use by the old owners. As was said in an Oregon case: "It necessarily follows, therefore, that the nature and extent of the right of a riparian proprietor to the water of a stream can not be measured by any definite or fixed rule, nor can the amount of water to which he is entitled to use for that purpose

¹⁵ Hall v. Lincoln, 10 Colo. App. 360, 50 Pac. Rep. 1047.

¹⁶ Boulder etc. Co. v. Lower Boulder D. Co., 22 Colo. 115, 43 Pac. Rep. 540.

¹ For judgments and decrees based upon appropriation, see Secs. 1557, 1558.

For such judgments as *res judicata*, see Sec. 1563.

² For riparian rights, see Secs. 450-551.

For decrees in actions to apportion the water between riparian owners, see Sec. 1559.

ordinarily be definitely ascertained or determined.”³ And, therefore, as held in a California case: “In ordinary controversies between parties claiming only as riparian proprietors on the same stream of water, a judgment determining that at a given time the parties are entitled to appropriate the waters in certain proportions is not necessarily conclusive in a subsequent action.”⁴

A decree based on riparian rights will not protect any rights based on prior appropriation afterward claimed by the plaintiff against the defendant.⁵

§ 1565. **Appeal from judgment and decrees.**—Appeals taken from judgments and decrees in cases adjudicating and settling water rights do not differ materially from appeals taken in other cases. The right of appeal from judgments rendered in the district or trial courts to the Supreme Court of the State is given in all jurisdictions to any of the parties to the action, who may feel that their rights were not properly adjudicated by the trial Court.¹ But it is held that the decision of the Supreme Court of the State is controlling, and that in actions simply adjudicating these rights between the respective parties, no appeal will lie from the State Supreme Court to the Supreme Court of the United States, upon the ground that it is a matter for the States to settle, and the subject involves no Federal question.² Where the action is

³ *Williams v. Altnow*, 51 Ore. 275, 95 Pac. Rep. 200, 97 Pac. Rep. 539.

See, also, *Jones v. Conn*, 39 Ore. 30, 64 Pac. Rep. 855, 65 Pac. Rep. 1068, 54 L. B. A. 630, 87 Am. St. Rep. 634.

⁴ *Los Angeles v. Baldwin*, 53 Cal. 469.

See, also, *Strong v. Baldwin*, 154 Cal. 150, 97 Pac. Rep. 178, 129 Am. St. Rep. 141.

⁵ *Davis v. Chamberlain*, 51 Ore. 304, 98 Pac. Rep. 154.

¹ In an action by several defendants to determine priorities in the use of water, where separate judgments are asked, the plaintiffs bring a writ of error to review a judgment for one of the defendants, the others need not
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be made parties. *Egan v. Estrada*, 6 Ariz. 248, 56 Pac. Rep. 721.

See, also, *Randall v. Rocky Ford D. Co.*, 29 Colo. 430, 68 Pac. Rep. 240, holding that where an appeal of the owner of the right was ineffectual, an appeal could not be maintained by a consumer under the ditch.

² For jurisdiction of courts, see Sec. 1533.

See, also, *Telluride Power Trans. Co. v. Rio Grande W. R. Co.*, 175 U. S. 639, 44 L. Ed. 305, 20 Sup. Ct. Rep. 245, dismissing writ of error to the Supreme Court of Utah, 16 Utah 125, 51 Pac. Rep. 146; *Id.*, on second appeal, 187 U. S. 569, 47 L. Ed. 307, 23 Sup. Ct. Rep. 178; dismissing writ of error to Supreme Court of Utah,

originally brought in, or removed to, the Federal Court from a State Court, a right of appeal lies to the Circuit Court of Appeals, or to the Supreme Court of the United States, or to both, as the case may be.

The provisions of the statutes of the respective States, and the rules adopted by its Supreme Court, govern the proceedings in taking the appeals, where the same are taken from the trial Court to the State Supreme Court. And these statutes and rules are mandatory in this respect; and, if they are not strictly followed, the appeal may be dismissed.³ In cases of appeal from the United States District or Circuit Courts, or from the Supreme Court of a State, to the Circuit Court of Appeals, or to the Supreme Court of the United States, the statutes of the United States, and the rules of procedure of those respective courts, must govern the procedure in taking the appeal.⁴ Again, the questions

23 Utah 22, 63 Pac. Rep. 995; *Crystal Springs etc. Co. v. Los Angeles*, 177 U. S. 169, 44 L. Ed. 720, 20 Sup. Ct. Rep. 573; affirming *Id.*, 82 Fed. Rep. 114, 76 Fed. Rep. 114, 76 Fed. Rep. 148; *Los Angeles v. Los Angeles etc. Co.*, 217 U. S. 217, 54 L. Ed. 736, 30 Sup. Ct. Rep. 452, 152 Cal. 645, 93 Pac. Rep. 869, 1135; *Hooker v. Los Angeles*, 188 U. S. 314, 47 L. Ed. 487, 23 Sup. Ct. Rep. 395, 63 L. E. A. 471; *Miller & Lux v. East Side etc. Co.*, 211 U. S. 293, 53 L. Ed. 189, 29 Sup. Ct. Rep. 111; *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. Rep. 56; reversing *Id.*, 68 Fed. Rep. 948.

³ *Needle Rock D. Co. v. Crawford etc. Co.*, 32 Colo. 209, 75 Pac. Rep. 424; *Twaddle v. Winters*, 29 Nev. 88, 85 Pac. Rep. 280, 89 Pac. Rep. 289; *Foss v. Johnstone*, 158 Cal. 119, 110 Pac. Rep. 294; *Van Camp v. Emery*, 13 Idaho 202, 89 Pac. Rep. 752; *Randall v. Rocky Ford D. Co.*, 29 Colo. 430, 68 Pac. Rep. 240; *Hess v. La Junta etc. Co.*, 6 Colo. App. 497, 42

Pac. Rep. 50; *Id.*, 25 Colo. 515, 55 Pac. Rep. 728; *Baer Bros. etc. Co. v. Wilson*, 32 Colo. 500, 77 Pac. Rep. 245; *Frost v. Alturas W. Co.*, 11 Idaho 294, 81 Pac. Rep. 996.

On appeal the opinion of the trial court has no place in the record. *Phillips v. Coburn*, 28 Mont. 45, 72 Pac. Rep. 291.

A transcript once filed within time may be withdrawn to perfect the record. *Baer Bros. etc. Co. v. Wilson*, 32 Colo. 500, 77 Pac. Rep. 245.

Where the record on appeal is insufficient, but the counsel for the defendants in error announce that they prefer to have the case decided on the merits and not on technicalities, the objection will not be noticed. *Wellington v. Beck*, 43 Colo. 70, 95 Pac. Rep. 297.

See, also, *South Side Imp. Co. v. Burson*, 147 Cal. 401, 81 Pac. Rep. 1107.

⁴ A judgment of the Circuit Court of Appeals, adjudging that defendant had acquired a valid right to the waters of a non-navigable stream, wholly

which the Appellate Court may consider in these actions do not differ materially from the questions which may be considered in other equity cases. The same general and well settled rules of law govern as in other equity cases. It is a general rule of practice that the Supreme Court, in equity cases, may consider the evidence taken by the trial Court, and upon which it based its findings and decree.⁵ And, upon this subject, we are confronted with another well settled rule of law that, where the evidence is conflicting, and the finding of the lower Court is sustained by sufficient legal evidence, it will not be disturbed by the Appellate Court upon an appeal of the case.⁶ And a finding of fact by the trial Court will not be dis-

on the public domain, as against the plaintiff, subject to the appropriation thereof by a military reservation, and remanding the cause to the lower court for further proceedings, is not a final judgment from which an appeal may be taken to the Supreme Court of the United States. *United States v. Krall*, 174 U. S. 385, 43 L. Ed. 1017, 19 Sup. Ct. Rep. 712; for the same case below, see 79 Fed. Rep. 241, 24 C. C. A. 543, 48 U. S. App. 351.

⁵ For findings of fact, see Sec. 1556.

For decrees, see Secs. 1557-1564.

⁶ *Peterson v. Payne*, 43 Colo. 184, 95 Pac. Rep. 301.

Where the evidence on a particular finding is conflicting, and there is some evidence to support the finding by the trial court, it can not be disturbed on appeal, though the preponderance of the evidence is against it. *Smith v. Hampshire*, 4 Cal. App. 8, 87 Pac. Rep. 224.

A finding of fact, based on conflicting inferences reasonably deducible from the evidence, is as conclusive as where the conflict arises directly from the evidence. *Mentone Irr. Co. v. Redlands etc. Co.*, 155 Cal. 323, 100 Pac. Rep. 1082, 22 L. R. A., N. S., 383, 17 Am. & Eng. Ann. Cas. 1223.

Where the evidence is conflicting, but does not clearly preponderate against the conclusions reached by the trial court, the findings will not be disregarded or set aside. *Kelly v. Hynes*, 41 Mont. 1, 108 Pac. Rep. 785.

See, also, *Cave v. Tyler*, 147 Cal. 454, 82 Pac. Rep. 64; *Davis v. Angelo*, 8 Cal. App. 305, 96 Pac. Rep. 909; *City of Pocatello v. Bass*, 15 Idaho 1, 96 Pac. Rep. 120; *Arroyo etc. Co. v. Baldwin*, 155 Cal. 280, 100 Pac. Rep. 874; *Van Camp v. Emery*, 13 Idaho 202, 89 Pac. Rep. 752; *Gurnsey v. Antelope etc. Co.*, 6 Cal. App. 387, 92 Pac. Rep. 326; *Anderson v. Cook*, 25 Mont. 330, 64 Pac. Rep. 873, 65 Pac. Rep. 113, 66 Pac. Rep. 504; *Miller & Lux v. Enterprise etc. Co.*, 145 Cal. 652, 79 Pac. Rep. 439; *West Point Irr. Co. v. Moroni etc. Co.*, 21 Utah 229, 61 Pac. Rep. 16; *San Luis W. Co. v. Estrada*, 117 Cal. 168, 48 Pac. Rep. 1075; *Wasatch Irr. Co. v. Fulton*, 23 Utah 466, 65 Pac. Rep. 205; *Sisk v. Caswell*, 14 Cal. App. 377, 112 Pac. Rep. 185; *Ripley v. Park Center etc. Co.*, 40 Colo. 129, 90 Pac. Rep. 75; *Winter v. Fulstone*, 20 Nev. 260, 21 Pac. Rep. 201; *Cardelli v. Comstock Tun. Co.*, 26 Nev. 284, 66 Pac. Rep. 950; *Patterson v.*

turbed on appeal unless it is clearly against the preponderance of the evidence and is manifestly against justice and right.⁷ Where the evidence is not before the Court on appeal, it is concluded by the findings of the trial Court.⁸ Where, however, the evidence is too indefinite to support the findings of the trial Court, the cause will be remanded to the trial Court to take further testimony and the findings will be set aside.⁹ An issue raised for the first time in the Appellate Court will not be considered;¹⁰ neither will objections not raised in the trial Court.¹¹ Again, where the parties

Mills, 138 Cal. 276, 71 Pac. Rep. 177; Churchill v. Rose, 136 Cal. 576, 69 Pac. Rep. 416; Southern Cal. Inv. Co. v. Wilshire, 144 Cal. 68, 77 Pac. Rep. 767; Boyd v. Huffine, — Mont. —, 120 Pac. Rep. 228; McDonnell v. Huffine, — Mont. —, 120 Pac. Rep. 792; Wolff v. Pomponia, — Colo. —, 120 Pac. Rep. 142; Donnelly v. Cunha, — Ore. —, 119 Pac. Rep. 331; Mellen v. Great Western Beet Sugar Co., — Idaho —, 122 Pac. Rep. 30; Kenck v. Deegan, — Mont. —, 122 Pac. Rep. 746.

See, also, for findings of fact, Sec. 1556.

⁷ Promontory Ranch Co. v. Argile, 28 Utah 398, 79 Pac. Rep. 47; Hayes v. Fine, 91 Cal. 391, 27 Pac. Rep. 772; Baer Bros. etc. Co. v. Wilson, 38 Colo. 101, 88 Pac. Rep. 265; Graham v. Pasadena etc. Co., 152 Cal. 596, 93 Pac. Rep. 498; Gates v. Settlers' etc. Co., 19 Okla. 83, 91 Pac. Rep. 856; Collins v. Gray, 154 Cal. 131, 97 Pac. Rep. 142; Farmers' etc. Co. v. Riverside Irr. Co., 16 Idaho 525, 102 Pac. Rep. 481; Baldrige v. Leon Lake etc. Co., 20 Colo. App. 518, 80 Pac. Rep. 477; Griseza v. Terwilliger, 144 Cal. 456, 77 Pac. Rep. 1034; Murray v. Nixon, 10 Idaho 608, 79 Pac. Rep. 643; X. Y. Irr. D. Co. v. Buffalo etc. Co., 25 Colo. 529, 55 Pac. Rep. 720; Purser v. Baker, 129 Cal. 607, 62 Pac. Rep. 190; Mes-

nager v. Engelhardt, 108 Cal. 68, 41 Pac. Rep. 20; Beach v. Spokane etc. Co., 25 Mont. 367, 65 Pac. Rep. 106; Great Plains W. Co. v. Lamar C. Co., 31 Colo. 96, 71 Pac. Rep. 1119; Senior v. Anderson, 138 Cal. 716, 72 Pac. Rep. 349; Cache La Poudre Res. Co. v. Windsor Res. Co., 25 Colo. 53, 52 Pac. Rep. 1104; Edson & Foulke Co. v. Winsell, 160 Cal. 783, 118 Pac. Rep. 243.

⁸ Salt Lake City v. Salt Lake City etc. Co., 24 Utah 249, 67 Pac. Rep. 672, 25 Utah 441, 71 Pac. Rep. 1069, 61 L. R. A. 648; Beatty v. Murray Placer Co., 15 Mont. 314, 39 Pac. Rep. 82; Mahoney v. American etc. Co., 2 Cal. App. 186, 83 Pac. Rep. 267; Bailey v. Tintinger, — Mont. —, 122 Pac. Rep. 575.

⁹ Elliot v. Whitmore, 8 Utah 253, 30 Pac. Rep. 984.

¹⁰ McPherson v. Alta Irr. Dist., 14 Cal. App. 353, 112 Pac. Rep. 193; Murray v. Nixon, 10 Idaho 608, 79 Pac. Rep. 643; Cache La Poudre Res. Co. v. Windsor etc. Co., 25 Colo. 53, 52 Pac. Rep. 1104; Coray v. Holbrook, — Utah —, 121 Pac. Rep. 572.

¹¹ Farmers' etc. Co. v. Riverside Irr. Dist., 14 Idaho 450, 94 Pac. Rep. 761; Baxter v. Dickinson, 136 Cal. 185, 68 Pac. Rep. 601; Smith v. Cucamonga W. Co., 160 Cal. 611, 117 Pac. Rep. 764.

go to trial, without objection, on a particular theory of their cases, a different theory will not be considered by the Appellate Court.¹² And, where the appeal is taken on the judgment roll alone, the question of the sufficiency of the evidence to support the findings can not be raised in the Appellate Court.¹³ The Appellate Court must consider the pleadings in the action, and render its decision within the rights asserted therein.¹⁴ A decree is presumed to be satisfactory on appeal to those parties not appealing.¹⁵

In deciding the case on appeal the Appellate Court may affirm the judgment of the trial Court; it may reverse it and send it back for a new trial;¹⁶ or, in most jurisdictions, the Appellate Court may reverse the judgment of the Court below with directions to enter a new judgment in accordance with its decision;¹⁷ or, the Court may modify the judgment of the trial Court in certain particulars.¹⁸ Or, the Appellate Court may, upon a proper showing,

¹² *Durning v. Walz*, 42 Ore. 109, 71 Pac. Rep. 662; *Hough v. Porter*, 51 Ore. 318, 372, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

¹³ *Miller & Lux v. Enterprise etc. Co.*, 145 Cal. 652, 79 Pac. Rep. 439; *Sternberger v. Seaton etc. Co.*, 45 Colo. 401, 102 Pac. Rep. 168; *Montezuma C. Co. v. Smithville C. Co.*, 11 Ariz. 99, 89 Pac. Rep. 512.

Whether the use of a certain amount of water was excessive can not be determined by the appellate court when the evidence is not before the Court. *Lone Tree D. Co. v. Cyclone D. Co.*, 15 S. D. 519, 91 N. W. Rep. 352.

¹⁴ *Huffner v. Sawday*, 153 Cal. 86, 94 Pac. Rep. 424; *Montezuma C. Co. v. Smithville C. Co.*, 11 Ariz. 99, 89 Pac. Rep. 512; *Sternberger v. Seaton etc. Co.*, 45 Colo. 401, 102 Pac. Rep. 168.

¹⁵ *Hough v. Porter*, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; *Seawear v. Duncan*, 47 Ore. 640, 84 Pac. Rep. 1043.

¹⁶ Where the various questions submitted in a suit and adjudicated by the decree therein were so interwoven that it was impossible to separate them so as to sustain such decree on any one or more of such questions, the decree will be reversed in its entirety. *New Cache La Poudre Irr. Co. v. Water Supply Co.*, 29 Colo. 469, 68 Pac. Rep. 781.

The appellate court may reverse the judgment with leave to amend the pleadings and bring in new parties. *McCook Irr. Co. v. Crews*, 70 Neb. 109, 96 N. W. Rep. 996.

¹⁷ *Walnut Irr. Dist. v. Burke*, 158 Cal. 165, 110 Pac. Rep. 518; *Munsee v. McKellar*, — Utah —, 116 Pac. Rep. 1024.

¹⁸ *Becker v. Marble Creek Irr. Co.*, 15 Utah 225, 49 Pac. Rep. 892, 1119; *Stewart v. Austin*, 50 Colo. 248, 115 Pac. Rep. 516; *Bielenberg v. Eyre*, 44 Mont. 397, 120 Pac. Rep. 243; *Sullo-way v. Sulloway*, 160 Cal. 508, 117 Pac. Rep. 522.

grant a rehearing of the appeal.¹⁹ The Supreme Court has full power to review all questions of law and fact in equity cases, and to set aside the judgment of the lower Court, if, in the opinion of the Supreme Court, such judgment is not supported by the evidence.²⁰

§ 1586. The enforcement of judgments and decrees.—The rights of the parties having been finally settled and adjudicated by a Court of equity, the Court has ample power to enforce its decrees. It has the power, if necessary, to prescribe the method to be used by the parties to correctly measure the water.¹ It likewise has the authority and jurisdiction to make such orders and to issue such writs as may be necessary and essential to carry the decree into effect and render it binding and operative.² The permanent injunction usually issued in such decrees is made merely in aid of the enforcement of that portion of the decree awarding the rights to the respective parties; and it will operate against any of the parties who may undertake or attempt to divert or use any of the water to the injury of any of the rights of the other parties, as settled and established by the decree.³ For a violation of the injunction,

¹⁹ *Mattis v. Hosmer*, 37 Ore. 523, 62 Pac. Rep. 17, 632.

²⁰ *Elliot v. Whitmore*, 23 Utah 842, 65 Pac. Rep. 70, 90 Am. St. Rep. 700; *North Point etc. Co. v. Utah etc. Co.*, 16 Utah 246, 52 Pac. Rep. 168, 40 L. R. A. 851, 67 Am. St. Rep. 607; *Small v. Harrington*, 10 Idaho 499, 79 Pac. Rep. 461; *La Jara etc. Co. v. Hansen*, 35 Colo. 105, 83 Pac. Rep. 644.

In equity cases, all improper testimony admitted by the trial court will be disregarded by the appellate court. *Winsor v. Hanson*, 40 Wash. 423, 82 Pac. Rep. 710.

¹ *Tolman v. Casey*, 15 Ore. 83, 13 Pac. Rep. 669; *Elliot v. Whitmore*, 10 Utah 246, 37 Pac. Rep. 461; *McGinness v. Stanfield*, 6 Idaho 372, 55 Pac. Rep. 1020.

See, also, *Porter v. Small*, — Ore. —, 120 Pac. Rep. 393.

Owing to the difficulties usually encountered in the enforcement of decrees, where there are many conflicting interests, in water suits, the trial court has the power, when deemed advisable, to enter such supplemental decree, not inconsistent with the decree of the appellate court, as may be necessary to make the decree of the appellate court effective. *Hough v. Porter*, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1093, 102 Pac. Rep. 728.

² *Taylor v. Hulett*, 15 Idaho 265, 97 Pac. Rep. 37, 19 L. R. A., N. S., 535; *Burr v. Maclay Rancho Co.*, 154 Cal. 428, 98 Pac. Rep. 260; *Hough v. Porter*, 51 Ore. 218, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; *Whited v. Cavin*, 55 Ore. 98, 105 Pac. Rep. 396.

³ *Taylor v. Hulett*, 15 Idaho 265, 97 Pac. Rep. 37, 19 L. R. A., N. S., 535.

the Court has the power to punish for contempt,⁴ and the party whose rights are materially injured has his action at law for damages.⁵ And, where the decree is clear upon its face as to the stream from which the diversion and distribution are to be made, and the

⁴ *In re* Whitmore, 9 Utah 441, 85 Pac. Rep. 524, where it is held that a Court has power to imprison a person for breach of an injunction until he complies therewith, when it is within his power to do so, and he refuses to do so.

See, also, *State ex rel. Flynn v. Dist. Court*, 33 Mont. 115, 82 Pac. Rep. 540.

See, also, for the protection of rights, injunctions, Secs. 1596-1647.

⁵ Where a decree has been entered, settling and adjusting the rights of the various parties to the waters of a stream, and enjoining the use or appropriation of said waters otherwise than provided in such decree, the remedy for the violation of the provisions of such decree, where neither a change of parties, conditions, nor interests appear, is not by a bill to enforce the decree, but by an action at law. *Raft River etc. v. Langford*, 5 Idaho 62, 46 Pac. Rep. 1024.

See, also, for protection of rights; actions for damages, Secs. 1660 *et seq.*

Where the rights adjudicated in the action are many and varied, and, as a consequence thereof, the accurate division of the water among the parties to whom the rights have been awarded is difficult and requires considerable skill and technical knowledge in the measurement of water, it is within the power of the Court to appoint a person familiar with this subject, as a water commissioner, or a water master, to make this division, and thus aid in the enforcement of the decree. The appointment of such a

commissioner is a common practice, and is a proper choice of method to carry the decree into effect, and the power given him by the Court is to exercise an administrative, and not a judicial, discretion.

The bounds of judicial authority are not transcended by the appointment by a Court of a water commissioner charged with the duty of distributing the waters of a river among the various irrigation canals, according to the adjudged priorities and imposing upon the parties a *pro rata* liability for his salary. *Montezuma Canal Co. v. Smithville Canal Co.*, 218 U. S. 371, 54 L. Ed. 1074, 31 Sup. Ct. Rep. 67; reversing *Id.*, 11 Ariz. 99, 89 Pac. Rep. 512.

See, also, *Sullivan v. Jones*, 13 Ariz. 229, 108 Pac. Rep. 476; *Salt Lake City v. Salt Lake City etc. Co.*, 24 Utah 249, 67 Pac. Rep. 672, 25 Utah 441, 71 Pac. Rep. 1069, 61 L. R. A. 648, where the Court decreed to the parties to the suit a certain portion of the water flowing in the stream, and appointed a commissioner at a monthly salary to superintend and direct the measurement and division of the water in accordance with the decree, also giving him authority to direct, supervise, and inspect all means and appliances for the diversion, conveyance, and use of the water, and to report to the Court from time to time any violations of the provisions of the decree, the Court retaining original jurisdiction of the case for the purpose of making all necessary orders and decrees to make effectual the rights awarded.

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' respective rights of the parties, as to the quantity of water and place of delivery, the water master or commissioner will not be required to look beyond the decree for his authority.⁶

• Stethem v. Skinner, 11 Idaho 374, 82 Pac. Rep. 451.

CHAPTER 79.

STATUTORY ADJUDICATION OF WATER RIGHTS.

- § 1567. Scope of chapter.
- § 1568. Special statutory proceedings for the adjudication of water rights.
- § 1569. The nature of such statutory actions.
- § 1570. The constitutionality of Acts.
- § 1571. The jurisdiction of courts—Venue.
- § 1572. The jurisdiction of courts—Subject matter and parties.
- § 1573. Parties to such actions.
- § 1574. The pleadings or statements of claims.
- § 1575. The process or notice of pending actions.
- § 1576. The proceedings on the hearing—Referees.
- § 1577. The form and substance of decrees.
- § 1578. Decrees as to inchoate rights.
- § 1579. Construction and effect of decree.
- § 1580. The review and modification of decrees—On petition of parties to the action.
- § 1581. Modification of decrees—On independent action by those not parties to the action.
- § 1582. Appeals from judgments and decrees.
- § 1583. The decree as *res judicata*.
- § 1584. The enforcement of decrees and judgments.

§ 1567. **Scope of chapter.**—Having discussed the subject of the adjudication of water rights by the courts under their general equity powers in the previous chapter,¹ in this chapter we will discuss the adjudication, or determination of water rights under special statutory proceedings, enacted in several of the States for this purpose, as to where these proceedings are had by the courts.²

§ 1568. **Special statutory proceedings for the adjudication of water rights.**—As the population of the Western States increased and the demand for water rights became greater and greater, the necessity for the adjudication of all such rights also increased. This was so in order that these rights might, as far as possible, become definitely and permanently settled, as between the various

¹ For the adjudication of water rights in equity, see Chap. 78, Secs. 1530-1566.

² For the determination of rights by administrative officers, see Secs. 1585-1595.

parties claiming the same.¹ And, therefore, owing to the almost numberless actions brought for that purpose, and also the great amount of time consumed by the courts in trying the same, for the purpose of simplifying these proceedings, the legislatures of a number of States have enacted special statutes regulating the proceedings in such cases. Colorado was the first State to provide by legislative enactment special proceedings for the adjudication of water rights, and the provisions of this statute have been, to a greater or lesser extent, followed by the statutes of Idaho, Kansas, Montana, North Dakota, Oklahoma, New Mexico, Oregon, South Dakota, Washington, and Utah.² The distinction between these statutes and those enacted by some of the other States, as is the case in Wyoming and those States following its system discussed in the next chapter,³ for the determination of existing water rights is that the proceedings throughout are always had by the courts, while in those States the proceedings are first had before certain State officials or boards of control, with the right of appeal to the courts. For reasons stated in a previous section, we are very much in favor of the Colorado procedure, and find that greater satisfaction is given where the rights are adjudicated entirely by the courts.⁴

In general, these Acts furnish an elaborate system of special procedure for the settlement and adjudication of all questions of priority of the appropriation of water from a common source of supply, as between the respective claimants thereto, and by decree awarding to each claimant the quantity of water to which he is entitled for the beneficial use or purpose to which he applies it. The power to enact such laws comes within the police power of the State,⁵ as one feature of the law of State control, which is the right of each State to adopt such laws regulating and controlling the waters which flow within its boundaries as it sees fit.⁶ As well stated in an early Colorado case: "They are in the nature of police regulations to secure the orderly distribution of water for irri-

¹ For the necessity of adjudication of water rights, see Sec. 1531.

² For the statutes of these various States, see Part XIV.

³ See Chap. 80, Secs. 1585-1595.

⁴ For criticism of the laws of State control, see Sec. 1367.

⁵ For the power of the legislature to regulate the use of water—police power, see Secs. 1341, 1370.

⁶ For the laws of State control, see Secs. 1337-1367.

gation purposes, and to this end they provide a system of procedure for determining the priority of rights as between the carriers."⁷ Where such statutes have been adopted by the legislature of a State, they will be followed by the Federal Courts.⁸

One end that has been attained by these special proceedings is that they have made a permanent public record of all the rights to the use of water which have been so adjudicated from any common source of water supply, and give the names of the parties who are entitled to the use of the water, together with a definite and certain description of their respective rights.⁹ As said in a recent Colorado case: "The statutory decree confers no new rights, but, as this Court has repeatedly held, embodies in the form of a permanent, binding decree the evidence of a pre-existing right."¹⁰ To those who are at all familiar with the previous conditions, or the conditions at the present time, where such rights have not been adjudicated, the need of a public record of all rights is apparent.

In general, these statutory proceedings have given the greatest satisfaction, and there has been no attempt to repeal such laws, where they have been tried. As was said by the Colorado Court in referring to the Acts of 1879, as supplemented by the Act of 1881, "The two together constitute a complete system of procedure, that in operation has been found so salutary and free from unnecessary expense as to command the tacit endorsement of all subsequent leg-

⁷ Elliott, J., in *Farmers' etc. Co. v. Southworth*, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767.

See, also, *Combs v. Farmers' etc. Co.*, 38 Colo. 420, 88 Pac. Rep. 396; *Nichols v. McIntosh*, 19 Colo. 22, 34 Pac. Rep. 278; *Sterling Irr. Co. v. Downer*, 19 Colo. 595, 36 Pac. Rep. 787; *White v. Farmers' High Line etc. Co.*, 22 Colo. 191, 197, 43 Pac. Rep. 1028, 31 L. R. A. 828; affirming 5 Colo. App. 1, 31 Pac. Rep. 345; *Louden etc. Co. v. Handy D. Co.*, 22 Colo. 102, 43 Pac. Rep. 535; *Broadmoor etc. Co. v. Brookside etc. Co.*, 24 Colo. 541, 52 Pac. Rep. 792; *Farmers' Ind. D. Co. v. Agricultural D.*

Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149.

But see *Bear Lake County v. Budge*, 9 Idaho 703, 75 Pac. Rep. 614, 108 Am. St. Rep. 179, where it was held that unconstitutional provisions of the Idaho statute of 1903 (Sess. Laws, 1903, p. 223), as to parties and service of process were not within the police power of the State.

⁸ *Ames Realty Co. v. Big Indian etc. Co.*, 146 Fed. Rep. 166.

⁹ *New Mercer D. Co. v. Armstrong*, 21 Colo. 357, 40 Pac. Rep. 989; *Farmers' Irr. Dist. v. Frank*, 72 Neb. 136, 100 N. W. Rep. 286.

¹⁰ *Alamosa Creek C. Co. v. Nelson*, 42 Colo. 140, 93 Pac. Rep. 1112.

islatures.”¹¹ And, in a more recent case it is said: “It was a new field, and, in the light of experience, we can, perhaps, point out many imperfections in these statutes, but they have been upheld by the courts and acquiesced in by the people for more than a quarter of a century.”¹²

§ 1569. **The nature of such statutory actions.**—The nature of these purely statutory actions to settle and adjudicate the rights to the use of water, as between the different ditches, or as between the respective claimants to the same, is peculiar and is in a class by itself.¹ Partaking mainly of actions *in rem*, they also contain at times elements of actions *in personam*. They may, therefore, be deemed actions both *in rem* and *in personam*, or, *quasi rem* and *quasi in personam*. As to how these actions are to be considered also depends somewhat upon the jurisdiction where they are brought. In Colorado, where the award of the water is made by the Court to ditches which are given certain numbers, according to their respective priorities which are also given certain numbers, such an action may be regarded as strictly one *in rem*; and, therefore, it is declared by the Supreme Court of that State to be in the nature of an action *in rem*.² And being *in rem* and not *in personam* the interference with the water commissioner who seeks to enforce a decree in such an action is not contempt of Court.³ But in those States where the award of the water is made to individuals or companies, it is made of the thing to the person. Therefore, such an action is both *in rem* and *in personam*.

And, although these actions are in the nature of suits to quiet

¹¹ Louden etc. Co. v. Handy D. Co., 22 Colo. 102, 43 Pac. Rep. 535.

¹² Ft. Lyon etc. Co. v. Arkansas Valley etc. Co., 39 Colo. 332, 90 Pac. Rep. 1023.

¹ For the nature of actions under the equity procedure, see Sec. 1534.

² “The statutory proceeding is in the nature of an action *in rem*.” Louden etc. Co. v. Handy Ditch Co., 22 Colo. 102, 43 Pac. Rep. 535; New Mercer D. Co. v. Armstrong, 21 Colo. 357, 40 Pac. Rep. 989; Combs v.

Farmers’ etc. Co., 38 Colo. 420, 88 Pac. Rep. 396.

“The general adjudication statutes have often been before this tribunal for consideration. They have been held to be a legitimate exercise by our general assembly of the police power of the State, and the proceeding thereby furnished is in the nature of a proceeding *in rem*.” Broad Run Inv. Co. v. Deuel etc. Co., 47 Colo. 573, 108 Pac. Rep. 755.

³ Roberson v. People *ex rel.* Soule, 40 Colo. 119, 90 Pac. Rep. 79.

title, as is the case in ordinary suits in equity brought for the same purpose,⁴ they are in a class by themselves, or are *sui generis*, to which the rules governing ordinary actions are not always applicable, and in which the courts are at times confronted with the dilemma of exercising their discretion in matters of practice. In one Colorado case it is stated that: "The statutory proceeding to adjudicate priorities of rights to the use of water under the irrigation Acts of 1879 and 1881 is not an ordinary civil action or proceeding. It is *sui generis*, to which the rules governing ordinary actions are not always applicable."⁵

Although the Court is usually vested with the power to grant an injunction in the same case in which the rights to the water are settled and adjudicated, this is not always done. However, in protection of the right, after the same has been adjudicated, an action will lie for an injunction against any interference with that right.⁶ So, also, where the right, or a portion of a right so adjudicated, has been conveyed, and there is a dispute as to the extent of the right which was so conveyed, an ordinary action in equity will lie to quiet the title thereto.⁷ But it is held that, in such an action, the Court has no power to adjudge that a change in the point of diversion of the water might be made. That can be done only in the special proceedings under the Act.⁸

⁴ For the nature of equity suits to adjudicate water rights, see Sec. 1534.

For suits to quiet title to water rights, see Secs. 1534-1537.

"It is manifest from a careful examination of our statutes and from the repeated decisions of our courts that our proceeding, if not technically one to quiet title, is quite analogous thereto, for the object is not merely to settle the individual and several priorities of the different appropriators, but the relative priorities as between the different ditches, in which every claimant is seeking to establish his right as against every other person." *Crippen v. X. Y. Irr. Ditch Co.*, 32 Colo. 447, 76 Pac. Rep. 794.

See, also, *Guthell Park Inv. Co. v. Town of Montclair*, 32 Colo. 420, 76

Pac. Rep. 1050; *Taylor v. Hulett*, 15 Idaho 265, 97 Pac. Rep. 37, 19 L. R. A., N. S., 535.

⁵ *People ex rel. Sterling Irr. Co. v. Downer*, 19 Colo. 595, 36 Pac. Rep. 787.

See, also, *Whited v. Cavin*, 55 Ore. 98, 105 Pac. Rep. 396; *Combs v. Farmers' etc. Co.*, 38 Colo. 420, 88 Pac. Rep. 396.

⁶ *Medano D. Co. v. Adams*, 29 Colo. 317, 68 Pac. Rep. 431; *Buckers etc. Co. v. Farmers' etc. Co.*, 31 Colo. 62, 72 Pac. Rep. 49.

For the protection of rights by injunction, see Secs. 1596-1647.

⁷ *Fluke v. Ford*, 35 Colo. 112, 84 Pac. Rep. 469.

⁸ *Fluke v. Ford*, 35 Colo. 112, 84 Pac. Rep. 469.

§ 1570. **The constitutionality of Acts.**—The constitutionality of these Acts have, in the main, been upheld by the Supreme Courts of the States where such laws have been enacted. As said by the Colorado Court: "This Court has repeatedly upheld the irrigation law of this State as being an exercise of the police powers of the State."¹ And, "the object of these Acts was to settle the priority of rights to the use of water for irrigation in the respective water districts in the State."²

The Supreme Court of Idaho, however, in the case of *Bear Lake County v. Budge*,³ held that certain provisions of the original Act of March 11, 1903, passed by the legislature of that State, were unconstitutional. First, that the provisions for the service of process on known resident claimants by publication was in violation of both the Federal and State constitutions; and if such suits, on such process, were prosecuted to judgment, it would result in the taking of private property without due process of law; second, that the provision that the water commissioner of the water district, a public official, should bring the actions as party plaintiff, was in violation of the State constitution, which requires suits to be brought in the name of the real party in interest, and that such commissioner was not the proper party plaintiff, for the reason that such an action was one for the determination of purely private interests; and, third, for the reasons as stated in the first and second grounds, by the Act in question the legislature attempted to go beyond its legitimate police powers. The Court, in this case, declined to pass upon the constitutionality of any of the other provisions of the Act. The

¹ *Roberson v. People ex rel. Soule*, 40 Colo. 119, 90 Pac. Rep. 79.

See, also, *White v. Farmers' etc. Co.*, 22 Colo. 191, 43 Pac. Rep. 1028, 31 L. R. A. 828; *Lamson v. Vailes*, 27 Colo. 201, 61 Pac. Rep. 231; *Ft. Lyon Canal Co. v. Chew*, 33 Colo. 392, 81 Pac. Rep. 37; *Union Colony v. Elliott*, 5 Colo. 371; *Nichols v. McIntosh*, 19 Colo. 22, 34 Pac. Rep. 278; *People ex rel. Sterling Irr. Co. v. Downer*, 19 Colo. 595, 36 Pac. Rep. 787; *Louden etc. Co. v. Handy D. Co.*, 22 Colo. 102, 43 Pac. Rep. 535; *Broadmoor etc. Co. v. Brookside etc. Co.*, 24 Colo.

541, 52 Pac. Rep. 792; *Broad Run Inv. Co. v. Deuel etc. Co.*, 47 Colo. 573, 108 Pac. Rep. 755.

The Act of 1877, for the distribution of irrigation waters (*Laws*, 1887, p. 295), is constitutional. *McLean v. Farmers' High Line etc. Co.*, 44 Colo. 184, 98 Pac. Rep. 16.

See, also, *Farmers' etc. Co. v. Agricultural D. Co.*, 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149.

² *Combs v. Farmers' etc. Co.*, 38 Colo. 429, 88 Pac. Rep. 396.

³ 9 Idaho 703, 75 Pac. Rep. 614, 108 Am. St. Rep. 179.

last ground decided, depending as it does upon the first two, the decision really held the Act unconstitutional upon two grounds: First, as to the parties plaintiff; and, second, as to the service of process. The Court, however, in later cases has upheld the constitutionality of the Act with the exception of those provisions held unconstitutional in the Bear Lake County case, as stated above, and it also held that the provisions of the Act as to the form of procedure, also applied to suits in progress at the time of the passage of the Act.⁴

§ 1571. **The jurisdiction of courts—Venue.**—These statutory actions for the adjudication of water rights must be brought in the proper Court as designated in the respective Acts. The States wherein these actions are provided for are usually divided into water districts. Sometimes these districts are conformable to the water system of any given source of supply, and sometimes they conform to the respective counties.¹ Where the rights to be adjudicated are wholly within one county, the action, of course, must be brought in the Court of that county having the jurisdiction of the subject matter.² In Colorado, when a water district extends into two or more counties, the District Court of the county in which the first regular term shall soonest occur is the proper county in which proceedings shall be commenced, and that Court thereafter retains exclusive jurisdiction of the case until the final adjudication is had.³ And, as defined by the Colorado Court, an "adjudication of priorities," within the meaning of the statute, is the judicial determination of the claims of different parties to the use of water for irrigation within the same irrigation district. Therefore, it is held that conflicting claims to priorities beyond the limits of the district can not be determined by the Court for the county within the district.⁴ It therefore follows that a claimant to rights

⁴ *Boise etc. Co. v. Stewart*, 10 Idaho 38, 77 Pac. Rep. 25, 321.

¹ See Sec. 1345.

² For jurisdiction in equity suits, see Sec. 1533.

³ *Presbyterian College v. Poole*, 25 Colo. 50, 52 Pac. Rep. 1103; *Louden Irr. C. Co. v. Handy D. Co.*, 22 Colo. 102, 43 Pac. Rep. 535.

⁴ *People ex rel. Sterling Irr. Co. v. Downer*, 19 Colo. 595, 36 Pac. Rep. 787.

See, also, *Farmers' etc. Co. v. Agricultural D. Co.*, 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149; reversing *Id.*, 3 Colo. App. 255, 32 Pac. Rep. 722.

"This Court more than once has

in a different district than that which is being adjudicated, and whose rights will be affected by the decree, must either intervene in the action pending, or bring an independent action under the four year statute of limitations.⁵ As stated by the Colorado Court in a recent case: "For the statutory period the priority of such districts are, as between the respective appropriators therein, but *prima facie* evidence of the rights of such appropriators, but after the lapse of four years from the date the decree is rendered fixing such priorities, unless suit is theretofore brought, they become conclusive."⁶ This section of the statute⁷ applies only to the jurisdiction of the Court to adjudicate the rights, and does not apply to actions to protect the rights, which have been awarded in such proceedings. Actions to protect the right may be brought in any county having jurisdiction of the subject matter and the parties, without regard to the county in which the statutory proceedings of adjudication were had.⁸ Where one has been a party to proceedings in the District Court of one county, and, without questioning the jurisdiction of that Court, for several years enjoyed the rights acquired by its judgment, he will be estopped from questioning the jurisdiction of the Court rendering the judgment.⁹

expressed regret that our general assembly did not include in one water district the principal stream and all its tributaries, so that a decree therein, when pronounced, should absolutely bind all the users of water therefrom." Lower Latham D. Co. v. Bijou Irr. Co., 41 Colo. 212, 93 Pac. Rep. 483.

In case of the division of an irrigation district by legislative enactment, it affects the subject matter of a pending proceeding to adjudicate rights; and the District Court of the proper county in the new irrigation district becomes vested with the jurisdiction to determine the priorities in such new district. People *ex rel.* Sterling Irr. Co. v. Downer, 19 Colo. 595, 36 Pac. Rep. 787.

⁵ 3 Colo. Stat. Ann., Morr. Ed.,

1911, Sec. 3313; Rev. Stat. 1908, Sec. 3313.

For independent actions, see Sec. 1581.

⁶ Ft. Lyon etc. Co. v. Arkansas Valley etc. Co., 39 Colo. 332, 90 Pac. Rep. 1023.

For decrees in statutory adjudications, see, also, Secs. 1577-1579.

⁷ 3 Colo. Stat. Ann., Morr. Ed., 1911, Sec. 2276; Rev. Stat. Colo., 1908, Sec. 3276.

⁸ Buckers Irr. Co. v. Farmers' D. Co., 31 Colo. 62, 72 Pac. Rep. 49; Farmers' etc. Co. v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149.

⁹ Handy D. Co. v. South Side D. Co., 26 Colo. 333, 58 Pac. Rep. 30.

See, also, for decrees, Secs. 1577-1589.

§ 1572. The jurisdiction of courts—Subject matter and parties.

—The Court must also have jurisdiction of the subject matter of the action, and the parties to the same, before there can be an adjudication which will finally settle the respective rights between them.¹ But as to the extent of the jurisdiction of the courts authorized to hear and determine these cases, as held by the Colorado Court, relative to the Acts of the legislature of that State, of 1879, as supplemented by that of 1881,² these Acts were passed for the purpose of establishing a system of procedure whereby the appropriators of water could have their priorities and rights determined in one proceeding, and that they do not attempt to limit or extend the jurisdiction of the District Court as to such rights.³

As we have discussed in previous sections, in Colorado the consumer under ditches and canals is deemed to be the appropriator, and the ditch or canal company is deemed to be merely the carrier of the water.⁴ Yet these special proceedings provide that the award of the water shall be to the ditches and canals, which shall be given a certain number, and which are accorded certain priorities, also to be numbered. And, it is construed by the Supreme Court of Colorado that these special proceedings apply only to the rights as between the various ditches in the district, and that they do not apply to the rights of the respective consumers of the water under those ditches *inter se*. And, further, it is further held that the trial Court has no jurisdiction under these special proceedings to try or determine the rights of the consumers under these ditches *inter se*; and, therefore, that a decree rendered under such proceedings attempting to adjudicate the rights as between the co-owners of a ditch, canal, or reservoir, or as between the consumers of the water under the same is void.⁵ But while the statute provides only

¹ For the jurisdiction of the parties, see process, Sec. 1573.

² See Secs. 1790-1793.

³ Broadmoor etc. Co. v. Brookside etc. Co., 24 Colo. 541, 52 Pac. Rep. 792.

⁴ For the relations between the ditch companies and consumers, see Secs. 1475-1477.

⁵ "Not only do our irrigation statutes not contemplate a determination, as between themselves, of the rights
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of the different owners of a ditch to any particular quantity of water, but the decree entered in this case did not purport to do, as, indeed, it could not, establish any such rights. Our Court has expressly decided that, so far as the questions now under consideration are concerned, the object of these statutory proceedings is to determine the relative priorities of the different ditches in the water district, and that the rights of the owners of a ditch,

for the adjudication of the relative rights of the various ditches, and the decree goes nominally only to the ditches, it is for the benefit, without specifying them, of those who own the rights to the use of the waters, or the consumers. In other words, the owners of the ditches in these proceedings are regarded as the representatives of the consumers thereunder, and that the rights of the two combined constitute the completed appropriation for the entire quantity of water awarded to the respective ditches. But when it comes to the adjudication of the rights of the consumers as between themselves under these ditches or canals, which have been awarded rights and priorities, it is held that it must be by an action to quiet title, under the ordinary proceedings of a Court of equity, as discussed in the previous chapter.⁶

as between themselves, can not be determined therein. So that, even had the decree of 1889 expressly given to the plaintiffs the right, as against their co-owners, to the use of a certain quantity of water from either of the ditches in controversy, it would have been void." *Evans v. Swan*, 38 Colo. 92, 88 Pac. Rep. 149.

"The proceeding does not contemplate that there shall be an adjudication of the relative rights of the owners or consumers of water under any particular ditch, as between themselves, but only the relative priorities of the ditches, canals, and reservoirs. . . . And, while no ascertainment is made as to who are consumers under any particular ditch, necessarily the relative rights of ditch owners and all consumers are determined." *Combs v. Farmers' etc. Co.*, 38 Colo. 420, 88 Pac. Rep. 396.

And the same Court, in a still later case, after quoting the last clause above, said: "This rule, however, is intended to govern contentions between different ditch owners taking water from the same stream, and does not determine the rights of the consumers in a ditch as between themselves, nor

their relative priorities." *O'Neil v. Ft. Lyon Canal Co.*, 39 Colo. 487, 90 Pac. Rep. 849.

See, also, *Putnam v. Curtis*, 7 Colo. App. 437, 43 Pac. Rep. 1056; *Oppenlander v. Left Hand D. Co.*, 18 Colo. 142, 31 Pac. Rep. 854; *Hallett v. Carpenter*, 37 Colo. 30, 86 Pac. Rep. 317; *Farmers' etc. Co. v. Agricultural D. Co.*, 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149; *Park v. Park*, 45 Colo. 347, 101 Pac. Rep. 406; *Woods v. Sargent*, 43 Colo. 268, 95 Pac. Rep. 932; *Farmers' etc. Co. v. Riverside Irr. Co.*, 14 Idaho 450, 94 Pac. Rep. 761; *Creer v. Bancroft W. Co.*, 13 Idaho 407, 90 Pac. Rep. 228; *O'Neil v. Fort Lyon Canal Co.*, 39 Colo. 487, 90 Pac. Rep. 849.

⁶ See Chap. 78, Secs. 1530-1566; *Evans v. Swan*, 38 Colo. 92, 88 Pac. Rep. 149; *Combs v. Farmers' etc. Co.*, 38 Colo. 420, 88 Pac. Rep. 396; *Kimball v. Northern Colo. Irr. Co.*, 42 Colo. 412, 94 Pac. Rep. 333; *Cooper v. Shannon*, 36 Colo. 98, 85 Pac. Rep. 175, 118 Am. St. Rep. 95; *Grand Valley Irr. Co. v. Leshar*, 28 Colo. 273, 65 Pac. Rep. 44; *Gutheil etc. Co. v. Montclair*, 32 Colo. 420, 76 Pac. Rep. 1050; *Beesemer etc. Co. v. Woolley*,

From the above it can be readily seen that the Colorado statutes and practice are cumbersome in that they necessitate at least two suits before the rights of the individual consumer of the water can be finally determined and adjudicated in cases where the ditch or canal is owned by one party and the water rights by others: One suit under the statutory proceedings to determine the relative rights and priorities as between the different ditches and canals taking the water from the same stream or other source of supply, and a second suit in equity to determine the relative rights of the respective consumers *inter se* who take the water from the same ditch or canal. The statutes and the practice of the other States which follow the Colorado procedure in the main, differ radically in this respect, and do not limit the jurisdiction of the courts in statutory proceedings to the determination of the rights only as between the various ditches and canals taking the water from the same source of supply. The rule in some of the States is that, where no issue is raised as between the various consumers of the water under any ditch, the Court may make its award to such ditch or canal, regardless of the rights of the respective consumers under the same.⁷ But, upon the other hand, where an issue is raised between the rights of the respective consumers, under any particular ditch, the Court has jurisdiction in the same action to hear, determine, and adjudicate those rights and make its award to the respective individuals or consumers. In other States following the Wyoming system, although the Court is given original jurisdiction to try these actions,⁸ all

32 Colo. 437, 76 Pac. Rep. 1053, 105 Am. St. Rep. 91; Woods v. Sargent, 43 Colo. 268, 95 Pac. Rep. 932; Peterson v. Payne, 43 Colo. 184, 95 Pac. Rep. 301; Conley v. Dyer, 43 Colo. 22, 95 Pac. Rep. 304; Cache La Poudre etc. Co. v. Hawley, 43 Colo. 32, 95 Pac. Rep. 317; Bates v. Hall, 44 Colo. 360, 98 Pac. Rep. 3; Bowman v. Verdin, 40 Colo. 247, 90 Pac. Rep. 506; Park v. Park, 45 Colo. 347, 101 Pac. Rep. 406; Farmers' etc. Co. v. White, 32 Colo. 114, 75 Pac. Rep. 416; Cooper v. Shannon, 36 Colo. 98, 85 Pac. Rep. 175, 118 Am. St. Rep. 95.

⁷ In Idaho, in an action between a

canal company and an irrigation district, and no issue was raised as between the consumers, and they were not made parties to the action, the Supreme Court held that a failure to bring the consumers into court in no way vitiated the decree as between the parties who were in court. Farmers' etc. Co. v. Riverside Irr. Dist., 14 Idaho 450, 94 Pac. Rep. 761.

See, also, for parties to actions for statutory adjudication, Sec. 1573.

⁸ For the Wyoming system or the determination of water rights by boards, see Chap. 104.

consumers of the water and claimants to the same must be made parties to the action, and their rights must be determined and adjudicated, and a certificate is issued in his name, showing the amount of water to which each claimant is entitled.⁹

These special statutes of the various States providing for the adjudication of water rights within their respective jurisdictions have no application to cases where the point of diversion from the stream or other source of water supply is within a State, but the lands to be irrigated are without its limits; and, therefore, water will not be decreed by the Court of one State to irrigate lands within another State.¹⁰ In Colorado, where a statutory action is required in order to change the point of diversion,¹¹ an action to determine both the rights and priorities and to change the point of diversion will be maintained.¹²

§ 1573. Parties to such actions.—In the majority of the States having these statutory proceedings for the adjudication of water rights, the actions must be instituted by a real party in interest; that is to say, by persons, associations, or corporations owning or claiming any of such water rights.¹ By the Act of March 11, 1903, of the Idaho legislature,² it was attempted to make the water commissioner of the district in which the stream is situated the party plaintiff. But the Supreme Court of that State held this portion of the Act invalid, and that such actions must be instituted by the real party in interest.³ The Utah Act provides that the action shall be instituted by the State Engineer.⁴ In New Mexico, North Da-

⁹ See decrees, Secs. 1577-1581.

For the adjudication of water rights in various States, see Part XIV.

¹⁰ *Lamson v. Vailles*, 27 Colo. 201, 61 Pac. Rep. 231; *Turley v. Furman*, 16 N. M. 253, 114 Pac. Rep. 278.

¹¹ For change of point of diversion, see Secs. 857-860.

¹² *Hallett v. Carpenter*, 37 Colo. 30, 86 Pac. Rep. 317.

¹ For the statutes of the various States upon the subject, see Part XIV; 3 Colo. Stat. Ann., Morr. Ed., 1911, Sec. 3284; Rev. Stat. Colo., 1908, Sec. 3284.

² Laws Idaho, 1903, p. 223.

³ "The water commissioner, a public official, is not the real party in interest in a suit to quiet title or to determine adverse interest in property not claimed or belonging to him or the State." *Bear Lake County v. Budge*, 9 Idaho 703, 75 Pac. Rep. 614, 108 Am. St. Rep. 179.

⁴ Comp. Laws of Utah, 1907, Sec. 1271. Owing to the fact that the legislature failed to provide the necessary funds for the State Engineer to make the surveys provided for by the Act, few suits under the Act have been brought. The validity of this portion

kota, Oklahoma, South Dakota, and Washington, the statutes provide that the suit shall be instituted by the Attorney-General, unless the same shall have been instituted by private parties.⁵

Under the Colorado special statute for the adjudication of water rights, and the procedure thereunder, as the rights of the consumers under ditches, canals, or reservoirs, can not be determined in such actions, only the owners of such works are the proper parties in such actions.⁶ The corporations or other owners of such works represent the consumers for the purpose of suits against other owners of works of like nature, and the consumers under the same are not proper parties to such an action; but, afterward, their disputes as to their rights to the use of the water, both as between themselves, or as between themselves and the owners of the works, may be settled and adjudicated in the ordinary actions to quiet title.⁷ In other words, in Colorado, as these statutory actions lie for the adjudication of rights only as between ditches, canals, or reservoirs, the owners of such works are the only proper parties; and, when sued in such actions, they are regarded as the representatives of the consumers of the water under such works, and are bound to protect the interests of all in the aggregate.⁸

But in Idaho and the other States which follow largely the Colorado statutes and procedure in the adjudication of these rights, the consumers under any ditch, or other works, may or may not be

of the Act has not been tested. In the meantime water rights are being adjudicated under the ordinary equity procedure.

⁵ For the Statutes upon the subject, see Part XIV.

⁶ For the jurisdiction of courts—subject matter, see Sec. 1572.

⁷ For the adjudication of water rights in equity suits, see Chap. 78, Secs. 1530-1566.

For jurisdiction in special proceedings, subject matter, see Sec. 1572.

For actions to quiet title by a consumer as against a corporation owning the ditch, see *Kimball v. Northern Irr. Co.*, 42 Colo. 412, 94 Pac. Rep. 333; *Grand Valley Irr. Co. v. Leshner*, 28 Colo. 273, 65 Pac. Rep. 44; *Gutheil*

etc. Co. v. Montclair, 32 Colo. 420, 76 Pac. Rep. 1050; *Bessemer etc. Co. v. Woolley*, 32 Colo. 437, 76 Pac. Rep. 1053, 105 Am. St. Rep. 91; *Putman v. Curtis*, 7 Colo. App. 437, 43 Pac. Rep. 1056; *Park v. Park*, 45 Colo. 347, 101 Pac. Rep. 406.

⁸ *Combs v. Farmers' etc. Co.*, 38 Colo. 420, 88 Pac. Rep. 396; *O'Neil v. Ft. Lyon etc. Co.*, 39 Colo. 487, 90 Pac. Rep. 849; *Park v. Park*, 45 Colo. 347, 101 Pac. Rep. 406; *Montrose Canal Co. v. Loutzenhizer D. Co.*, 23 Colo. 233, 48 Pac. Rep. 532; *Farmers' etc. Co. v. Agricultural D. Co.*, 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149; *Supply D. Co. v. Elliott*, 10 Colo. 327, 15 Pac. Rep. 691, 3 Am. St. Rep. 586.

made parties to the action, where the action is originally brought to determine the rights as between two ditch companies. But, where the consumers are made parties and their claims to the use of the water are set up *inter se*, their rights must be determined and adjudicated in the same action. And, to this end, upon application of any of the original parties to the action, the general practice is for the Court to make an order bringing in all of such consumers, under any particular ditch or canal where there are controversies between them. Or, the same thing may be accomplished by the consumers themselves, by way of a complaint in intervention setting up their respective claims. But, upon the other hand, where the suit is between two companies, or other owners of water rights, where the water is furnished to consumers, to adjudicate their respective rights in the aggregate, the failure to bring into the action the consumers under the respective ditches and canals in no way voids or vitiates the decree as between the companies, who were parties to the action.⁹

§ 1574. **The pleadings or statements of claims.**—In the Acts of the various States providing for the statutory adjudication of water rights, it is generally provided that the statements of claims filed by the respective parties shall stand in the place of pleadings and issue be made thereon. And, while the technical forms of equity pleadings are superseded by these statements, it is required that the rights claimed must be set out therein with even greater particularity than is required in the pleadings under the regular practice, in suits brought for the same purpose, and which we have discussed in a previous chapter.

⁹ In an action in Idaho between a canal company and an irrigation district, where the consumers were not made parties to the action, and there was no suggestion before the trial court to make them parties, and the award of the water was made to the company and district respectively without objection in the Court below, the Supreme Court upon appeal held that, had it been insisted upon in the trial court, the consumers might properly have been made parties to the

action, but that in view of the facts, the failure to bring them into the court in no way voided or vitiated the decree as between the parties who were in court and participated in the action; and, further, that the question could not be heard for the first time on appeal on such objections in urging a reversal of the judgment. *Farmers' Co-op. D. Co. v. Riverside Irr. Dist.*, 14 Idaho 450, 94 Pac. Rep. 761.

In Colorado, as a basis for such an adjudication, the statute designates the facts to be included in the statements.¹ It is necessary for the party claiming a water right, and seeking an adjudication of the same, to file with the District Court a statement under oath, containing the name or names, together with the postoffice address of the claimant or claimants, with a description of the headgate, general course of the ditch or canal, and the name of any stream from which said ditch, canal, or reservoir is supplied with water, the length, width, and depth thereof, the time of the appropriation of the water by original construction, also by enlargement or extension, the present capacity of the ditch, canal, or reservoir, and also the number of acres lying under it, and being, or proposed to be, irrigated by water from such works. It is not necessary to give the names of the individuals supplied by any ditch, or the number of acres owned by each.² However, all the facts which are requisite to constitute a right should be set forth; and it is held that the mere difference in the form of the procedure does not vary the principles involved, nor dispense with these rules.

In Utah it is provided that the first pleading shall consist of a written statement by the State Engineer, filed with the Clerk of the District Court having jurisdiction of the case, which statement shall set forth the fact of the completion of the survey of the stream, or other source of water supply, the rights to the water of which are about to be adjudicated, the names and postoffice addresses of all persons, corporations, and associations using the water, so far as the same are known to the State Engineer, and shall also contain such other facts and information as he may deem necessary. Within six months after the service of process, as required by the statute, all persons claiming the right to the use of any of the water from said source of supply must file with the Clerk of said Court their written sworn statements of their claims to the water. These statements must include, as near as may be, the following: The name and postoffice address of the person, corporation, or association making the claim; the nature of the use of the water on which

¹ 3 Colo. Stat. Ann., Morr. Ed., cultural D. Co., 22 Colo. 513, 45 Pac. 1911, Secs. 3277, 3284; Rev. Stat. Rep. 444, 55 Am. St. Rep. 149.
Colo. 1908, Secs. 3277, 3284.

² Farmers' Ind. D. Co. v. Agri-

For the pleadings under the equity practice to adjudicate water rights, see Secs. 1447-1552.

the claim of appropriation is based; the flow per second of water used, and the time during which it has been used each year; the name of the stream or other source from which the water is diverted; the place on such stream or source where the water is diverted, and the nature of the diverting works; the date when the first work for diverting the water was begun, and the nature of such work; the dimensions, grade, shape, and nature of the diverting channel as originally constructed; the date when the original diverting channel was completed; the date when the water was first used, the flow per second, and the time during which the water was used the first year; the date and nature of each subsequent change made in the original diverting channel; the flow per second of the water and the time it was used each year between each of the changes so made; the place where and the manner in which the water was first used; the nature of each subsequent change in the place or manner of use, and the place and manner of present use; and such other facts as will clearly define the extent and nature of the appropriation claimed. If the water claimed to have been appropriated is used for irrigation the statement shall show, in addition to the above required facts, the area of land irrigated the first year and each subsequent year; the total area at present irrigated, and its location in section, township, and range wherein it is situated; the character of the soil, and the kind of crops raised during the first year of use and the first year after each subsequent change of channel, and during the last year in which the water was applied. If the water claimed to have been appropriated is used for developing power the statement shall show, in addition to the above required facts, the number, size, and kind of water wheels employed; the head under which each wheel is operated; the extent of power produced, and the purposes for which and the places where it is used, and the point where the water is returned to the natural stream. If the water claimed to have been appropriated is used for mining the statement shall show, in addition to the above required facts, the name of the mine and the mining district in which it is situated; the nature of the material mined, and the place where the water is returned to the natural channel of the stream.

The Clerk of the said Court shall enter the statement in a book kept for that purpose, and shall file and preserve the same in his office, noting the date of filing. The filing of each statement shall

be considered notice to all persons of the claim of the party making the same, and any person failing to make and deliver such statement of claim to the Clerk of the Court within six months after the first publication of the notice provided for, shall be forever barred and estopped from subsequently asserting any rights theretofore acquired to the use of water of said river, system, or water source, and shall be held to have forfeited all rights to the use of said water theretofore claimed by him; provided, that any claimant upon whom no other service of the notice shall be made than by publication in the newspaper may apply to the Court for permission to file a statement of claim after the time therefor has expired, and the Court, or Judge thereof, may extend the time for filing said statement, not exceeding one year from the first publication of said notice.³

The Court or the referee appointed is given the power to allow amendments to any statement or pleading.⁴

The statements required by the Acts in the other States which have adopted the statutory method of the adjudication of water rights by special proceedings for that purpose in the courts, are similar to the above. However, space will not permit an abstract of them here. But it must be borne in mind that all the essentials, as required by the particular statute of the jurisdiction in which the action is brought, must be specifically and definitely set forth in the statements of claims.

§ 1575. The process or notice of pending actions.—Some of the legislatures in the provisions for the statutory adjudication of water rights, in endeavoring "that the procedure for determining such rights should be as simple, effective, and inexpensive as practicable under the conditions,"¹ upon the subject of process or the service of notice of the pending of an action, in our opinion, have attempted to sacrifice the rights of the claimants to the water for the sake of obtaining a simple procedure.

In Colorado, however, the procedure in this respect is sufficient. The Act provides for three forms of notice: First, the Clerk of

³ For the notice or process, see Sec. 1575.

⁴ Comp. Laws of Utah, 1907, Secs. 1273, 1274, 1277, 1278.

¹ Boise etc. Co. v. Stewart, 10 Idaho 38, 77 Pac. Rep. 25, 321.

the Court must give notice of the pendency of the action by publication as provided in the Act; second, ten printed copies of the notice must be posted in ten public places in the water district by the party or parties moving the adjudication; third, the party or parties moving such adjudication shall cause a printed or written copy of such notice to be served on every person, association, or corporation having any claim to the use of the water, by delivering such copy personally to the person to be served, if such person, by due diligence, can be found in the county of his residence. If such person can not be found as aforesaid, then constructive service is provided for by leaving the notice at his residence, or place of business, or by mailing a copy of the notice.² But, in Utah, the statute provides that the notice of the pendency of the action may be given by publication of the notice published at least once a week for three successive months, and that the clerk shall also mail, by registered letter, to each of the persons, corporations, or associations whose names and addresses are given in the preliminary statement filed by the State Engineer, a copy of such notice.³

In Idaho, the Act of 1903⁴ provided that the service of summons upon all parties should be by publication in a newspaper of general circulation published in the county where such decree is entered and through which the stream flows, and if in more than one county, then in some newspaper of general circulation published in each of said counties; that no affidavit to obtain order for publication of said summons, and no order of publication of the same should be required; and that the affidavit of the publisher, proprietor, business manager, or editor of such newspaper that such summons has been duly published in such newspaper at least once a week for a period of not less than one month, shall be conclusive evidence of such publication and of due service of said summons upon each and every one of the defendants. The Supreme Court, in the first case which was brought before it upon the proposition,⁵ held that this portion of the Act was unconstitutional, upon the ground that the remedy by due course of law guaranteed by both the Federal and

² 3 Colo. Stat. Ann., Morr. Ed., 1911, Secs. 3286-3288; Rev. Stat., 1908, Secs. 3286-3288; *Doll v. McEllen*, — Colo. App. —, 121 Pac. Rep. 149.

³ Comp. Laws of Utah, 1907, Secs. 1271, 1272.

⁴ Idaho Laws, 1903, p. 223, Sec. 34.

⁵ *Bear Lake County v. Budge*, 9 Idaho 703, 75 Pac. Rep. 614, 108 Am. St. Rep. 179.

State constitutions requires that, before there is a judicial determination affecting the right to life, liberty, or property, process to obtain jurisdiction must be issued and personally served when practicable; and that constructive notice can only be made effective when actual service is impracticable. The Court, by Mr. Justice Sullivan, in the course of the opinion said: "If the power assumed by the legislature in the provisions of this Act in regard to the service of summons be sustained by this Court, it would lead to most fearful results, as it would enable them by special and limited law to settle controversies over titles to private property, and to take the property of one person against his consent and give it to another." ⁶

We are in hearty accord with the views taken by the Supreme Court of Idaho upon the subject of the service of process or notice of pendency of these actions. These actions being largely *in rem*,⁷ jurisdiction over the property can be acquired by the regular proceedings provided for by the statutes of all jurisdictions, even where the owner is not a resident, or the place of his residence not known. To quiet title to a tract of land, for the Court to acquire jurisdiction as against a non-resident claimant by constructive service, the proceedings must be had as prescribed by the general statutes upon the subject. It must be upon an affidavit or showing that the defendant is a non-resident and that personal service can not be had, in which must be also stated the last known address of the defendant; it must be upon an order of the Court for publication of the summons; it must be the mailing of a copy of the summons and complaint by the clerk to such defendant at his last known address; and it must be upon proof of both the publication and mailing in accordance with the statute. Now to prescribe by statute in actions to adjudicate the water rights, which make the same tract of land valuable, that the service shall be complete both as to non-resident and resident defendants, by publication merely, and that, too, without the showing of any necessity therefor, or upon any order of the Court, certainly exceeds the power of any legislature to enact, and still keep within the limitations of both the Federal and State constitutions. And, again, it is class legislation, permitting the service

⁶ See, also, for the question of due process of law, Secs. 1568, 1571, 1572.

For the service of process or notice

in the adjudication before boards, see Sec. 1587.

⁷ For the nature of these actions, see Sec. 1569.

of summons in these cases only by special, limited, and constructive service, that is not permitted by the general law of any State in other cases.

§ 1576. **The proceedings on the hearing—Referees.**—The Acts of all the States provide for a hearing of the cases brought to adjudicate water rights under these special proceedings. Notice of such hearing is required to be given all parties interested. Such hearing may be had before the Court itself; but, owing to the fact that these hearings are usually of great length and in some jurisdictions would practically require all of the time of the Court to the, at least, disarrangement of its other business, the Acts generally provide that the hearings may be had before a referee, or referees, to be appointed by the Court, with the usual powers.¹ At the trial the Court or referee must hear all the evidence that may be offered by any person, corporation, or association, in support or against any claim of appropriation, and a statement of which has been properly filed in accordance with the Act.

If the hearing is had before a referee, the usual procedure is that, after the completion of the testimony,² he is required to make an abstract thereof, also separate findings as to each claim submitted,

¹ *Colorado*.—3 Colo. Stat. Ann., Morr. Ed., 1911, Secs. 3291-3205; Rev. Stat., 1908, Secs. 3291-3205.

Utah.—Comp. Laws, 1907, Secs. 1275-1281.

Idaho.—Under the provisions of Sec. 4493, Ann. Code Civ. Proc., 1901 (Sess. Laws, 1901, p. 132), the Court or Judge has authority to appoint a referee to take the testimony in an action where the parties are numerous and the convenience of the witnesses and the ends of justice would be promoted thereby. *Boise City etc. Co. v. Stewart*, 10 Idaho 38, 77 Pac. Rep. 25, 321.

See, also, as to powers of referees, *New Mercer D. Co. v. Armstrong*, 21 Colo. 357, 40 Pac. Rep. 989; *Dorr v. Hammond*, 7 Colo. 79, 1 Pac. Rep. 693; *Ft. Morgan C. Co. v. South*

Platte etc. Co., 18 Colo. 1, 30 Pac. Rep. 1032, 36 Am. St. Rep. 259; *Kerr v. Dudley*, 26 Colo. 457, 58 Pac. Rep. 610; *Union Colony v. Elliott*, 5 Colo. 371; *Boise City etc. Co. v. Stewart*, 10 Idaho 38, 77 Pac. Rep. 25, 321; *Lamson v. Vailes*, 27 Colo. 201, 61 Pac. Rep. 281; *Louden etc. Co. v. Handy D. Co.*, 22 Colo. 102, 43 Pac. Rep. 535; *Daum v. Conley*, 27 Colo. 56, 59 Pac. Rep. 753; *Woods v. Sargent*, 43 Colo. 268, 95 Pac. Rep. 932.

² It is held that the referee before his report leaves his hands can reopen the hearing for the purpose of considering a statement and evidence thereon, where the necessary witnesses could not be procured before the close of the hearing. *New Mercer D. Co. v. Armstrong*, 21 Colo. 357, 40 Pac. Rep. 989.

and the conclusions of law in relation thereto, and shall report the same to the Court, together with a form of a decree; and the Court, upon notice to all the parties on a day set therein may review the report and enter the decree thereon, or set it aside, alter, or modify the same, and enter the decree thereon so altered and modified.³ It is also usually provided that all testimony taken before any referee shall be stenographically reported and the same, together with the other evidence in the matter, shall be transmitted to, preserved, and filed in the office of the Clerk of the Court, with the report of the referee. Exceptions to the findings and report of the referee may be taken by the parties as a basis of appeal to the Supreme Court.⁴

§ 1577. **The form and substance of decrees.**—The decrees rendered by the Court in these statutory proceedings to adjudicate water rights must not only be definite and certain, both as to the parties entitled to the use of the water and the quantity of water which they are entitled to use, as is the case of decrees under the ordinary equity procedure,¹ but also they must be rendered substantially in accordance with the formula as prescribed by the respective statutes. This tends, as can be readily seen, toward a uniformity of the forms of decrees within at least the same State.

In Colorado it is provided that the Court, in making such decree, shall number the several ditches and canals in the water district, concerning which adjudication is made, in consecutive order, according to the priority of appropriation of water thereby made by the original construction thereof, and shall also number the reservoirs in like manner, separately from ditches and canals, and shall further number each several appropriations of water consecutively, beginning with the oldest appropriation, without respect to the ditches or reservoirs, by means of which such appropriations are made; whether such appropriation shall have been made by means of construction, extension, or enlargement.² The Court must also

³ The findings of the referee may be modified either by the trial Judge or by the Supreme Court upon appeal. *Dorr v. Hammond*, 7 Colo. 79, 1 Pac. Rep. 693.

⁴ For decrees under these proceedings, see Secs. 1577-1579.

For appeal, see Sec. 1582.

¹ For decrees under the equity procedure, see Secs. 1558-1564.

² 3 Colo. Stat. Ann., Morr. Ed., 1911, Sec. 3290; Rev. Stat., 1908, Sec. 3290.

The same ditch may be awarded two or more priorities belonging to the same or different parties, based upon

make its award of the water to which each ditch is entitled by means of such appropriations, describing such amount by cubic feet per second of time, if the evidence shall show sufficient data to ascertain such cubic feet, and if not, by width, depth, and grade, and such other description as will most certainly and conveniently show the amount of water intended. The Court must further order that each and every party interested shall receive from the clerk a certificate, under the seal of the Court, setting forth the data contained in the decree as to his right. This certificate is for the information of the water commissioner of the district, and constitutes his warrant of authority for the distribution of water to the ditch involved.³

The decree must be expressly based upon beneficial use without waste, or else the actual beneficial use will be implied and read into the decree.⁴ As was said in a recent Colorado case:⁵ "The test is not necessarily the number of acres irrigated each year. If these tracts were farmed, and all the water necessary to irrigate them was beneficially used with reasonable diligence in the improvement of the land, it is sufficient. What was a sufficient amount of water, and was it applied to a beneficial use, is the test." But a decree is not void for its failure to fix the acreage under the ditch or canal.⁶

In Colorado it is held that a decree can not adjudicate the rights in more than a single water district, and provisions are made for the adjudication of rights in special districts, and when so adjudicated the decrees in each district are to be treated as a single de-

appropriations made at different times. *Nichols v. McIntosh*, 19 Colo. 22, 34 Pac. Rep. 278.

Where, however, in adjudicating priorities of water rights, the decree did not follow the statute in numbering the ditches and awarding the priorities, such errors are irregularities only, and do not render the decree void, so as to be subject to collateral attack. *Lake Fork D. Co. v. Haley*, 28 Colo. 513, 67 Pac. Rep. 158.

³ *Mills' Ann. Stat.*, 1905, Secs. 2403, 2408.

For the form of decrees, see *Magill v. Hyatt*, 20 Colo. App. 542, 80 Pac.

Rep. 472; *Park v. Park*, 45 Colo. 347, 101 Pac. Rep. 406.

⁴ *X. Y. etc. Co. v. Buffalo etc. Co.*, 25 Colo. 529, 55 Pac. Rep. 720; *Doll v. McEllen*, — Colo. App. —, 121 Pac. Rep. 149; *Medano etc. Co. v. Adams*, 29 Colo. 317, 68 Pac. Rep. 431; *Drach v. Isola*, 48 Colo. 134, 109 Pac. Rep. 748; *Woods v. Sargent*, 43 Colo. 268, 95 Pac. Rep. 932.

⁵ *Weldon Valley D. Co. v. Farmers' Pawnee Canal Co.*, — Colo. —, 119 Pac. Rep. 1056.

⁶ *Bates v. Hall*, 44 Colo. 360, 98 Pac. Rep. 3.

See, also, *Johnson v. Starling Irr. Co.*, 49 Colo. 482, 113 Pac. Rep. 496.

cree.⁷ Where the petition for the determination of priority of a water right merely asked for an adjudication "for irrigation and domestic purposes," a decree fixing the priority "for domestic, household, stock, and other beneficial purposes," is invalid as going beyond the prayer of the complaint.⁸

In Utah it is provided that the decree shall determine and establish the rights of the several claimants to the use of the water of the river system or water source; and, among other things, shall set forth the name and postoffice address of the person, corporation, or association entitled to the use of water; the quantity of water in acre feet, or the flow of water in second feet to be used; the purpose for which the water is to be used; the time during which the water is to be used each year; the name of the stream or other source from which the water is diverted; the place where it is diverted; the priority number of the right; the date of the right, and such other matter as will fully and completely define the right of such person, corporation, or association to the use of the water. If no appeal is taken from the decree within six months after the same has been entered, or, if the case is appealed within thirty days after final decree is entered, the clerk must issue to each person, corporation, or association a certificate in duplicate, setting forth the substance of the decree, as specified above. One copy is to be given to the appropriator, which must be recorded in the office of the County Recorder of the county in which the water is diverted from its natural channel, and the other to be delivered to the State Engineer, and filed in his office as a part of the records thereof.⁹

The statutes of the other States adopting this mode for the adjudication of water follow more nearly the form of decrees as set forth in the Utah law, than that in Colorado. The radical difference is that in Colorado the award of the water is made to the ditches and canals, or reservoirs, while in the other States the award is made to the persons, corporations, or associations using the water. Under the Colorado rule it is, therefore, held that in decrees under the statutory proceedings to adjudicate water rights, the only award

⁷ Sterling Irr. Co. v. Downer, 19 Colo. 595, 36 Pac. Rep. 787; Fort Lyon etc. Co. v. Arkansas etc. Co., 39 Colo. 332, 90 Pac. Rep. 1023.
⁸ Doll v. McEllen, — Colo. —, 121 Pac. Rep. 149.

⁹ Comp. Laws Utah, 1907, Secs. 1282, 1284.

See, also, Salt Lake City v. Gardner, — Utah —, 114 Pac. Rep. 147.

which can be made is to the respective ditches and canals, and that the rights to the use of the water by the individual consumers, under any ditch, as between themselves, can only be determined in a second action to quiet title.¹⁰ In the other States the respective rights of all, whether they are ditch owners or consumers, may be determined in the same action, provided that the issues in the case, as set forth in the pleadings or statements of claims, call for such an adjudication.

In Idaho the statute requires that the water decreed be made appurtenant to certain lands, and that such lands must be particularly described.¹¹ But in Colorado a decree awarding a certain priority of a certain amount of water to a particular canal does not attempt to attach priorities to any particular land.¹² A decree which is altered before entry, is held to be inadmissible in evidence.¹³

Costs may be assessed against the parties, at the discretion of the trial Court.¹⁴

§ 1578. Decrees as to inchoate rights.—At the time of the adjudication of water rights under a certain source of supply, it has often happened that the trial Court has found that certain claims,

¹⁰ An adjudication decreeing a certain priority in a certain amount of water to a particular canal is not intended to determine the rights of the consumers under that canal, except incidentally as against other canal owners. *O'Neil v. Ft. Lyon C. Co.*, 39 Colo. 487, 90 Pac. Rep. 849; *Combs v. Farmers' etc. Co.*, 38 Colo. 420, 88 Pac. Rep. 396; *Farmers' Independent D. Co. v. Agricultural D. Co.*, 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149; *Oppenlander v. Left Hand D. Co.*, 18 Colo. 142, 31 Pac. Rep. 854.

See, also, jurisdiction of courts, subject matter, Sec. 1572.

¹¹ But this is held not to be necessary where certain water is awarded and time given by the statute to apply it to a beneficial use. *Farmers' etc.*

Co. v. Riverside Irr. Dist., 16 Idaho 525, 102 Pac. Rep. 481.

That a water right can not be made an inseparable appurtenance to a certain tract of land, even in Idaho, see *Secs. 1015, 1016.*

¹² *O'Neil v. Ft. Lyon C. Co.*, 39 Colo. 487, 90 Pac. Rep. 849.

For form of decrees in Oregon, see *Hough v. Porter*, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; *Seaweed v. Duncan*, 47 Ore. 640, 84 Pac. Rep. 1043.

¹³ *Bates v. Hall*, 44 Colo. 360, 98 Pac. Rep. 3.

¹⁴ *Boise etc. Co. v. Stewart*, 10 Idaho 38, 77 Pac. Rep. 25, 321; *Farmers' etc. Co. v. Riverside Irr. Dist.*, 14 Idaho 450, 94 Pac. Rep. 761; *Hough v. Porter*, 51 Ore. 318, 95 Pac. Rep. 532, 98 Pac. Rep. 1083, 102 Pac. Rep. 723.

at the time of the rendition of the decree, were inchoate, or in an uncompleted condition. But these claims, under the Arid Region Doctrine of appropriation, if properly instituted, and if finally completed, and the water claimed thereunder actually applied to some beneficial use or purpose within a reasonable time, or within the time fixed by the statute, merge into valid and complete rights. The courts have at times been at a loss as to just what kind of a decree to render in such cases as to these inchoate rights. If such claims have not been abandoned, or forfeited under some statutory provision, that they should be recognized, in some manner, is conceded by all. The recognition of these inchoate rights was not provided for by the Colorado statute for the adjudication of water rights, and it was held that the District Court had no authority in such proceedings to give a definite decree in favor of a ditch not then completed; and, if such a decree was to be entered, that the Court would require not only that the ditch be completed, but that the water diverted through it be actually applied to a beneficial use, before awarding to it any priority.¹ In a later case, the Court citing its previous ruling, said: "We have decided that in these special proceedings the Court is without authority to award a ditch or canal, in advance of its completion, any definite quantity of water,² but we have not decided it was wrong for the Court to fix a date of priority of a canal begun, but not completed, at the time the decree was rendered."³ Therefore, the Court holds that, in such cases, the Court may render a decree definitely fixing the priority of the inchoate right in point of time; and, as to the quantity of water, the decree may be made conditional upon the completion of the ditch or canal and the application of the water to a beneficial use, within a reasonable time after the inception of the right, to be determined in a subsequent proceeding to make the decree final. As was said in a recent case by the Supreme Court, referring to a similar decree: "By that decree, therefore, the existence or non-existence of a vested or completed interest in this water was left open to future ascertainment and decision in some appro-

¹ *Water Supply etc. Co. v. Tenney*, 24 Colo. 344, 51 Pac. Rep. 505; *Water Supply etc. Co. v. Larimer & Weld etc. Co.*, 24 Colo. 332, 51 Pac. Rep. 496.

² *Citing Water Supply etc. Co. v. Tenney*, 24 Colo. 344, 51 Pac. Rep. 505.

³ *In re Priorities of Water Rights* in Dist. No. 12, 30 Colo. 270, 30 Pac. Rep. 891.

appropriate action or proceeding.”⁴ Or, as stated by the Court in a similar case: “It may be, and possibly is, the better practice to withhold entirely a decree, as to any element, until the ditch is finished and the water actually and beneficially applied.”⁵

In Idaho the statute requires the amount and the time for future application and use of the water, in case such a claim is made, to be fixed by the decree. The Federal Court, in construing this statute, upheld the same.⁶

§ 1579. Construction and effect of decree.—A Court must take notice of its former decree or adjudications of priorities of water rights in a given district and each subsequent hearing or adjudication is supplementary to the original, and each grant is related to every other grant, though to a different party.¹

One of the most important subjects for the Court to determine and decree in these actions is in regard to the quantity of water awarded to each party. As is the case in the ordinary equity proceedings for the same purpose, only so much water should be awarded to any party for any use as is reasonably necessary for that use or purpose.² As was held by the Supreme Court of Colorado, no waste of water should be countenanced by the courts, and decrees for its use should be withheld in the absence of evidence showing, *inter alia*, with reasonable certainty, the quantity continuously applied to some beneficial use;³ and, in another case, that where the decree is silent upon the subject, that beneficial use will

⁴ Conley v. Dyer, 43 Colo. 22, 95 Pac. Rep. 304.

See, also, Drach v. Isola, 48 Colo. 134, 109 Pac. Rep. 748; Bates v. Hall, 44 Colo. 360, 98 Pac. Rep. 3; Magill v. Hyatt, 20 Colo. App. 542, 80 Pac. Rep. 472; Waterman v. Hughes, 33 Colo. 270, 80 Pac. Rep. 891; Larimer & Weld Irr. Co. v. Wyatt, 23 Colo. 480, 48 Pac. Rep. 528; Crawford etc. Co. v. Needle Rock D. Co., 50 Colo. 176, 114 Pac. Rep. 655.

⁵ In re Priorities of Water Rights in Dist. No. 12, 30 Colo. 270, 80 Pac. Rep. 891.

⁶ Trade Dollar etc. Co. v. Fraser, 148 Fed. Rep. 537, 79 C. C. A. 37.

¹ Doll v. McEllen, — Colo. App. —, 121 Pac. Rep. 149.

² For decrees adjudicating water rights in equity, see Secs. 1530-1566.

³ X. Y. Irr. D. Co. v. Buffalo etc. Co., 25 Colo. 529, 55 Pac. Rep. 720; New Mercer D. Co. v. Armstrong, 21 Colo. 357, 40 Pac. Rep. 989; Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278; Broadmoor etc. Co. v. Brookside etc. Co., 24 Colo. 541, 52 Pac. Rep. 792; Bates v. Hall, 44 Colo. 360, 98 Pac. Rep. 3; Broad Run Inv. Co. v. Denel etc. Co., 47 Colo. 573, 108 Pac. Rep. 755; Park v. Park, 45 Colo. 347, 101 Pac. Rep. 406; Woods v. Sargent, 43 Colo. 268, 95 Pac. Rep. 932.

be implied and read into the decree.⁴ Again, as said by Mr. Justice Frick, in a Utah case: "The ultimate question for determination, however, is not how much water appellants required, but what amount they had applied to a useful and beneficial purpose for a term of years prior to the time when respondents made their appropriation."⁵ The decree rendered by the Court in these cases does not grant any new property rights, but merely embodies in a permanent form the evidence of those rights previously acquired.⁶ As was stated in a Colorado case: "No one is entitled to have a priority adjudged for more water than he has actually appropriated, nor for more than he actually needs."⁷ Where the Court found that the appellee made two distinct appropriations of water for a reservoir, the first on March 5, 1901, of 200 cubic feet per second, and the second on October 22d, of the same volume, a decree awarding appellee 400 cubic inches per second, as to March 5, 1901, was erroneous.⁸ A diversion and a promise to use in the future will not support the decree.⁹ Neither does the decree guarantee that the right awarded shall be a perpetual right regardless of the fact whether or not the water shall be used for a beneficial use or purpose. But the owner of the right is subject to its loss by abandonment by the failure to use the water subsequently to the decree. As stated by the Colorado Court: "It does not purport to be a perpetual insurance or guaranty to the owner of the ditch against a total or partial loss of his priority by abandonment. In that way he may lose the rights resulting from an appropriation and evidenced by the decree, just as he may where they have been acquired by purchase and conveyed by deed."¹⁰ Where the decree is susceptible of other meanings, one of which would be in accordance

For the economical use of water and the suppression of waste, see Chap. 49, Secs. 874-916.

⁴ Medano etc. Co. v. Adams, 29 Colo. 317, 68 Pac. Rep. 431.

⁵ Salt Lake City v. Gardner, — Utah —, 114 Pac. Rep. 147.

⁶ New Mercer D. Co. v. Armstrong, 21 Colo. 357, 40 Pac. Rep. 989; Alamosa etc. Co. v. Nelson, 42 Colo. 140, 93 Pac. Rep. 1112.

⁷ Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278.

See, also, Water Supply etc. Co. v. Tenney, 24 Colo. 344, 51 Pac. Rep. 505; Water Supply etc. Co. v. Larimer & Weld Irr. Co., 24 Colo. 322, 51 Pac. Rep. 496, 46 L. R. A. 322.

⁸ Windsor etc. Co. v. Lake Supply D. Co., 44 Colo. 214, 98 Pac. Rep. 729.

⁹ Ft. Morgan etc. Co. v. South Platte D. Co., 18 Colo. 1, 30 Pac. Rep. 1032, 36 Am. St. Rep. 259.

¹⁰ Alamosa etc. Co. v. Nelson, 42 Colo. 140, 93 Pac. Rep. 1112.

with the law by recognizing a valid appropriation only upon the application of the water to a beneficial use, and others would disregard the law in that respect, the former interpretation will be adopted.¹¹

In Idaho these conditional decrees are especially provided for in the Act, and where a company has works capable of diverting more water than it is then applying to a beneficial use, the decree shall allow it four years thereafter in which to apply the water to a beneficial use.¹²

A decree settling the rights on a particular source of water supply does not prevent the turning developed water into such stream and taking it out again for use below.¹³ And, where the flow of a stream is more at certain seasons of the year than at others a decree was sustained which provided that a senior appropriator should permit all the water in excess of his prior appropriation to flow down to the junior appropriator, whenever such excess was sufficient to be beneficially used by him.¹⁴ One effect of a decree is that where one has received the water according to the terms of the award therein made, he is afterward estopped from repudiating or attacking the decree.¹⁵

§ 1580. The review and modification of decrees—On petition of parties to the action.—The Colorado statute provides that the District Court, or the Judge thereof in vacation, shall have the power to order, for good cause shown, and upon terms just to all parties, and in such manner as may seem meet, a re-argument or review, with or without additional evidence, of any decree made under the provisions of the Act; but no such review or re-argument shall be ordered unless applied for by petition or otherwise, within two

¹¹ *Drach v. Isola*, 48 Colo. 134, 109 Pac. Rep. 748; *Crawford etc. Co. v. Needle Rock D. Co.*, 50 Colo. 176, 114 Pac. Rep. 655.

¹² *Farmers' etc. Co. v. Riverside Irr. Dist.*, 16 Idaho 525, 102 Pac. Rep. 481; *Trade Dollar etc. Co. v. Fraser*, 148 Fed. Rep. 587, 77 C. C. A. 37.

¹³ *Ripley v. Park etc. Co.*, 40 Colo. 129, 90 Pac. Rep. 75.

For developed water, see Secs. 1205, 1206.

¹⁴ *City of Telluride v. Blair*, 33 Colo. 353, 80 Pac. Rep. 1053.

¹⁵ *Kerr v. Burns*, 42 Colo. 285, 93 Pac. Rep. 1120; *Denver etc. Co. v. Middaugh*, 12 Colo. 434, 21 Pac. Rep. 565, 13 Am. St. Rep. 234; *Handy Ditch Co. v. South Side Ditch Co.*, 26 Colo. 333, 58 Pac. Rep. 30; *Doll v. McEllen*, — Colo. App. —, 121 Pac. Rep. 149.

years from the time of entering the decree complained of.¹ It is held that the petition for review must be based on facts on which the Court arrived at its conclusions for the decree, and not upon the Court's conclusions of law.² In other words, good cause must be shown before the review will be granted. No re-argument or review can be had unless applied for within two years from the entry of the decree, in the absence of fraud.³ But where an application is made, a rehearing may be granted, for, as said in a recent case, "the decree when first made is not final, because we find provisions for re-argument and review, and for appeals."⁴ And a party, whether or not he applies for a review of the decree under this provision, does not waive his right to appeal from the decree.⁵ Where such a proper petition for review is filed within the time specified by the Act, and is granted, the Court may set aside the decree pending its final determination, or permit it to stand until it shall make its final entry, since the power of the Court over the proceedings and decree is full and complete, and co-extensive with that which any Court has over its judgments and decrees.⁶ It will be noticed that the above provision, Section 3318 of the Colorado statute, applies only to the parties of the action. And it is held that even such a party, who knowingly neglected to notify the Court of his objec-

¹ 3 Colo. Stat. Ann., Morr. Ed., 1911, Sec. 3318; Rev. Stat., 1908, Sec. 3318.

² *Crippen v. Burroughs*, 27 Colo. 155, 60 Pac. Rep. 487, holding that the petition or application for rehearing must state facts, showing that the party has been aggrieved, to enable the Court to determine by examination of the petition whether, if the facts alleged therein are true, the decree should be amended or modified.

See, also, *Bio Grande etc. Co. v. Prairie D. Co.*, 27 Colo. 225, 60 Pac. Rep. 726; *Peterson v. Durkee*, 15 Colo. App. 258, 62 Pac. Rep. 370.

³ *In re Priorities of Water Rights* in Dist. No. 12, 33 Colo. 270, 80 Pac. Rep. 891; *Peterson v. Durkee*, 15 Colo. App. 258, 62 Pac. Rep. 370; *Crippen v. X. Y. Irr. D. Co.*, 32 Colo. 447,

76 Pac. Rep. 794; *Magill v. Hyatt*, 20 Colo. App. 542, 80 Pac. Rep. 472; *New Mercer D. Co. v. Armstrong*, 21 Colo. 357, 40 Pac. Rep. 989; *Boulder etc. Co. v. Lower Boulder D. Co.*, 22 Colo. 115, 43 Pac. Rep. 540; *Daum v. Conley*, 27 Colo. 56, 59 Pac. Rep. 753; *Nichols v. McIntosh*, 19 Colo. 22, 34 Pac. Rep. 278.

⁴ *Ft. Lyon Canal Co. v. Arkansas Valley etc. Co.*, 39 Colo. 332, 90 Pac. Rep. 1023.

⁵ *Daum v. Conley*, 27 Colo. 56, 59 Pac. Rep. 753, where application for review was made; *Child v. Whitman*, 7 Colo. App. 117, 42 Pac. Rep. 601, where application was not made.

⁶ *Peterson v. Durkee*, 15 Colo. App. 258, 62 Pac. Rep. 370; *Magill v. Hyatt*, 20 Colo. App. 542, 80 Pac. Rep. 472.

tions to the decree, which existed at the time it was rendered, was not entitled thereafter to file such a petition for rehearing.⁷ In a proceeding to reopen a decree, under this provision, the statement filed by a claimant in the original adjudication proceedings, may be introduced along with the decree to enable the Court to interpret or construe the decree.⁸

§ 1581. Modification of decrees—On independent action by those not parties to the action.—There is another provision of the Colorado statute which applies only to persons, associations, or corporations who were not parties to such an action to adjudicate priorities.¹ This section, in effect, provides that nothing in the Act or in any decree rendered under the provisions thereof, shall prevent any person, association, or corporation from bringing or maintaining any suit or action whatsoever hitherto allowed in any Court having jurisdiction, to determine any claim of priority of right to water, by appropriation thereof, for irrigation or other purposes, at any time within four years after the rendering of a final decree under the Act in the water district in which such rights may be claimed.² And the following section also provides that,³

⁷ *Rio Grande etc. Co. v. Prairie D. Co.*, 27 Colo. 225, 60 Pac. Rep. 726.

⁸ *New Mercer D. Co. v. Armstrong*, 21 Colo. 357, 40 Pac. Rep. 989.

¹ 3 Colo. Stat. Ann., Morr. Ed., 1911, Sec. 3313; Rev. Stat., 1908, Sec. 3313.

² The latter part of Section 3313 also provides: "Save that no writ of injunction shall issue in any case restraining the use of water for irrigation in any water district wherein such final decree shall have been rendered, which shall affect the distribution of water in any manner adversely to the rights determined and established by and under such decree, but injunctions may issue to restrain the use of any water in such district not affected by such decree, and restrain violations of any right thereby established, and

the water commissioner of every district where such decree shall have been rendered shall continue to distribute water according to the rights of priority determined by such decree, notwithstanding any suits concerning water rights in such district, until in any suit between parties the priorities between them may be otherwise determined, and such water commissioner have official notice by order of the Court or Judge determining such priorities, which notice shall be in such form and so given as the said Judge shall order."

For the construction of the above section, see *Broad Run Inv. Co. v. Deuel etc. Co.*, 47 Colo. 573, 108 Pac. Rep. 755; *Montrose Canal Co. v. Loutsenhizer D. Co.*, 23 Colo. 233, 48 Pac. Rep. 532; *Crippen v. X. Y. Irr. Co.*, 32 Colo. 447, 76 Pac. Rep. 794.

after the lapse of four years from the time of rendering a final decree in any water district, all parties whose interests are thereby affected shall be deemed and held to have acquiesced in the same, except in cases before then brought, and thereafter all persons shall be forever barred from setting up any claim to priority of rights to the water in such water district adverse or contrary to the effect of such decree. These provisions are held to apply only to persons, associations, or corporations who were either not parties to the original action,⁴ or who were parties, but whose rights grow out of matters arising subsequent to the decree in the original action.⁵ These provisions fix a special limitation of four years in such cases in which an independent action may be brought by such parties,⁶ as to the rights and matters not tried and finally adjudicated in the original action;⁷ and, if such action is not brought within the time specified, by such parties, they are deemed to have acquiesced in

³ Mills' Ann. Stat., 1905, Sec. 2435;

⁸ Colo. Stats. Ann., 1911, Sec. 3314.

⁴ "Section 2434 does not permit one who was a party to an adjudication proceeding to maintain an independent action against another party to such a proceeding for the purpose of fixing rights different from those determined in the adjudication proceedings, because such proceedings are, as to such parties, *res judicata*." Ft. Lyon Canal Co. v. Arkansas etc. Co., 39 Colo. 332, 90 Pac. Rep. 1023.

This section is held, also, not to apply to parties to the action who failed to avail themselves of the statute for rehearing, under Section 2425, discussed above. Crippen v. X. Y. Irr. D. Co., 32 Colo. 447, 76 Pac. Rep. 794.

See, also, Handy D. Co. v. South Side D. Co., 26 Colo. 333, 58 Pac. Rep. 30; Montrose etc. Co. v. Loutsenheiser D. Co., 23 Colo. 233, 48 Pac. Rep. 532; Greer v. Heiser, 16 Colo. 306, 26 Pac. Rep. 770; Consolidated etc. Co. v. New Loveland etc. Co., 27 Colo. 521,

62 Pac. Rep. 364; Waterman v. Hughes, 33 Colo. 270, 80 Pac. Rep. 891; Broad Run etc. Co. v. Denel etc. Co., 47 Colo. 573, 108 Pac. Rep. 755; Johnson v. Sterling etc. Co., 49 Colo. 482, 113 Pac. Rep. 496.

⁵ Crippen v. X. Y. Irr. D. Co., 32 Colo. 447, 76 Pac. Rep. 794; Handy D. Co. v. South Side D. Co., 26 Colo. 333, 58 Pac. Rep. 30; Montrose C. Co. v. Loutsenheiser etc. Co., 23 Colo. 233, 48 Pac. Rep. 532.

⁶ Nichols v. McIntosh, 19 Colo. 22, 34 Pac. Rep. 278; Putnam v. Curtis, 7 Colo. App. 437, 43 Pac. Rep. 1056; Greer v. Heiser, 16 Colo. 306, 26 Pac. Rep. 770.

⁷ Handy etc. Co. v. South Side D. Co., 26 Colo. 333, 58 Pac. Rep. 30; Montrose etc. Co. v. Loutsenheiser D. Co., 23 Colo. 233, 48 Pac. Rep. 532; Upper Platte etc. Co. v. Ft. Morgan etc. Co., 27 Colo. 214, 60 Pac. Rep. 484; Boulder etc. Co. v. Lower Boulder etc. Co., 22 Colo. 115, 43 Pac. Rep. 540.

the decree, and are forever barred from setting up any claim to the contrary.⁸

But it is held that neither Section 3318 nor Section 3313 of the Colorado statute, discussed above, is applicable to cases where the priority of right was determined therein, but the decree was conditional as to the quantity of water, from the fact that the canal through which it was made was incomplete when the decree was rendered and, therefore, the right to the water was inchoate.⁹ It is also held that the limitation of four years set by the statute in the above section, does not apply to an action to set aside a decree upon the ground of fraud, but that such an action will lie, under the Colorado statute, to within three years after the discovery of the fraud.¹⁰

The object of the passage of the provisions above discussed and in the previous section, as stated by the Supreme Court of Colorado, was that: "The doctrine of priority to the use of water for irrigation was not, at the time of the passage of these Acts, and is not yet, fully developed. To have given the statutory decree at once the force and effect of a judgment *in rem* would have been contrary to the best interests of the State, which require an economical use of the water in order that the largest acreage may be brought under cultivation. Lands, when first irrigated, require more water than after the soil has become thoroughly saturated by repeated flooding; and the exact amount required to properly irrigate a given tract of land can only be determined by experiment. Hence, the necessity for the various provisions of the statute allowing a decree to be opened within certain fixed periods after its rendition. A conclusive adjudication at the time when the practical application of the proceedings was a matter of conjecture might have been disastrous. To guard against such results as these, it is not unreasonable to suppose that the legislature would make some provision." ¹¹

⁸ Upper Platte etc. Co. v. Ft. Morgan etc. Co., 27 Colo. 214, 60 Pac. Rep. 484; Fort Lyon etc. Co. v. Arkansas etc. Co., 39 Colo. 332, 90 Pac. Rep. 1023.

⁹ *In re* Priorities of Water Rights in Dist. No. 12, 33 Colo. 270, 80 Pac. Rep. 891.

See, also, Larimer & Weld Irr. Co.

v. Wyatt, 23 Colo. 480, 48 Pac. Rep. 528.

For decrees as to inchoate rights, see Sec. 1578.

¹⁰ Peck Lateral D. Co. v. Pella Irr. D. Co., 19 Colo. 222, 34 Pac. Rep. 988.

¹¹ Loudon etc. Co. v. Handy D. Co., 22 Colo. 102, 43 Pac. Rep. 535.

§ 1582. **Appeals from judgments and decrees.**—The statutes of all the States, providing for special proceedings for the adjudication of water rights, also provide for appeals from the decree and final judgment of the District or trial Court, to the Supreme Court of the State. In some of the States no special mode of procedure is provided for. In Utah it is provided that the decree so entered by the District Court may be appealed from to the Supreme Court, in like manner as from decrees and judgments in other cases; provided, that such appeal shall be taken within six months after the entry of said decree, and all proceedings on appeal shall be conducted according to the provisions of the code of civil procedure, and the practice on appeals from the District Court to the Supreme Court.¹ This mode of appeal is also followed in the majority of the other jurisdictions.²

In Colorado the Acts provide for special proceedings for appeal in these cases.³ It is provided, in effect, that any party or parties representing any ditch, canal, or reservoir, or any number of parties representing two or more ditches, canals, or reservoirs, which are affected in common with each other by any portion of the decree, by which he or she or they may feel aggrieved, may have an appeal from said District Court to the Supreme Court.⁴ The party or

¹ Comp. Laws Utah, 1907, Sec. 1283.

² For appeals under the ordinary equity proceedings, see Sec. 1565.

³ 3 Colo. Stat. Ann., 1911, Secs. 3307-3312; Rev. Stat., 1908, Secs. 3307-3312; Mills' Ann. Stat., 1905, Secs. 2427-2432.

⁴ Prior to the consolidation of the Colorado Court of Appeals with its Supreme Court it was held that such appeals would lie only to the Supreme Court, upon the ground that such actions related to the freehold. *Wyatt v. Larimer & Weld Irr. Co.*, 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280.

See, also, *Hess v. La Junta etc. Co.*, 25 Colo. 515, 55 Pac. Rep. 728; *Daum v. Conley*, 27 Colo. 56, 59 Pac. Rep. 753.

A party does not waive his right

to an appeal regardless of the fact as to whether or not he applied for a review of the decree under the provisions therefor. *Daum v. Conley*, 27 Colo. 56, 59 Pac. Rep. 753; *Child v. Whitman*, 7 Colo. App. 117, 42 Pac. Rep. 601; *Kerr v. Dudley*, 26 Colo. 457, 58 Pac. Rep. 610.

As the statute only applies to the adjudication of water rights as between ditches, canals, or reservoirs, the appeal statute only authorizes an appeal from such a decree by parties representing such a ditch or other works. The consumers under such a ditch, etc., are not entitled to appeal because of the failure of the owner of the works to perfect his appeal, where such failure is due to a mistake in the procedure regulating the appeal, and not to fraud or in-

parties joining in such appeal shall file a statement in writing, verified by affidavit in the District Court, which statement shall show that the appellants claim a valuable interest in the ditch, canal, or reservoir, also stating the name or names, or otherwise the description of the same, and the name or names, or otherwise the description of any one or more other ditches, canals, or reservoirs, which by said decree derive undue advantage in respect to priority as against that of those represented by appellants; and shall also set forth the name or names of the party or parties claiming such other one or more ditches, canals, or reservoirs affected in common by said decree adversely to the interest of appellant or appellants, and praying that an appeal be allowed against such other parties appellees. If the Court, or Judge in vacation, on examination, finds such statement in accordance with the statement of claim filed by the parties named as appellees, he shall approve the same and make an order allowing the appeal, and fix the amount of the appeal bond, which shall be conditioned for the payment of costs, which may be awarded against them or any of them in the Supreme Court, and which bond must be duly executed by the appellants.⁵ Such order must be entered of record, and the appellants shall cause a certified copy thereof to be served on each of the appellees in the same manner as summonses are served, and shall also cause the said order to be published in the same manner as the original notices of suit are required to be published. The appellants shall file the transcript of record of the District Court with the Clerk of the Supreme Court at any time within six months after the appeal shall be allowed.⁶ Only so much of the decree appealed from, and so

tentional neglect of the consumers. *Randall v. Rocky Ford D. Co.*, 29 Colo. 430, 68 Pac. Rep. 240.

See, also, jurisdiction, subject matter, Sec. 1572.

⁵ See *Daum v. Conley*, 27 Colo. 56, 59 Pac. Rep. 753.

⁶ It will be noticed that the time within which an appeal must be taken is not fixed by the statute, but it is held that the appeal can only be taken within two years after the decree was entered. *Upper Platte etc. Co. v. Ft. Morgan etc. Co.*, 27 Colo. 214, 60 Pac.

Rep. 484; *Daum v. Conley*, 27 Colo. 56, 59 Pac. Rep. 753.

It is also held that, after the Judge of the District Court has signed the order allowing the appeal the following steps prescribed by the statute must be taken within the time as therein prescribed. Such provisions are mandatory, and the Supreme Court has no power to grant any extensions, but must dismiss the appeal if a motion therefor is made. *Baer Bros. etc. Co. v. Wilson*, 32 Colo. 500, 77 Pac. Rep. 245.

much of the evidence as shall affect the appropriations of water claimed of the several ditches, canals, and reservoirs mentioned in the order allowing the appeal, need be copied into the bill of exceptions.⁷

The Supreme Court is given the power to make any and all rules as may be necessary and expedient in furtherance of the Act, as well as to the preparation of the cases for submission as to supplying deficiencies of record, if any, and for avoiding unnecessary costs and delay. The Supreme Court is also given the power to make such a decree in the matters involved in the appeal as should have been made by the District Court, or direct in what manner the decree of that Court shall be amended.⁸ Also, on the dismissal of such appeal, or on affirming or reversing the parts of the decree appealed from, the Supreme Court shall award costs, as in its discretion shall be found and held to be equitable.

The mode of the taking of appeals in such cases, where special statutes are provided therefor, must be in accordance with such special statutes, and the provisions of the code of civil procedure does not apply to such cases.⁹ In Colorado the filing of the statement of claims with the District Court is the only method by which the appeal can be allowed.¹⁰ And the regulations prescribed by the

The notice must be published within the time prescribed. *Napier v. Glenwood etc. Co.*, 49 Colo. 208, 112 Pac. Rep. 323.

See, also, *Needle Rock D. Co. v. Crawford-Clipper D. Co.*, 32 Colo. 209, 75 Pac. Rep. 424.

⁷ *Catlin etc. Co. v. Burke*, 22 Colo. 419, 45 Pac. Rep. 387, holding that it is only necessary to incorporate all the evidence bearing upon the particular point in question in the bill of exceptions.

But objections and exceptions taken on the hearing of the referee's report are a part of the record and can not be stricken therefrom on appeal. *Daum v. Conley*, 27 Colo. 56, 59 Pac. Rep. 753.

⁸ See *Great Plains W. Co. v. Lamar C. Co.*, 31 Colo. 96, 71 Pac. Rep. 1119;

Croke v. American Nat. Bank, 18 Colo. App. 3, 70 Pac. Rep. 229; *Magill v. Hyatt*, 20 Colo. App. 542, 80 Pac. Rep. 472; *Means v. Stow*, 31 Colo. 382, 73 Pac. Rep. 48.

As to rules, see *La Junta etc. Co. v. Hess*, 25 Colo. 513, 55 Pac. Rep. 729; *Windsor etc. Co. v. Lake Supply D. Co.*, 44 Colo. 214, 98 Pac. Rep. 729; *Doll v. McEllen*, — Colo. App. —, 121 Pac. Rep. 149.

See, also, for appeals in ordinary equity cases, Secs. 1565.

⁹ *Daum v. Conley*, 27 Colo. 56, 59 Pac. Rep. 753; *Hess v. La Junta etc. Co.*, 25 Colo. 515, 55 Pac. Rep. 728; *Means v. Stow*, 31 Colo. 382, 73 Pac. Rep. 48; *Means v. Gotthelf*, 31 Colo. 168, 71 Pac. Rep. 1117.

¹⁰ *Daum v. Conley*, 27 Colo. 56, 59 Pac. Rep. 753.

statute for taking such an appeal are mandatory, and can not be waived or ignored by the parties.¹¹ As in equity cases¹² it is the duty of the Appellate Court to weigh all the evidence with a view to a just determination of the controversy.¹³ But the Court will not disturb the decree of the trial Court unless it is well satisfied that the judgment is so unsupported by the evidence as to be against its manifest weight, or the record compels the conclusion that the judgment was the result of those influences, motives, or considerations which the law does not permit to control the findings of either a Court or jury.¹⁴ And, when the question depends upon the weight of the evidence for its determination, and the evidence is conflicting, or of a vague and uncertain character, the Appellate Court, as in other cases, will not disturb the decree.¹⁵

§ 1583. The decree as *res judicata*.—The decree of the Court in these statutory proceedings to adjudicate water rights, as is the case in ordinary equity actions,¹ as to the matters properly embodied therein, unless the same be appealed or proceedings be taken to reopen and review the same, in accordance with the provisions of the statute, and, if so taken, after they have been finally determined, is *res judicata* between the parties,

¹¹ *Napier v. Glenwood etc. Co.*, 49 Colo. 208, 112 Pac. Rep. 323; *Needle Rock D. Co. v. Crawford-Clipper D. Co.*, 32 Colo. 209, 75 Pac. Rep. 424; *Baer Bros. etc. Co. v. Wilson*, 32 Colo. 500, 77 Pac. Rep. 245; *Haines v. Fearnley*, — Colo. —, 117 Pac. Rep. 162.

¹² For appeals in equity cases, see Sec. 1565.

¹³ *Sieber v. Frink*, 7 Colo. 148, 2 Pac. Rep. 901; *Childs v. Lowenbruck*, 2 Colo. App. 92, 29 Pac. Rep. 1014; *La Jara etc. Assn. v. Hansen*, 35 Colo. 105, 83 Pac. Rep. 644; *X. Y. Irr. D. Co. v. Buffalo Creek Irr. Co.*, 25 Colo. 529, 55 Pac. Rep. 720; affirming *Id.*, 9 Colo. App. 438, 49 Pac. Rep. 624.

¹⁴ *Bugh v. Rominger*, 15 Colo. 452, 24 Pac. Rep. 1046.

An objection that a referee failed to take the oath prescribed will not be considered when made for the first time on appeal. *Kerr v. Dudley*, 26 Colo. 457, 58 Pac. Rep. 610.

A decree based on a statute subsequently declared invalid will be reversed on appeal. *Rio Grande etc. Co. v. Prairie D. Co.*, 27 Colo. 225, 60 Pac. Rep. 726.

¹⁵ *Gates v. Settlers' etc. Co.*, 19 Okla. 83, 91 Pac. Rep. 856; *Ripley v. Park Center etc. Co.*, 40 Colo. 129, 90 Pac. Rep. 75.

For the consideration of the evidence on appeal in equity cases, see Sec. 1565.

¹ For *res judicata* in equity actions, see Secs. 1563, 1564.

and thereafter proceedings can not be taken to reopen the decree by one of the parties to the action, except in case of fraud, for the purpose of making any change or correction in the decree.² It therefore follows that a statutory decree is *res judicata* as to the quantity of water awarded to any particular ditch or canal, and can not be attacked collaterally.³ It is also held that even a mistake of the District Court in computing the carrying capacity of a ditch can not be corrected by a collateral attack upon the decree, made

² For decrees adjudicating water rights in equity, see Secs. 1557-1564.

A general adjudication of water rights under statutory provisions therefor is conclusive as to parties to the proceedings properly served with notice, and unless impeached for fraud, or application for review thereof is made by the parties within two years, the provisions of the decree are final and binding. Broad Run Inv. Co. v. Deuel etc. Co., 47 Colo. 573, 108 Pac. Rep. 755; Ft. Lyon Canal Co. v. Arkansas Valley etc. Co., 39 Colo. 332, 90 Pac. Rep. 1023, where it is held that Section 2434 does not permit one who was a party to the action to maintain an independent action against another party to such proceeding for the purpose of fixing rights different from those determined in the decree, because such proceedings are, as to such parties, *res judicata*.

See, also, Loudon C. Co. v. Handy D. Co., 22 Colo. 102, 43 Pac. Rep. 535; Montrose C. Co. v. Loutsenheizer etc. Co., 23 Colo. 233, 48 Pac. Rep. 532; Handy D. Co. v. South Side D. Co., 26 Colo. 333, 58 Pac. Rep. 30; Consolidated etc. Co. v. New Loveland etc. Co., 27 Colo. 521, 62 Pac. Rep. 364; Crippen v. X. Y. Irr. Co., 32 Colo. 447, 76 Pac. Rep. 794; New Mercer D. Co. v. Armstrong, 21 Colo. 357, 40 Pac. Rep. 989; Boulder etc. Co. v. Lower Boulder D. Co., 22 Colo. 115, 43 Pac. Rep. 540; Farmers' Ind.

D. Co. v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149; Water Supply etc. Co. v. Larimer & Weld Irr. Co., 24 Colo. 322, 51 Pac. Rep. 496, 46 L. R. A. 322; Alamosa Creek C. Co. v. Nelson, 42 Colo. 140, 93 Pac. Rep. 1112; Farmers' Union D. Co. v. Rio Grande C. Co., 37 Colo. 512, 86 Pac. Rep. 1042; Kerr v. Burns, 42 Colo. 285, 93 Pac. Rep. 1120; Lake Fork etc. Co. v. Haley, 28 Colo. 513, 67 Pac. Rep. 158; Ft. Lyon etc. Co. v. Arkansas etc. Co., 39 Colo. 332, 90 Pac. Rep. 1023; Wadsworth etc. Co. v. Brown, 39 Colo. 57, 88 Pac. Rep. 1060; Lower Latham D. Co. v. Bijou etc. Co., 41 Colo. 212, 93 Pac. Rep. 483; Doll v. McEllen, — Colo. App. —, 121 Pac. Rep. 149.

³ Alamosa Creek C. Co. v. Nelson, 42 Colo. 140, 93 Pac. Rep. 1112; O'Brien v. King, 41 Colo. 487, 92 Pac. Rep. 945; New Mercer D. Co. v. Armstrong, 21 Pac. Rep. 357, 40 Pac. Rep. 989; Boulder etc. Co. v. Lower Boulder etc. Co., 22 Colo. 115, 43 Pac. Rep. 540; Platte Valley etc. Co. v. Central Trust Co., 32 Colo. 102, 75 Pac. Rep. 391; Broad Run Inv. Co. v. Deuel etc. Co., 47 Colo. 573, 108 Pac. Rep. 755; Farmers' etc. Co. v. Rio Grande etc. Co., 37 Colo. 512, 86 Pac. Rep. 1042; Wadsworth etc. Co. v. Brown, 39 Colo. 57, 88 Pac. Rep. 1060.

after the time for its reformation and review of the trial Court has gone by, and when also the time for appeal has expired.⁴ In fact, all the matters adjudicated in the trial and covered by the decree, are *res judicata*. Therefore, the decree is *res judicata* as to the question of abandonment prior to the date of the decree.⁵ But the decree does not affect the question of abandonment after the same was rendered, for the reason that a decreed water right may be abandoned.⁶

In Colorado a decree in an action between ditch companies is conclusive as to the rights awarded to the respective ditches on the persons or consumers receiving water from the same.⁷ Again, in Colorado, owing to the provisions for rehearing,⁸ independent suits by those not parties to the original action,⁹ and appeal, a decree in that State can not be regarded as final until the time has elapsed sufficient to bar such matters, and those pending in the meantime have been fully determined. Notwithstanding these provisions, it is held that a decree, when first entered, is *res judicata* as between the parties to the action, and as to the subject matter covered by such decree, until the same is attacked, reviewed, or modified in the manner provided by the statute.¹⁰ And, as respects decrees entered in different suits for different irrigation districts, but involving the

⁴ *Water Supply etc. Co. v. Larimer & Weld Irr. Co.*, 24 Colo. 322, 51 Pac. Rep. 496, 46 L. R. A. 322.

⁵ *O'Brien v. King*, 41 Colo. 487, 92 Pac. Rep. 945; *Alamosa Creek C. Co. v. Nelson*, 42 Colo. 140, 93 Pac. Rep. 1112.

⁶ *Alamosa etc. Co. v. Nelson*, 42 Colo. 140, 93 Pac. Rep. 1121; *Drach v. Isola*, 48 Colo. 134, 109 Pac. Rep. 748; *New Mercer etc. Co. v. Armstrong*, 21 Colo. 357, 40 Pac. Rep. 989; *Boulder etc. Co. v. Leggett etc. Co.*, 36 Colo. 455, 86 Pac. Rep. 101.

⁷ *Combs v. Farmers' etc. Co.*, 38 Colo. 420, 88 Pac. Rep. 396.

See, also, *Montezuma Canal Co. v. Smithville Canal Co.*, 218 U. S. 317, 54 L. Ed. 1074, 31 Sup. Ct. Rep. 67; affirming *Id.*, 11 Ariz. 99, 89 Pac. Rep. 512, holding that a decree is *res judi-*

cata as to canal owners, and the water users under such canals in a subsequent controversy over the respective rights of the appropriators of the waters of the river.

⁸ See Sec. 1580.

⁹ See Sec. 1581.

¹⁰ "The decree when first entered is not final, because we find provisions for reargument and review, and for appeals. Notwithstanding these provisions, however, the decrees are *res adjudicata* between those who were parties to, or participated in, the proceedings in which such decrees were rendered, and can only be attacked, reviewed, or modified in the manner provided by law. *Ft. Lyons etc. Co. v. Arkansas etc. Co.*, 39 Colo. 332, 90 Pac. Rep. 1023.

right to the use of the water from the same common source of supply, the Colorado Court holds that the resulting decrees are conclusive and binding upon all those within the same water district, and *prima facie* correct as between the rights in the different water districts, and become conclusive and *res judicata* as to those rights upon the lapse of the four-year statute of limitations, or upon the decree of the Court in an independent action, as provided for under Section 2434.¹¹

However, the decrees rendered in these special adjudication proceedings, as is the case with other decrees, are not *res judicata* as to persons or companies who were not parties to such proceedings.¹² The same may be said as to matters not adjudicated by the decree, or as to matters arising subsequent thereto.¹³ Decrees rendered as to inchoate rights are not *res judicata* as to such rights.¹⁴ But one who was a party to the action, and who submitted without objection to the jurisdiction of the Court, and accepted the benefits of the decree for several years thereafter, will be estopped from assailing or

¹¹ 3 Colo. Stat. Ann., Morr. Ed., 1911, Sec. 3313; Rev. Stat., 1908, Sec. 3313; Mills' Ann. Stat., 1905, Sec. 2434; Lower Latham D. Co. v. Bijou Irr. Co., 41 Colo. 212, 93 Pac. Rep. 483; Ft. Lyon C. Co. v. Arkansas Valley etc. Co., 39 Colo. 332, 90 Pac. Rep. 1023; Farmers' Independent D. Co., v. Agricultural D. Co., 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149.

¹² See Secs. 1563, 1564; Oppenlander v. Left Hand D. Co., 18 Colo. 142, 31 Pac. Rep. 854; Lower Latham D. Co. v. Loudon etc. Co., 27 Colo. 267, 60 Pac. Rep. 629, 83 Am. St. Rep. 80.

Where the enforcement of a judgment violates his rights, a stranger thereto may maintain suit to enjoin it. Crippen v. X. Y. Irr. D. Co., 32 Colo. 447, 76 Pac. Rep. 794.

¹³ McLean v. Farmers' etc. Co., 44 Colo. 184, 98 Pac. Rep. 16; Buckers etc. Co. v. Farmers' etc. Co., 31 Colo. 62, 72 Pac. Rep. 49; Alamosa etc. Co.

v. Nelson, 42 Colo. 140, 93 Pac. Rep. 1121; Montrose v. Loutsenheizer etc. Co., 23 Colo. 233, 48 Pac. Rep. 532; Josslyn v. Daly, 15 Idaho 137, 96 Pac. Rep. 568; Park v. Park, 45 Colo. 347, 101 Pac. Rep. 406; Evans v. Swan, 38 Colo. 92, 88 Pac. Rep. 149.

Such decree is not conclusive as to other reservoirs than those the rights to which were adjudicated, nor as to parties not parties to the prior proceeding. Windsor etc. Co. v. Lake Supply D. Co., 44 Colo. 214, 98 Pac. Rep. 729.

¹⁴ For decrees as to inchoate rights, see Sec. 1578; Conley v. Dyer, 43 Colo. 22, 95 Pac. Rep. 304; Waterman v. Hughes, 33 Colo. 270, 80 Pac. Rep. 891; Water Supply etc. Co. v. Tenney, 24 Colo. 344, 51 Pac. Rep. 505; Drach v. Isola, 48 Colo. 134, 109 Pac. Rep. 748; Crawford Clipper D. Co. v. Needle Rock D. Co., 50 Colo. 176, 114 Pac. Rep. 655.

repudiating the same upon any ground.¹⁵ These decrees, however, are subject to direct attack for fraud.¹⁶

§ 1584. The enforcement of decrees and judgments.—As the statutory adjudication of water rights is but one feature of the laws of State control,¹ in those statutes which provide for such special proceedings for adjudication, will also be found provisions for the distribution of the water by State officials to the parties awarded the right to the use of the same in accordance with the decrees. In Colorado, by the Act of 1887, it is made the duty of the superintendents of the water divisions of the State to distribute the water in accordance with the decrees of the Court, without regard to the water districts in which such decrees may have been entered.² The power conferred upon the superintendent is executive and not judicial.³

The various decrees of the water districts included therein are treated as one and the water distributed accordingly.⁴

¹⁵ "And, even if the water decree of 1897 were void, plaintiff in error would now be estopped from repudiating or assailing the same." *Kerr v. Burns*, 42 Colo. 285, 93 Pac. Rep. 1120.

See, also, *Consolidated etc. Co. v. New Loveland etc. Co.*, 27 Colo. 521, 62 Pac. Rep. 364; *Denver City etc. Co. v. Middaugh*, 12 Colo. 434, 21 Pac. Rep. 565, 13 Am. St. Rep. 234; *Handy D. Co. v. South Side D. Co.*, 26 Colo. 333, 58 Pac. Rep. 30; *Drach v. Isola*, 48 Colo. 134, 109 Pac. Rep. 748; *Broadmoor etc. Co. v. Brookside etc. Co.*, 24 Colo. 541, 52 Pac. Rep. 792; *Boulder & Weld etc. Co. v. Lower Boulder D. Co.*, 22 Colo. 115, 43 Pac. Rep. 540.

¹⁶ *Peck etc. Co. v. Pella Irr. D. Co.*, 19 Colo. 222, 34 Pac. Rep. 988.

¹ For State control, see Chap. 68, Secs. 1337-1367.

² The special proceedings outlined by *Mills' Ann. Stat.*, Sec. 2421, providing that no recognition of any priority of water rights shall be regarded by any water commissioner in

distributing water until claimant by application to the proper court has obtained leave and made proof thereof and received his decree therefor, is not a proper one to sustain a claim of priority under Sec. 2268 (*Rev. Stat.* 1908), giving priority to the owner of meadow land watered by the natural overflow of the stream whose supply is diminished by the construction of irrigation ditches by others, where such priority would relate back to an earlier date, and so injure the rights of others whose priorities had been adjudicated in statutory proceedings. *Broad Run Inv. Co. v. Deuel etc. Co.*, 47 Colo. 573, 108 Pac. Rep. 755.

³ *Farmers' Ind. D. Co. v. Agricultural D. Co.*, 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149.

⁴ *Ft. Lyon etc. Co. v. Arkansas Valley etc. Co.*, 39 Colo. 332, 90 Pac. Rep. 1023; *Lower Latham D. Co. v. Loudon etc. Co.*, 27 Colo. 267, 60 Pac. Rep. 629, 83 Am. St. Rep. 80; *McLean v. Farmers' etc. Co.*, 44 Colo. 184, 98 Pac. Rep. 16; *New Cache La*

In Colorado, as the decree is deemed to be one strictly *in rem*, it is held that it can not be enforced by contempt proceedings against one who prevents the water commissioner from enforcing it.⁵ In Oregon it is held that owing to the difficulties usually encountered in the enforcement of decrees, where there are many conflicting interests, the trial Court has the power, when deemed advisable, to enter such supplemental decree, not inconsistent with the decree of the Appellate Court, as may be necessary to make the decree of the Appellate Court effective.⁶ In all of these States, however, there are provisions making it a misdemeanor for a person to interfere with the distribution of the water by the respective State officers whose duty it is to distribute the same, and also for the taking of water by a person who is not entitled to its use.⁷

Upon the civil side, for the protection of a decreed right, the parties may resort to the ordinary actions in equity to enjoin in subsequent independent suits acts in violation of the rights granted by an adjudication decree. And all questions determined by a decree adjudicating such rights, affirmed on appeal, are *res judicata*, for the purpose of such subsequent suit against any of the parties thereto, to enjoin them from taking more water than they were awarded under such decree.⁸

In all actions brought for the enforcement of decreed rights, the State officials whose duty it is to distribute the water to the respective parties entitled thereto, may be joined as parties defendant, together with all parties, who it is claimed are using the water

Poudre Irr. Co. v. Water Supply Co., 29 Colo. 469, 68 Pac. Rep. 781; Roberson v. People, 40 Colo. 119, 90 Pac. Rep. 79; Farmers' Ind. D. Co. v. Maxwell, 4 Colo. App. 447, 36 Pac. Rep. 556; White v. Farmers' High-line etc. Co., 22 Colo. 191, 43 Pac. Rep. 1028, 31 L. R. A. 828.

But see Johnson v. Sterling, 49 Colo. 482, 113 Pac. Rep. 496.

⁵ Roberson v. People, 40 Colo. 119, 90 Pac. Rep. 79.

⁶ Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

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See, also, Taylor v. Hulett, 15 Idaho, 265, 97 Pac. Rep. 37, 19 L. R. A., N. S., 535.

⁷ For the laws of the respective States, see Part XIV.

For the enforcement of decrees under the ordinary equity procedure, see Sec. 1566.

⁸ Kerr v. Burns, 42 Colo. 285, 93 Pac. Rep. 1120; Crippen v. X. Y. Irr. Co., 32 Colo. 447, 76 Pac. Rep. 794.

For protection of rights by injunction, see Chap. 81, Secs. 1596-1647.

in violation of the decree.⁹ A decree may be enforced by mandamus against the water official having charge of the distribution of the water.¹⁰ An action for an injunction will also lie against acts in violation of an adjudicated decree.¹¹

⁹ *McLean v. Farmers' High Line etc. Co.*, 44 Colo. 184, 98 Pac. Rep. 16, holding that necessary parties are all who have an interest in the subject and the object of the action, and all persons against whom relief must be obtained in order to accomplish the object of the suit.

See, also, *Nichols v. McIntosh*, 19 Colo. 22, 34 Pac. Rep. 278; *Farmers' etc. Co. v. Agricultural D. Co.*, 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149.

See, also, *Boulware v. Parke*, 4 Idaho, 692, 43 Pac. Rep. 680.

See, also for the protection of rights by injunction, Chap. 81, Secs. 1596-1647.

¹⁰ *Boulder etc. Co. v. Hoover*, 48 Colo. 343, 110 Pac. Rep. 75; *Northern Colorado Irr. Co. v. Poupprit*, 47 Colo. 490, 108 Pac. Rep. 23.

See, also, *Parker v. Small*, — Ore. —, 120 Pac. Rep. 393.

¹¹ *Kerr v. Burns*, 42 Colo. 285, 93 Pac. Rep. 1120.

CHAPTER 80.

DETERMINATION OF WATER RIGHTS BY BOARDS.

- § 1585. Scope of chapter.
- § 1586. Statutes for the determination of water rights by boards—Nature of proceedings—Constitutionality of Acts.
- § 1587. Procedure—Process or notice.
- § 1588. Procedure—The filing of statements of claims.
- § 1589. Procedure—The hearing by the board.
- § 1590. Procedure—The award—Certificates.
- § 1591. Review of decisions of boards by the courts—Appeal.
- § 1592. Jurisdiction of courts in cases not submitted to board.
- § 1593. Conclusiveness of the determination or award by the board.
- § 1594. The enforcement of awards by board.
- § 1595. Criticism of system for determination by boards.

§ 1585. **Scope of chapter.**—Having discussed in the preceding chapters of this work the adjudication of existing water rights by the courts,¹ there remains but one method for the determination of these rights. Some of the Western States, by statutory provisions, have provided for the determination of existing water rights, in the first instance, by public officials or public governing boards, with the right of appeal from their decision to the courts. The first State to adopt this system was Wyoming,² and the States of Nebraska and Nevada have, with more or less modification, adopted the Wyoming plan. In the present chapter we will discuss these proceedings for such determination.

In Oregon the determination is made in the first instance by the Board of Control, whose determination is afterward submitted to the Court for affirmation.³

§ 1586. **Statutes for the determination of water rights by boards—Nature of proceedings—Constitutionality of Acts.**—Under the laws of State control, or State administrative laws, discussed in a previous chapter,¹ we have seen that there are two methods

¹ For the adjudication of rights in equity, see Chap. 78, Secs. 1530-1566.
For the statutory adjudication of rights, see Chap. 79, Sec. 1584.

² See Sec. 1586.

³ See Lord's Oregon laws, Secs. 6635 *et seq.*

¹ For State administrative laws, see Chap. 68, Secs. 1337-1367.

adopted by the statutes of the respective States for the statutory adjudication or determination, in the first instance, of existing water rights. These are: First, by actions brought in the courts either by private parties or by some public officer authorized by statute;² second, by proceedings brought before some public official—usually the State Engineer—or before a governing board or board of control,³ upon their own motion, with the right of appeal from the determination of such officer or board to the courts or with the right of an independent action in the courts against such officer or board rendering such decision.

As stated by Mr. Chief Justice Potter, in speaking for the Wyoming Court, the object of the Act is "for the purpose of ascertaining the precise rights and priority of each appropriator, to the end that the public records may be furnished an accurate and defined statement thereof, and as an aid to adequate and effective State control of the public waters."⁴ And the nature of the proceeding as stated by the same justice is one largely *in rem*. "In our view it would seem to partake more largely of the nature of a proceeding *in rem* than of one *in personam*."⁵

From a careful examination of the statutes providing for the determination of existing water rights by governing boards it will be readily seen that they are decidedly drastic and summary in their character.⁶ Again, there can be no question but that upon principle, regardless of the fact as to whether these special proceedings are brought before the Court, as is the case in Colorado,⁷ or before the State Engineer or board, upon identically the same state of facts, as far as the determination of existing vested rights to the use of water are concerned, involving as they do at times enormous property values, they are in their very nature judicial proceedings, which may result in the taking of the property of one person and giving it to another. Yet in those States following the Colorado rule in providing that these actions should be tried by the courts, the proceeding is strictly judicial, while, upon the other hand, in those

² For the statutory adjudication of water rights by courts, see Chap. 79, Sec. 1567.

³ For the governing boards, see Sec. 1342.

For the State Engineer and his duties, see Secs. 1343, 1344.

⁴ *Farm Inv. Co. v. Carpenter*, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918.

⁵ *Farm Inv. Co. v. Carpenter*, *supra*.

⁶ For the proceedings thereunder, see Secs. 1587-1590.

⁷ See Secs. 1569-1584.

States following the Wyoming rule these proceedings are declared to be not judicial, but purely ministerial or administrative acts. Or, as stated by the Wyoming Court: "The board, it is true, acts judicially; but the power exercised is quasi-judicial only, and such as, under proper circumstances, may be conferred upon executive officers or boards."⁸ But in a previous portion of the opinion the Court, in speaking of the results attained by these proceedings, said: "But the finality of the proceeding is a settlement or adjustment of the priorities of appropriation of public waters of the State, and is followed by the issuance of a certificate to each appropriator, showing his relative standing among other claimants, and the amount of water to which he is found to be entitled." This is precisely the result of the statutory adjudications by the Colorado courts.⁹ But in that State such a proceeding is deemed strictly judicial, and the result of the proceeding is deemed an "adjudication," while in Wyoming the proceeding is deemed ministerial, and where the board "acts judicially; but the power exercised is quasi-judicial only," and the proceeding is deemed a "determination."¹⁰

From a careful study of the constitution of Wyoming we are of the opinion that the Court might have better rested its decision squarely upon the proposition that, under the State constitution, the board was vested with judicial power to try and decide the existing rights to water. The State constitution seems to have been adopted with this very end in view. It is true that Section 1 of Article 5 provides that: "The judicial power of the State shall be vested

⁸ *Farm Inv. Co. v. Carpenter*, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918, wherein it is also stated by Mr. Justice Potter: "The statute nowhere attempts to divest the courts of any jurisdiction granted them by the Constitution to redress grievances and afford relief at law or in equity under the ordinary and well known rules of procedure. A purely statutory proceeding is created, to be set in motion by no act or complaint of any injured party, but which in each instance is to be inaugurated by order of the board—a proceeding which is to result, not in

a judgment for damages for injuries sustained, nor the issuance of any writ or process known to law for the purpose of preventing the unlawful invasion of a party's rights or privileges."

See, also, *Farmers' Irr. Dist. v. Frank*, 72 Neb. 136, 100 N. W. Rep. 286; *Ryan v. Latty*, 13 Wyo. 122, 78 Pac. Rep. 661.

⁹ See Secs. 1569-1584.

See, also, for Colorado laws, Chap. 87.

¹⁰ *Farm Inv. Co. v. Carpenter*, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918.

in the senate, sitting as a court of impeachment, in a supreme court, district courts, justices of the peace, courts of arbitration, and such other courts as the legislature may by general law establish for incorporated cities and incorporated towns." But in the same instrument, by Section 2 of Article 8, upon the very subject under discussion, it is also provided: "There shall be constituted a Board of Control, to be composed of the State engineer and superintendents of water divisions, which shall, under such regulations as may be prescribed by law, have the supervision of the waters of the State and of their appropriation, distribution, and diversion, and of the various officers connected therewith, *its decisions to be subject to review by the courts of the State.*" However, it seems to be the accepted construction of both the courts of Wyoming¹¹ and the Court of Nebraska construing the Wyoming constitution, and the statutes enacted thereunder, and its own statutes,¹² that the powers vested by the board are not judicial, but administrative; and, furthermore, that these Acts were in all respects constitutional.¹³ And, furthermore, that a regular proceeding before such board as prescribed by the statutes constituted due process of law.¹⁴

¹¹ *Farm Inv. Co. v. Carpenter*, *supra*; *Willey v. Decker*, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939; *Ryan v. Tutty*, 13 Wyo. 122, 78 Pac. Rep. 661.

The Supreme Court of Colorado in drawing a distinction between the Wyoming and Colorado statutes upon the subject of the adjudication of water rights in the respective States, said: "The statutes of Wyoming on this subject in force before the adoption of its constitution were very similar to the present law of this State, but after the adoption of that instrument an entirely different system was established. The settlement of priorities in that State is made by a State board of control, while in this State it is by the District Courts." *Crippen v. X Y. Irr. D. Co.*, 32 Colo. 447, 76 Pac. Rep. 794.

¹² "The Wyoming statute, from which ours is borrowed, has been sub-

ject to judicial construction, and is upheld by the Supreme Court of that State on the express ground that the powers therein are not judicial, but administrative. With this authoritative construction of the statute, and a decision of the very question raised in the case at bar, upon reasoning quite convincing and satisfactory, it would seem that the question should be regarded as at rest." *Crawford Co. v. Hathaway*, 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647.

See, also, *Farmers' Irr. Dist. v. Frank*, 72 Neb. 136, 100 N. W. Rep. 286.

¹³ See cases cited *supra*.

¹⁴ *Farm Inv. Co. v. Carpenter*, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918; *United States etc. Co. v. Gallegos*, 89 Fed. Rep. 769, 32 C. C. A. 470, 61 U. S. App. 13.

But the constitutions of all of the States do not permit this arbitrary method of adjudicating existing water rights. While Montana was a Territory an Act of the legislature attempting to confer the authority upon commissioners to determine existing water rights and to apportion the water in accordance with their decision was held to be void, as the attempt to confer judicial power upon non-judicial officials, contrary to the Montana organic Act.¹⁵

The Oregon law differs from that of Wyoming in the fact that instead of claimants being given a right of appeal from the orders of the Board of Control to the Court, the Court in each instance must confirm the order of the board or make a new adjudication.¹⁶ As was said in a late Oregon case: ¹⁷ "The intent of the Act seems to be to place the control of irrigating water under the jurisdiction of the Board of Control as rapidly as rights are determined by it, and become a matter of record in its office. When the board convenes to determine such rights, prior decrees, made independent of action by the board, are conclusive upon it as between the parties to such decrees, and thereafter the rights established thereby may be enforced by the water master, the same as though they had been originally determined by the board. But in the absence of such determination in accordance with the Water Code, such rights must be enforced by the Court making the decree."

§ 1587. **Procedure—Process or notice.**—In Wyoming, as we have stated in a previous section, the board by which existing water rights are determined in the first instance consists of the Board of Control, composed of the State engineer and the four division superintendents of the State.¹ The statute provides that the board shall prepare a notice setting forth the date and place when and where the

¹⁵ Thorp v. Woolman, 1 Mont. 168, 8 Morr. Min. Rep. 87; Thorp v. Freed, 1 Mont. 651.

In Utah, under the constitution of the State, the District Court has held to the same effect. And; in the majority of the States the matter of adjudicating existing water rights is properly left to the courts.

See, also, Cleghorn's Appeal, 3

Hawn. 216, where similar powers conferred were held to be judicial.

For the adjudication of water rights by the court, see Secs. 1530-1584.

¹⁶ Lord's Oregon laws, Secs. 6635 *et seq.*

¹⁷ Wattles v. Baker County, 59 Ore. 255, 117 Pac. Rep. 417.

¹ For the board of control and their duties, see Sec. 1342.

State engineer will begin the measurement of any stream and ditches, and a day and place when and where the division superintendent shall begin the taking of testimony as to the rights of the parties taking water therefrom. The notice must be published in two issues of a newspaper having general circulation in the county in which such stream is situated, the publication to be at least thirty days prior to the taking of any testimony or the measurement of any streams or ditches. A similar notice must be mailed by the superintendent by registered mail to each party having a recorded claim to the waters of such stream. This provision for the service of notice upon claimants has been upheld by the Supreme Court of the State upon the ground that the proceeding was not an action at law, but an administrative act to ascertain for public records the facts as to existing water rights, and, therefore, it is sufficient notice to constitute due process of law.²

In Nebraska the details of the proceedings are left to the rules of the State Board of Irrigation, which provide that there shall be ten days' notice of the hearing.³

In Nevada, as no formal hearing is provided for, of course, no notice is required for this purpose. But a notice to the claimant must be sent by the State engineer to file his statement of claim, and accompanying such notice must be sent a blank form for the same.⁴

In Oregon it is provided that notice to each claimant must be sent by registered mail at least thirty days prior to the date set therein for making the examination of the stream or the taking of testimony.⁵

² *Farm Inv. Co. v. Carpenter*, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918.

For the laws of Wyoming, see Chap. 104.

See, also, Wyoming Comp. Stats. 1910, Secs. 765 *et seq.*

³ See Rules of State Board of Irrigation.

"It shall be the duty of the State board to make proper arrangements for the determination of priorities of right to use the public waters or the State, and determine the same. The

method of determining the priority and amount of appropriation shall be fixed by the said board." Com. Stats. of Neb. 1911, Sec. 6424.

For laws of Nebraska, see Chap. 92.

⁴ For statements of claims, see Sec. 1588.

Revised laws of Nev., 1912, Sec. 4685.

For laws of Nevada, see Chap. 93.

⁵ For Lord's Oregon laws, Secs. 6636-6639.

For laws of Oregon, see Chap. 97.

§ 1588. **Procedure—The filing of statements of claims.**—The statutes of all of these States require the filing by the claimants with the board a statement of their claims to the right to the use of the water. In Wyoming, accompanying the notice of the hearing, as discussed in the previous section,¹ a blank form is required to be sent to each claimant to the waters of the stream which the board is about to investigate and determine, on which the claimant is required to present, in writing, under oath, his name and postoffice address, the date of the appropriation, and the nature of the interest claimed, and for what purpose the water is used, the date when the construction of the works began and when completed, the date when the water was first beneficially used, the dimensions of the ditch or canal, the legal subdivisions of the land owned or controlled by the claimant to which the water is applied, the crops grown, and the estimated acreage of each crop, during what months the water is beneficially used, the amount expended in the construction of the ditch and laterals, the estimated cost per acre of preparing the land for irrigation, and a map or plat showing correctly the location of the diverting works, and the area of land where the water is used.²

In Nebraska similar statements as are required by the statute of Wyoming are required by the State Board of Irrigation by its rules and regulations.³

In Nevada the claimant, within ninety days after the notice from the State engineer, must prepare a statement of his claim on blanks furnished for that purpose, swear to the same, and return it to the State engineer. The blank form of the statement is furnished by the engineer at the same time that the notice is sent. The failure to file such statement within the time prescribed is made punishable

¹ See Sec. 1587.

² The legislature may require all persons claiming rights to water to submit their claims to the board for settlement, and such regulation may apply to existing rights, as well as those sought to be newly acquired. *Farm. Inv. Co. v. Carpenter*, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. B. A. 747, 87 Am. St. Rep. 918.

Wyoming Com. Stats. 1910, Secs. 768, 769.

For laws of Wyoming, see Chap. 104.

³ See Rules and Regulations of the State Board of Irrigation of Nebraska, Sec. 1589.

See, also, as to statements, *Farmers' Irr. Dist. v. Frank*, 72 Neb. 136, 100 N. W. Rep. 286.

as a misdemeanor on the complaint of the State engineer or any of his assistants.⁴

In Oregon, it is also required that each claimant must file with the division superintendent a statement of his claim under oath.⁵

§ 1589. Procedure—The hearing by the board.—The statutes provide for a hearing by the board of the respective claimants as to their claims, with the exception of the statutes of Nevada. In Wyoming, at the time and place named in the notice,¹ the superintendent of the water division, through which the stream flows, the rights to the waters of which are about to be determined, must begin the taking of the testimony, which may be continued from time to time until completed. And upon the completion of the taking of the proofs the superintendent must give notice in one issue of a newspaper of general circulation of a time and place when and where he will open the evidence for inspection for not less than one day or more than five days. Any person desiring to contest the claim of another shall, within fifteen days after the testimony has been opened for inspection, in writing notify the superintendent, stating the grounds of the proposed contest, which statement must be under oath, and the superintendent shall then notify the contestants and the person whose rights are contested to appear before him at some convenient time and place, in not less than thirty days nor more than sixty days from the date of the service of the notice, to be served and returned in the same manner as summons issued out of the District Court. The hearings may be adjourned from time to time, the superintendent is given the power to issue subpoenas, and has the power to compel the attendance of witnesses. The evidence must be confined to the subjects enumerated in the notice of contest. Upon the completion of the evidence upon all phases of the case, it must be transmitted by the superintendent to the office of the Board of Control.²

In Nebraska, under the rules adopted by the State Board of Irrigation, the hearing must be presided over by the secretary of the

⁴ Laws Nev., 1907, p. 30, Secs. 15, 16; revised laws of Nevada, 1912, Secs. 4685-4687.

For laws of Nevada, see Chap. 93.

⁵ Lord's Oregon laws, Secs. 6636-6639.

¹ For the notice of hearing, see Sec. 1587.

² For hearings in Wyo., see Wyo. Comp. Stat. 1910, Secs. 770-773.

For laws of Wyoming, see Chap. 104.

board, who is the State engineer.³ Claimants may appear in person or by attorney, or both. Claimants may testify as to their respective rights, and witnesses may be examined, or the claimants may fully set forth their claims by affidavits, in which case they need not further appear. A failure to make claim constitutes an abandonment of such claim. Rules of the board also provide for contests similar to the statute of Wyoming providing for such contests. The record in the case of each claim consists of the original notice of appropriation recorded with the county recorder, a verified claim affidavit, and any additional testimony or affidavits offered; and upon this data, together with the stream measurements by the State engineer, the award must be made.⁴ The procedure as to the hearing is largely the same as that in Wyoming, discussed above.

These acts of the boards as to the hearing, etc., are declared by both the Supreme Courts of Wyoming and Nebraska to be administrative and not judicial.⁵

In Nevada no hearing is provided for, but the State engineer gathers his data for his decision from a personal examination either by himself or by some qualified assistant. He is required to make an examination of the stream and of the works diverting therefrom, said examination to include the measurement of the discharge of the stream, unless adequate proof is available from the measurements made by the United States Government; he must also measure the carrying capacity of the various ditches and canals diverting therefrom. He must also make an examination of the lands irrigated and make an approximate measurement of such lands, and also the lands susceptible of irrigation from such ditches and canals. The observations and measurements must be reduced to writing, and made a matter of record of his office. He must also make a map or plat showing with substantial accuracy the course of said stream, the location of each ditch or canal diverting water therefrom, and the legal subdivisions of lands which have been irrigated or which

³ For State engineers and their duties, see Secs. 1343, 1344.

⁴ For the award, see Sec. 1593.

⁵ *Farm Inv. Co. v. Carpenter*, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918; *Wiley v. Decker*, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939; *Ryan v.*

Tutty, 13 Wyo. 122, 78 Pac. Rep. 661; *Crawford Co. v. Hathaway*, 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; *Farmers' Irr. Dist. v. Frank*, 72 Neb. 136, 100 N. W. Rep. 286.

See, also for the constitutionality of these Acts, Sec. 1586.

are susceptible of irrigation from the ditches and canals already constructed. In performing such work the State engineer or his assistant may avail himself of the works, records, and information of the United States Geological Survey. The record of these investigations, together with the statements of claims of the respective claimants to the use of the water, constitute all of the data required under the Nevada Act for the determination of the respective rights.⁶ I am not sure but the Nevada rule is the better one. There is no pretense of a hearing, and, therefore, the question of vesting judicial powers on an administrative board or officer is not involved. Any one dissatisfied with the award of the State engineer may not appeal from such decision, but bring an original action both against the State engineer and also the other claimants.⁷

In Oregon the proceedings as to the hearings largely follow the statutes of Wyoming. The testimony is taken by the division superintendent and by him transmitted to the Board of Control.⁸

§ 1590. Procedure—The award—Certificates.—Upon the data gathered as provided by the statutes, the board, or State engineer, must make an award of the rights to the use of the waters to the parties who, in its or his judgment, are entitled thereto.

In Wyoming it is provided that at the first regular meeting of the Board of Control after the completion of the stream measurement and the return of the evidence by the division superintendent, it is the duty of the Board of Control to make, and cause to be entered of record in its office, an order determining and establishing the several priorities of right to the use of the waters of said stream, and the amounts of appropriations of the several persons claiming the same, and the character of the use for which the appropriation shall be found to have been made. Each appropriation shall be determined in its priority and amount by the time by which it shall have been made, and the amount of water which shall have been applied for beneficial purpose; provided that the appropri-

⁶ Laws, Nev., 1907, p. 30, Sec. 17; Rev. Laws Nev., 1912, Secs. 4687, 4688.

See, also, instructions issued by the State Engineer, Rev. laws Nev. 1912, p. 1343.

⁷ Laws, Nev., 1907, p. 30, Sec. 19; Rev. laws Nev. 1912, Sec. 4690.

See, also, for right of review by the courts, Sec. 1591.

⁸ Lord's Oregon laws, Secs. 6640-6642.

ator shall at no time be entitled to the use of more water than he can make a beneficial application of on the lands for the benefit of which the appropriation may have been made; provided, that no allotment shall exceed one cubic foot for each seventy acres of land for which said appropriation shall have been made.¹ It is further provided that, as soon as practicable after the determination of the priorities in any case by the Board of Control, the secretary of the board shall issue to each person, association, or corporation represented in such proceeding a certificate signed by the State engineer as president of the board, and attested under the seal of the secretary, setting forth the name and postoffice address of the appropriator, the priority and number of the appropriation, the amount of water appropriated, and, if the appropriation be for irrigation, a description of the legal subdivisions of the land to which the water is applied. The said certificate must be transmitted by the State engineer or board to the county clerk of the county in which the appropriation is made; and it is the duty of the county clerk, upon receipt of the fee for the same, to record the certificate in a book specially prepared and kept for that purpose, and to immediately transmit the certificate to the appropriator.²

In Nebraska the State engineer is the secretary of the State Board of Irrigation. Upon the record of the case the Secretary must, in the first instance, make the determination as to the respective rights.³ Within thirty days after the determination by the board of priorities of appropriation, the board, through its secretary, must issue certificates to the claimants.⁴ Right of appeal is then given under the rules of the board to the board itself. But in case there is no appeal to the board it merely adopts the report and decision of the secretary.⁵

In Nevada, there being no hearing before the State engineer provided for, the engineer is given absolute power to make the determination as to existing rights upon his own investigations, the

¹ Wyo. Comp. Stat. 1910, Sec. 777.

² Wyo. Comp. Stat. 1910, Sec. 778.

See, also, *Farm Inv. Co. v. Carpenter*, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918; *Whalon v. North Platte Canal etc. Co.*, 11 Wyo. 313, 71 Pac. Rep. 995; *Johnston v. Little Horse Creek Irr. Co.*, 13

Wyo. 208, 79 Pac. Rep. 22, 70 L. R. A. 341, 110 Am. St. Rep. 986.

³ For the hearing, *Nebraska*, see Sec. 1589.

⁴ Comp. Stats. of Neb., 1911, Sec. 6429.

⁵ See Rules State Board of Irrigation, Sec. 1589.

records as to the stream measurements, and the verified statements of the claimants. Within thirty days after the determination of the engineer and the preparation of the list of priorities of appropriation of the use of waters of any stream it is made the duty of the State engineer to issue to each person, association, or corporation a certificate signed by the State engineer setting forth the facts similar to those required in the Wyoming certificates, as stated above. He must also send the certified list of the awards and priorities to the county recorder of the county in which such appropriations have been made, as well as to the county recorder of the county in which the waters appropriated are used. It is then made the duty of the recorders to record such lists in a book specially prepared and kept for that purpose, the fees for the same being paid by the State.⁶

In Oregon it is provided that upon the final determination of the rights to the water it is the duty of the secretary of the Board of Control to issue to each claimant a certificate of his claim, said certificate to be recorded by the county clerk of the county in which the right is located.

§ 1591. Review of decisions of boards by the courts—Appeal.—

The saving provision of all of these Acts for the determination of existing water rights by governing boards is the right given to all parties feeling aggrieved by any decision of the board to have the same in some manner reviewed by the courts. In Wyoming it is provided by the constitution that "Its decision to be subject to review by the courts of the State."¹ And in the statutes it is provided that an appeal may be taken from the board to the District Court of the county in which the stream may be situated.² The procedure upon appeal as provided by the statute is that the party appealing shall, within sixty days of the determination of the board and the entry thereof in the records of the board, file in the District Court to which an appeal is taken, a notice in writing stating that such party appeals to such Court from the determination and order of the Board of Control; and upon the filing of such notice the appeal

⁶ Laws Nev., 1907, p. 30, Sec. 18; Rev. Laws, Nev., 1912, Sec. 4689.

¹ Wyo. Const., Art. 8, Sec. 2.

² Wyo. Comp. Stat. 1910, Secs. 779-787.

Daley v. Anderson, 7 Wyo. 1, 48 Pac. Rep. 839, 75 Am. St. Rep. 870.

shall be deemed to have been taken. The appealing party shall also, within such sixty days, enter into an undertaking, to be approved by the District Court, in such an amount as the Court or judge may fix, conditioned upon the prosecution of the appeal and the payment of all costs and damages. The clerk of the court, upon filing the notice of appeal and bond, shall transmit to the secretary of the board a notice to the effect that the appeal has been perfected, and the appellant shall cause a certified copy of such notice to be served upon the adverse parties, in the same manner as a summons. The appellant shall also, within six months after the appeal is perfected, file in the office of the clerk of the court a certified transcript of the order of the board, a certified copy of all records of the board, and of all evidence offered, including the measurements of the streams and ditches, together with a petition setting out the cause of complaint of the party appealing, and all parties named as appellees shall be served with summons in the manner and time as provided for issuance and service of summons.³

In Nebraska any party, or number of parties acting jointly, who may feel themselves aggrieved by the determination of the State board, is given the right of an appeal to the District Court, under proceedings provided by the statute.⁴

In both the States of Wyoming and Nebraska the Court to which the appeal is first taken being a *nisi prius*, or trial court, a case appealed as above is tried *de novo*.

In Nevada, under the Act of 1907, there are no provisions for an appeal from the decision of the State Engineer, but it is provided that any party, or number of parties acting jointly, who may feel themselves aggrieved by the determination of the State engineer, may bring an original action in any court having jurisdiction

³ Wyo. Comp. Stat. 1910, Secs. 780, 781.

The provisions of the statute relating to appeals are mandatory and must be strictly complied with. *Daley v. Anderson*, 7 Wyo. 1, 48 Pac. Rep. 839, 75 Am. St. Rep. 870.

"Proceedings before the board of control are purely statutory, and an appeal to the District Court from a decision of the board is merely a con-

tinuation of those proceedings in an appellate tribunal. Such an appeal is based upon the statute, and does not invite the general law and equity jurisdiction of the Court to afford affirmative relief." *Willey v. Decker*, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939.

⁴ Comp. Stats. of Neb., 1911, Secs. 6430-6434.

against such State engineer, and all persons having interests adverse to the party or parties bringing the action to have their respective rights determined. Such action must be brought within one year after the record of the award and list of priorities of appropriation has been recorded. Such action must be tried as speedily as possible, and the Court is authorized to employ a hydraulic engineer or other expert to examine and make report under oath upon any subject matter in controversy, the cost of such employment to be equitably apportioned by the Court and charged against the parties to the suit as costs.⁵

In Oregon a final determination of existing rights being by an adjudication of the Court, an appeal can only be had from such a judgment to the Supreme Court.

§ 1592. Jurisdiction of courts in cases not submitted to board.—

In those jurisdictions the statutes of which provide for the filing of claims with the board and a hearing by the board upon the respective rights of the parties before its determination, the question has arisen as to the effect upon the rights of those parties who have claims to the use of the water, but fail to make such statements, or in any manner to appear or participate in such hearing. The general rule upon the subject is that, under statutes having no provisions expressly barring or estopping a claimant failing to participate in the proceedings before the board, he is at liberty to assert and maintain his rights in the courts. The Supreme Court of Wyoming, in speaking of this right, says: "But nowhere is it provided that a claimant failing to appear shall be barred or estopped from subsequently maintaining or asserting his claim."¹ In Nebraska it is said: "Whenever a controversy arises over the substance of the rights of the parties making use of a stream, such controversies are proper for the courts to take judicial cognizance of."² In

⁵ Laws, Nev. 1907, p. 30, Sec. 19; Rev. Laws, Wyo. 1912, Sec. 4690.

¹ Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918; Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939; Ryan v. Tutty, 13 Wyo. 122, 78 Pac. Rep. 661;

Whalon v. North Platte etc. Co., 11 Wyo. 313, 71 Pac. Rep. 995.

² Crawford v. Hathaway, 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647.

See also, Farmers' etc Co. v. Cozad etc. Co., 65 Neb. 3, 90 N. W. Rep. 951; McCook Irr. Co. v. Crews, 70 Neb. 102, 115 N. W. Rep. 249.

Nevada, where the decision of the State engineer is based upon no hearing, but upon his own investigations, the right is granted all parties, within one year from the recording of the decision of the engineer, to bring an action in the proper court to determine his rights, and that, too, regardless of the fact as to whether their claims were determined by the State engineer or not.³ But the statute makes it a misdemeanor for any claimant to fail within ninety days to file his statement of claim with the State engineer after notice that such statement is required.⁴

As to the jurisdiction of the courts to adjudicate rights which have previously been determined by the board or the State engineer, we will discuss in the next section.⁵

In Oregon the "decree confirming the determination of the board" is, in fact, a judgment of the Court.

§ 1593. **Conclusiveness of the determination or award by the board.**—In proceedings where the respective parties have submitted their claims to the board and have participated in the proceedings, and there is no appeal from its decision, and the time for such an appeal has lapsed, the determination or award of the Board of Control of Wyoming, or of the State Board of Irrigation of Nebraska, is conclusive as between the parties so participating in the proceedings. As stated by the Wyoming Supreme Court: "It may be assumed that, in the absence of fraud or collusion, any matter actually and legally determined by the final decree of the board becomes *res judicata*—at least, as to the public and the parties participating in the proceedings."¹ The Nebraska Court, upon the same subject, said: "If a controversy has been submitted to that board and by it adjudicated and no appeal taken, an entirely different question is presented" to those cases where there was no presentation of claims to the board or where there has been no determination by the board.² And in a later case the Court said: "It would seem that an adjudication made by the State Board of Irrigation upon a matter properly before it, and within the scope of its

³ Laws, Nev. 1907, p. 30, Sec. 19; Wyo. 110, 61 Pac. Rep. 258, 50 L. R. Rev. Laws Nev. 1912, Sec. 4690. A. 747, 87 Am. St. Rep. 918.

⁴ Laws, Nev. 1907, p. 30, Sec. 16; ² Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647.

⁵ See Sec. 1593.

¹ Farm Inv. Co. v. Carpenter, 9

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powers and duties, is final, unless appealed from to the District Court. . . . Indeed, if the determinations of the State Board of Irrigation with reference to the priorities of appropriators are not of this final character, of what benefit or use would they be? For the board to attempt to decide a controversy or to establish a right when, in fact, after it had acted, no right was established or controversy settled, would be a vain thing."³ Where there has been a contested case before the Board of Control in Wyoming and an appeal to the District Court, the Supreme Court of the State holds that the previous adjudication, even by the Court, is no bar to a future independent action involving the same rights, upon the ground that the proceedings before the Board of Control are purely statutory, and an appeal to the District Court from a decision of the board is merely a continuation of those proceedings to an appellate tribunal, and that such an appeal does not invite the general law of equity jurisdiction of the Court; and such relief may be had in an independent separate action.⁴

In Nevada, under the law of 1907,⁵ the determination and award of the State engineer is conclusive upon no one, nor as to any subject covered by his decision; provided, that within the year allowed by the statute a suit is brought to determine such rights. But, as we view the law, the section of the Act allowing one year from the date of the recording of the list of priorities and awards, within which those dissatisfied therewith may bring an action in any court having jurisdiction and have the same adjudicated, is a new statute of limitations upon the subject; and unless such action is brought within the year prescribed, the award of the engineer must be regarded as final as to the rights of the parties and the subject matter covered by the same.

§ 1594. The enforcement of awards by board.—In the chapter discussing the laws of State control ¹ we described how, by means of State officials, variously termed division superintendents, division

³ *Farmers' Irr. Co. v. Frank*, 72 Neb. 136, 100 N. W. Rep. 286.

See, also, *Castle Rock etc. Co. v. Jurisch*, 67 Neb. 377, 93 N. W. Rep. 690.

⁴ *Willey v. Decker*, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939; *State ex rel. Mau v. Ausherman*, 11

Wyo. 410, 72 Pac. Rep. 200; *Ryan v. Tutty*, 13 Wyo. 122, 78 Pac. Rep. 661; *Whalon v. North Platte etc. Co.*, 11 Wyo. 313, 71 Pac. Rep. 995.

⁵ See Laws, Nev. 1907, p. 30.

¹ See Chap. 68, Secs. 1337-1367.

engineers, water commissioners, water masters, under assistants, or supervisors, the awards of the use of the water given by the respective governing boards were enforced by the distribution of the water to the respective claimants according to the terms of the awards. In all of these States it is made a misdemeanor for any person to interfere with the distribution of the water by these officials, or in any way to interfere with the proper discharge of his duties. The power conferred upon these officials is purely administrative, and in nowise judicial. They are usually given the power to make arrests for any interference with their duties, or any interference with the water as by them distributed. These provisions prevent in a large measure subsequent litigation as between the parties for the protection or enforcement of their rights.² But where an award has once been made by the governing board, and it is not properly observed, a party injured has the right to resort to a court of equity for the enforcement and protection of his rights, and the Court, upon a proper showing, will issue an injunction for that purpose.³

In all States criminal statutes are provided for the protection of water rights and against the interference with same.⁴

§ 1595. Criticism of system for determination by boards.—The laws for the determination of existing water rights by governing boards or State officials constitute one feature of the law of State control discussed in a previous chapter of this work. Under this system the State does not wait for controversies to arise between the claimants to the use of the water of a certain stream, but having ascertained the amount of water available by actual stream measurement, and who are the claimants thereto, awards the water in the first instance to the persons entitled thereto according to their respective priorities. Under this system, at least, there is no longer the ludicrous spectacle of learned judges solemnly decreeing the right to use from two to ten times the amount of water flowing in the stream, or, in fact, amounts so great that the channel of the stream could not possibly carry them, and thus practically leaving the question at stake as unsettled as it was before the trial, as was the fact in

² For the statutes upon the subject, see Part XIV.

³ *McPhail v. Forney*, 4 Wyo. 556, 35 Pac. Rep. 773.

⁴ For the statutes, see Part XIV, under the respective States.

See, also, *Hamp v. State*, — Wyo. —, 118 Pac. Rep. 653.

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an extreme case arising in Idaho before the adoption in that State of the law of State control.¹

¹ In the case of *Hillman v. Hardwick*, 3 Idaho 255, 28 Pac. Rep. 438, the evidence showed that there was about eighty or one hundred inches of water in a certain stream, and the plaintiff claimed by virtue of a prior appropriation one hundred and twenty-five inches of water, but despite the fact that his claim to this amount and his actual application of all of the water to a beneficial purpose was proven, the trial court rendered a judgment giving the defendants permission to divert something like eight hundred inches over and above the amount claimed by the plaintiff. The Supreme Court reversed the judgment below, and in the opinion rendered Mr. Justice Horton said: "We then have this anomalous condition of affairs: A creek or stream of water flowing one hundred inches of water, with appropriations of that water to the amount or extent of eight hundred inches in addition to the prior appropriation by the plaintiff of all the water of the creek and its tributaries. To the ordinary mind this might, and perhaps does, present a somewhat difficult problem for judicial solution, unaided by the statutes; but the learned District Judge found no difficulty whatever in reaching a conclusion as unique as it is unprecedented. We say unprecedented, because this question, under statutes identical with that of Idaho, has been decided so often in favor of the prior appropriator that it has been generally considered both by professionals and profanes as a settled question; as for instance, the question has been decided up to 1889 twice by the Supreme Court of the United States, seventeen times by the Supreme Court of Cali-

fornia, five times by the Supreme Court of Colorado, six times by the Supreme Court of Nevada, twice by the Supreme Court of Montana, once by the Supreme Court of New Mexico, twice by the Supreme Court of Utah, once by the Supreme Court of Oregon, and repeatedly by the Supreme Court of Idaho; in fact the decision of the learned District Judge in this case stands alone. We have been unable by the most diligent search to find a precedent or a parallel to it. Heroically setting aside the statute, the decisions and the evidence in the case, he assumes the role of Jupiter Pluvius, and distributes the waters of Gooseberry Creek with a beneficent recklessness which makes the most successful efforts of all the rain-wizards shrink into insignificance, and which would make the hearts of the ranchers on Gooseberry dance with joy if only the judicial decree could be supplemented with a little more moisture. The individual who causes two blades of grass to grow where but one grew before is held in highest emulation as a benefactor of his race. How then shall we rank him who, by judicial fiat alone, can cause four hundred inches of water to run where nature only put one hundred inches? (We veil our faces, we bow our heads before this assumption of judicial power and authority.) . . . Evidently the Court assumed that Gooseberry Creek was as inexhaustible as the widow's cruse, or else that its decree possessed the potency of Moses' rod. All the provisions of the statute in regard to priority of right incident to priority of appropriation are ignored, as are the sources and volume of supply."

But there is another side to this feature of the law. The law of State control, as it is known in the State of Wyoming, including this method for the determination of existing water rights, was conceived by a State engineer, and modeled somewhat after the laws of Italy and India governing waters, with the evident intention that the State engineer should be given powers greater than those of any other officer of the State, and even to the usurpation of the functions of the Court. It was evidently the intent to give him, or the Board of Control, over which he presides, the exclusive jurisdiction in the determination of existing water rights within the State, and the power to enforce his, or its, decisions, in the distribution of the water. In other words, as far as this phase of the subject is concerned, it was to be a government by engineers. But the constitutional convention and the legislature, departing from the original conception of the framer of the bill, gave the right of appeal to the courts. And, further, the Supreme Court of the State, by its decisions in construing the law after its enactment, has also modified what was undoubtedly the intent of the framer of the bill by holding that an appropriator who had not even presented his claim to the Board of Control, even after notice of the proceedings, was not estopped from afterward asserting his rights in the District Court;² and, further, by holding that a water right can not be made an inseparable appurtenance to a certain tract of land, as was attempted by the Act, but which feature was held to be unconstitutional, and that, too, even after the "views" of the engineer in question and the framer of the bill had been presented to the Court.³ It is true that such an arbitrary method as designed might prevent litigation. But it is also true that if the citizens of this country can not settle their disputes peaceably they should be given the right to resort to the courts for their adjudication as to their respective rights. As was said in the recent Wyoming case, decided in the jurisdiction where this theory of absolute control and determina-

See, also, *Farm Inv. Co. v. Carpenter*, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918, quoting *Kinney on Irr.*, 1st Ed., from Sec. 493.

² See Sec. 1588.

See, also, *Farm Inv. Co. v. Carpen-*

ter, 9 Wyo. 110, 61 Pac. Rep. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918.

³ *Johnston v. Little Horse Creek Irr. Co.*, 13 Wyo. 208, 79 Pac. Rep. 22, 70 L. R. A. 341, 110 Am. St. Rep. 986.

That a water right is not an inseparable appurtenance to a certain tract of land, see Secs. 1015, 1016.

tion of the rights of the Board of Control was so strenuously contended for: "We can not agree that the doctrine (of the courts) has resulted from ignorance concerning irrigation matters. Nor can we agree with the notion that men not necessarily or usually trained in the law are more competent than the courts to determine the legal principles controlling the use of water by prior appropriation, notwithstanding that the judges may not, as a rule, be practical irrigators. . . . We can not agree that, in order to discourage litigation or render it impossible, the courts should divest the citizen of his property." ⁴

The more we study the workings of the laws of State control as to the determination by governing boards, in the first instance, of existing rights to the use of water, the more firmly we are convinced that all judicial or "quasi-judicial" powers should be taken from the State engineer and governing boards, and vested in the courts, as is the case in Colorado,⁵ where, under our form of government, that power properly belongs. And, fortunately, this is the rule in the most of the States which have recently adopted these laws. It is true that in Wyoming and Nebraska any party feeling himself aggrieved by the decision of the State engineer or governing board may appeal from such decision to the District Court, but the first trial is before the board. And, furthermore, when an appeal is taken it takes a double amount of time and expense upon the part of the contestants in attending the trials and getting their evidence properly before the board and Court. Why is it not better for all parties concerned, in the first instance, to bring the action in court and to have the matter properly adjudicated and finally settled by a proper decree? If not satisfied with the decree and judgment of the trial court, a party may then appeal to the Supreme Court of the State. Even the recent law adopted by the State of Nevada⁶ is better, where there is not even a pretense of a trial or hearing; but the parties interested are given the right to bring an original action in the courts for a judicial determination and judgment as to their rights within one year from the date of the filing

⁴ Johnston v. Little Horse Creek Irr. Co., 13 Wyo. 208, 79 Pac. Rep. 22, 70 L. R. A. 341, 110 Am. St. Rep. 986.

⁵ For the statutory adjudication of water rights, see Chap. 80, Secs. 1585-1595.

of the record of the decision of the State engineer. As it appears to us, from all sides of the question, the better rule is to have these rights determined and authoritatively adjudicated in the first instance by the courts. But, paramount above all questions, it is better even to encourage litigation than that a citizen should be deprived of his property unjustly.

CHAPTER 81.

PROTECTION OF RIGHTS BY INJUNCTION.

- § 1596. Scope of chapter.
- § 1597. Actionable injury to a right.
- § 1598. Action for both injunction and the adjudication of rights.
- § 1599. Action for both injunction and damages.
- § 1600. Injunctions—In general—Essentials.
- § 1601. Injunctions—Must be the existence of the right in the party claiming relief.
- § 1602. Injunctions—There must be an irreparable injury to the right.
- § 1603. Injunctions—The injury must be actual, continuing, or threatened.
- § 1604. Injunctions—There must be no adequate remedy at law.
- § 1605. Injunctions—There must have been no laches in the bringing of the action.
- § 1606. Injunctions where no actual damages are shown.
- § 1607. Restraining orders or preliminary injunctions.
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- § 1609. Injunctions in the alternative, or conditional.
- § 1610. An appropriator's right to an injunction for unlawful diversion or diminution of quantity.
- § 1611. Riparian owner's right to injunction for diminution of quantity.
- § 1612. A riparian owner's right without use to injunction against diversion for use—The California cases.
- § 1613. A riparian owner's right without use to injunction against diversion for use—The more modern rule.
- § 1614. A riparian owner with use has a right to injunction for unlawful diversion.
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- § 1616. Injunctions against unlawful diversion of subterranean waters.
- § 1617. Right of riparian owner to an injunction against negligent logging.
- § 1618. Injunctions against the interference with easements.
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- § 1620. Injunctions relating to reservoir rights.
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- § 1622. Injunctions for trespass on land.
- § 1623. Injunctions against the flooding of lands from ditches or other works.
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- § 1625. Injunctions protecting the navigable capacity of waters.
- § 1626. Injunctions as between ditch companies and their stockholders or consumers.
- § 1627. Injunctions against the violation of contracts.

- § 1628. Injunctions to protect decreed rights.
- § 1629. Injunctions—Jurisdiction of courts—Venue.
- § 1630. Injunctions—Jurisdiction of courts—Person and subject matter.
- § 1631. Injunctions—Parties plaintiff.
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- § 1633. Pleadings—Complaint, petition, or bill.
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- § 1642. The decree and judgment.
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- § 1644. Decree and judgment—The balance of convenience—Authorities in favor of.
- § 1645. Decree and judgment—Effect of.
- § 1646. Decree and judgment—Enforcement of—Violation of.
- § 1647. Appeals in injunction cases.

§ 1596. **Scope of chapter.**—Having discussed in the preceding chapters of this work how rights to the use of waters may be acquired, both under the Arid Region Doctrine of appropriation,¹ and under the common law of riparian rights,² the nature and extent of those rights,³ and how conflicting rights may be determined and adjudicated and the title to the same quieted in their respective owners,⁴ we will now discuss in this and the following chapters how those rights may be protected by the lawful owner or owners thereof. In this chapter we will confine our discussion to the phase of the question as to how these rights may be protected in equity by injunction, leaving the question as to how they may be protected by methods other than injunction to the following chap-

¹ For the appropriation of water, see Chap. 38, Secs. 706-732.

² For the common law of riparian rights, see Chaps. 21-28, Secs. 450-551.

³ For the nature and extent of rights, see Part IX.

⁴ For the adjudication of water rights in equity, see Chap. 78, Secs. 1530-1566.

For the statutory adjudication of rights, see Chap. 79, Secs. 1567-1584.

For the determination of rights by boards, see Chap. 80, Secs. 1585-1595.

ter,⁵ and the question of damages for injuries to rights to the second chapter following this.⁶

§ 1597. **Actionable injury to a right.**—Before an action in equity will lie to protect a water right, or the right to a ditch, canal, or other works, by the owner or owners thereof, there must be an actual or threatened unlawful invasion of, or injury to, such right. Where the right in question is a right to the use of water, or a water right, the invasion or injury may be one of two kinds, or both: First, an unlawful diminution of the quantity of the water;¹ and, second, an unlawful deterioration of the quality of the water.² Where the injury is caused by the diminution of the quantity of the water, it may be the result of one of two acts, or both: First, the actual and unlawful diversion of the water by another;³ and, second, an injury to the ditch, canal, or other works, whereby their capacity to divert, convey, or store the water is impaired.⁴ The result in either case being that the parties entitled to its use are deprived of a portion or all of the water.

Where the right in question is that of the injury to a ditch, canal, or other works used in the diversion and the carrying of the water from the natural source of supply to the place of use, the invasion or injury may consist of any unlawful act which amounts to an actual continuing or threatened trespass upon such works, and which have resulted in, or may result in material injury to, or the impairment of the title to such ditch or works.⁵

Where the act complained of is committed under a claim of right, which, if allowed to continue for a certain length of time would ripen into an adverse right, and thus deprive a person of his property, he is not only entitled to bring an action for the vindication of his right, but also for its preservation. This is especially true when there is an unlawful diversion of water, and where there is a clear violation of an established right and a threatened continuation

⁵ See Chap. 82, Secs. 1648-1659.

⁶ See Chap. 83, Secs. 1660 *et seq.*

¹ For relief against unlawful diversion, see Secs. 1610-1614.

² For actions against the pollution of water, see Secs. 1142-1147.

³ For injunctions against the un-

lawful diversion of water, see Secs. 1610-1614.

⁴ For enjoining trespass upon ditches and other works, see Secs. 1619, 1620.

⁵ For equitable actions against the invasion of rights in ditches, etc., see Secs. 1619, 1620.

of such violation. Such an invasion of a right is actionable, and that, too, regardless of the fact as to whether or not actual present damages are shown.⁶ A distinction in this respect, however, must be noticed where the right claimed is that of the undiminished flow of a stream by a riparian proprietor, in those States which adhere to the common law as one of the rules governing waters, and where it is the theory of the law that all of the existing water supply should be used for beneficial purposes. The tendency in these States is for the courts to refuse equitable relief, where there is no actual material injury, and thus to cause the riparian owner to rely upon an action for damages.⁷

No set rule can be stated as to just when a Court of equity will interfere with the invasion of a right; but it depends upon the facts and circumstances of each particular case.⁸

The fact that the act complained of is a criminal offense, or that the defendant has been prosecuted for such an offense, does not bar a civil action for enjoining the same.⁹

§ 1598. Action for both injunction and the adjudication of rights.—It often happens, where there has been no previous adjudication of the right involved,¹ that an action for protection against the invasion of a right by another also involves the title to the right, as is the case where an injunction is asked for, the gist of the action being as to whether or not the party asking for the injunction is entitled to the same; and, if so, it must be based upon his title to the right. This involves a trial upon the issue as to the respective rights of the parties, and an adjudication or determination as to those rights, before the injunction will issue. And, of course, if the plaintiff asking for the injunction can not show that

⁶ See, also, for injunctions against the invasion of a right without damages, Sec. 1606.

For the acquisition of title to a water right by prescription, see Secs. 1033-1058.

⁷ For injunctions by riparian owners for the diminished flow, see Secs. 549, 1611-1614.

⁸ For injunctions by appropriators, see Sec. 1610.

For injunctions by riparian owners, see Secs. 1611-1614.

⁹ *People v. Truckee Lumber Co.*, 116 Cal. 397, 48 Pac. Rep. 374, 39 L. R. A. 581, 58 Am. St. Rep. 183; *Arizona Copper Co. v. Gillespie*, 12 Ariz. 190, 100 Pac. Rep. 465; *Spring Valley etc. Water Co. v. Fifield*, 136 Cal. 14, 68 Pac. Rep. 108.

¹ For the adjudication and determination of water rights, see Chaps. 78-80, Secs. 1530-1595.

he has a title to the right, the injunctive relief will be denied him; but it may then be granted to the defendant, or to an intervenor in the action, in case he shows that the title to the right is in him. The Court having acquired jurisdiction of the case has the power to determine all of the questions involved, and to grant all appropriate relief necessary. An action for an injunction and an action to quiet the title to a water right both appeal to the equity side of the Court, and the Court having acquired jurisdiction for one purpose also acquires jurisdiction to settle and determine all the questions involved. And, it therefore follows that where the principal object of the suit is to enjoin the defendants from interfering with the water which the plaintiff claims, the equitable jurisdiction of the Court is invoked, and the Court can adjudicate and determine which party is entitled to the action, and then grant the injunctive relief to the party found to be entitled to the use of the water.²

And, as we have seen in a previous section of this work, where the main object of the suit is to determine and adjudicate the rights between the respective parties, after such determination and adjudication, the common practice of the Court is to grant equitable relief by way of an injunction in favor of the prevailing party and against the losing party. Or the injunction may be granted in favor of both parties, or all parties, restraining them, or any of

² Where one object of the suit was to enjoin defendant from interfering with plaintiff's use of water rights, the equitable jurisdiction of the Court was invoked, and it could decide all questions involved, and grant appropriate relief, such as the quieting of title. *Bessemer Irr. D. Co. v. Woolley*, 32 Colo. 437, 76 Pac. Rep. 1053, 105 Am. St. Rep. 91.

See, also, *Guthell Park Inv. Co. v. Montclair*, 32 Colo. 420, 76 Pac. Rep. 1050; *Rincon etc. Co. v. Anaheim Union W. Co.*, 115 Fed. Rep. 543; *Burr v. Maclay Rancho Co.*, 154 Cal. 428, 98 Pac. Rep. 260; *Simpson v. Harrah*, 54 Ore. 448, 103 Pac. Rep.

58; *Sand Point etc. Co. v. Panhandle Dev. Co.*, 11 Idaho 405, 83 Pac. Rep. 347; *Watts v. Spencer*, 51 Ore. 262, 94 Pac. Rep. 39; *Pomona etc. Co. v. San Antonio etc. Co.*, 152 Cal. 618, 93 Pac. Rep. 881; *Gates v. Settlers' etc. Co.*, 19 Okla. 83, 91 Pac. Rep. 856; *Hawaiian etc. Co. v. Wailuku Sugar Co.*, 15 Haw. 675; *Donnelly v. Cuhna*, — Ore. —, 119 Pac. Rep. 331.

See the case of *City of Pocatello v. Bass*, 15 Idaho 1, 96 Pac. Rep. 120, where a permit-holder was enjoined from interfering with a certain water and the right to the same adjudicated to be in the other claimant.

them, from interfering with the respective rights of any other parties as determined and adjudicated in the action.³

§ 1599. **Action for both injunction and damages.**—Mixed actions appealing to both the equity and law sides of the Court are permitted in all of the Western States. Under the statute of California, and also of those States following the code of civil procedure of that State, there is no question but that both relief at law and in equity may be sought and obtained in the same action. As was said by Mr. Justice Field, in an early California case: "This blending of an action at law, with a petition for ancillary relief to the equity side of the Court, is admissible under our system of practice."¹ Again, upon his accession to the Supreme Court of the United States, in a case arising in the Territory of Montana, and appealed to that Court, the same Justice said: "Sometimes in the same action both legal and equitable relief may be sought, as, for example, where damages are claimed for a past diversion of water, and an injunction prayed against its diversion in the future. Upon the question of damages, a jury would be required; but upon the propriety of an injunction, the action of the Court alone could be invoked."² And, referring to the statute of Montana governing civil actions in this respect, he said: "That statute is substantially a copy of the statute of California as it existed in 1851." In an early Montana case it was held that legal and equitable relief could not be obtained in the same proceeding; and, therefore, it was held that a judgment for damages for the diversion of water and which perpetually enjoins parties from using the water, was irregular and void.³ But this is not the general rule even in Montana at the present time.⁴ And the general practice throughout the Western States is that a party may, in one

³ For actions to quiet title and injunction in the same suit, see Secs. 1536, 1598.

For the enforcement of decrees adjudicating rights, see Secs. 1566, 1584.

¹ *Natoma etc. Co. v. Clarkin*, 14 Cal. 544.

² *Basey v. Gallagher*, 87 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683, affirming *Id.* 1 Mont. 458.

³ *Woolman v. Garringer*, 1 Mont. 535, 1 Morr. Min. Rep. 675.

⁴ *Basey v. Gallagher*, 87 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683; *Leonard v. Shatzer*, 11 Mont. 422, 28 Pac. Rep. 457; *Harris v. Shontz*, 1 Mont. 212; *Carron v. Wood*, 10 Mont. 500, 26 Pac. Rep. 388; *Cruse v. McCauley*, Mont., 96 Fed. Rep. 369.

action, recover damages for past injuries and secure an injunction preventing a continuance of the injuries.⁵

In the pleadings in such mixed actions, to prevent confusion, and preserve the simplicity and directness requisite, it is the better practice that the grounds of equity interposition should be stated subsequently to, and distinct from, those upon which the judgment at law is sought.⁶ However, it is held in California that a cause of action for damages for a trespass and a cause of action for an injunction to restrain a threatened trespass, not separately stated, can not be reached by demurrer, upon the ground of misjoinder, but can only be reached by motion, unless the failure to state the two causes of action separately renders the complaint ambiguous, unintelligible, or uncertain.⁷

Upon the question of damages, a jury is required, unless the

⁵ One may in the same action seek damages for the injury to water rights and an injunction. *Watterson v. Salunbehere*, 101 Cal. 107, 35 Pac. Rep. 432.

See, also, *Lisonbee v. Monroe Irr. Co.*, 18 Utah 343, 54 Pac. Rep. 1008, 72 Am. St. Rep. 784; *Clark v. Allaman*, 71 Kans. 206, 80 Pac. Rep. 571, 70 L. R. A. 971; *Stoner v. Mau*, 11 Wyo. 366, 72 Pac. Rep. 193, 73 Pac. Rep. 548; *Jacob v. Lorenz*, 98 Cal. 332, 33 Pac. Rep. 119; *Hoyt v. Hart*, 149 Cal. 722, 87 Pac. Rep. 569; *Stocker v. Kirtley*, 6 Idaho 795, 59 Pac. Rep. 891; *Peterson v. City of Santa Rosa*, 119 Cal. 387, 51 Pac. Rep. 557; *Union Light etc. Co. v. Lichty*, 42 Ore. 563, 71 Pac. Rep. 1044; *Bowman v. Bowman*, 35 Ore. 279, 57 Pac. Rep. 546; *North Powder M. Co. v. Coughanour*, 34 Ore. 9, 54 Pac. Rep. 223; *Joseph v. Ager*, 108 Cal. 517, 41 Pac. Rep. 422; *Richardson v. City of Eureka*, 110 Cal. 441, 42 Pac. Rep. 965; *Hargrave v. Hall*, 3 Ariz. 252, 73 Pac. Rep. 400; *Mattis v. Hosmer*, 37 Ore. 523, 62 Pac. Rep. 17, 632; *Churchill v. Rose*, 136 Cal. 576, 69 Pac. Rep. 416; *Williams v. Harter*, 121 Cal. 47,

53 Pac. Rep. 405; *Silver Creek etc. Co. v. Hayes*, 113 Cal. 142, 45 Pac. Rep. 191; the *Salton Sea cases*, *New Liverpool Salt Co. v. California Dev. Co.*, 172 Fed. Rep. 820, 97 C. C. A. 242.

A complaint in an action to enjoin the maintenance of a dam is not objectionable for asking for both legal and equitable relief. *Durga v. Lincoln Cr. Lum. Co.*, 47 Wash. 477, 92 Pac. Rep. 343.

⁶ "It would be the better practice, in such case, to commence that portion of the complaint which seeks the equitable relief, with the form: 'And for equitable relief, pending the above action, the plaintiff further represents'; or, 'and, for a further cause of action, the plaintiff represents.' " *Natoma etc. Co. v. Clarkin*, 14 Cal. 544.

⁷ *Jacob v. Lorenz*, 98 Cal. 332, 33 Pac. Rep. 119.

In addition to the facts averred in the complaint for damages, it was held that it was sufficient to aver facts sufficient to obtain equitable relief, without repeating the averments already made. *Jerrett v. Mahan*, 20 Nev. 89, 17 Pac. Rep. 12.

same should be waived; but upon the propriety as to whether or not the injunction should issue, the question is for the Court alone.⁸

As we shall discuss in a following section of this chapter, several persons who have common interests may join together as parties plaintiff in an action for an injunction.⁹ The same is true as heretofore discussed in actions for the adjudication of rights.¹⁰ And, although, under the above rule, a single plaintiff may bring an action both for an injunction against the future invasion of his rights and for damages for past injuries, a distinction must be noticed in this respect where there are several plaintiffs. In actions for an injunction and for damages for past injuries, where there are several parties plaintiff, causes of action which are several can not be joined with causes of action which are common to all. Thus, in a case where several persons own tracts of land in severalty, and each was injured by past wrongful diversions by the defendant, they may join together as parties plaintiff in an action for an injunction to prevent the future invasion of their rights, but they can not in that action join in a count for damages for past injuries to their respective tracts of land.¹¹

§ 1600. Injunctions—In general—Essentials.—By far the most common equitable remedy for the protection of a right in the owner thereof, and against the continuing invasion of a right to the use of water, or for the trespass upon ditches, canals, or other works used in connection therewith, is the remedy of injunction. Injunctions may be divided into two classes. The most common are pre-

⁸ For practice in injunction suits, see Sec. 1639.

⁹ For parties plaintiff in injunction suits, see Sec. 1631.

¹⁰ For parties plaintiff in actions to adjudicate rights, see Sec. 1544.

¹¹ That the same is true in actions for damages only, see Sec. 1684.

A cause of action for injunction, which is common to all the plaintiffs, can not be joined with a cause of action for damages which is not joint as to all the plaintiffs, but is undoubtedly several. *Barham v. Hostetter*, 67 Cal. 272, 7 Pac. Rep. 689.

See, also, *Foreman v. Boyle*, 88 Cal. 290, 26 Pac. Rep. 94.

Since in a suit to abate a nuisance, the recovery of damages constitutes incidental relief only, and the defendant is not entitled to have such damages assessed by a jury as a matter of right, it is not error for the Court to refuse to accept a verdict on the issue of damages in such action on the ground that the verdict was not in accordance with the evidence, and to itself making a finding of damages. *McCarthy v. Gaston etc. Co.*, 144 Cal. 542, 78 Pac. Rep. 7.

ventive injunctions, which command a party to refrain from certain acts.¹ Mandatory injunctions command a party to do a particular thing. These are resorted to rarely and are seldom allowed before the final hearing of a case.²

The nature of an action for an injunction is one *in personam*; and the decree in such an action operates against all parties who were duly served with process and against whom the same was rendered.³

Upon the subject of when an injunction will be granted against the invasion of water rights, or the works used in connection therewith, the law does not depart materially from the general principles of law against the invasion on other rights. The essentials are that: There must be first the existence of the right in the party seeking the injunctive relief;⁴ the injury must be irreparable;⁵ there must be an actual continuing injury to the right, or there must be a threat of continuance in the future;⁶ the party praying for the injunction must show that he has no adequate remedy at law;⁷ and, further, there must have been no unreasonable delay or laches before bringing the action for injunctive relief.⁸ We will discuss these subjects in the order named in the following sections.

¹ For preventive injunctions, see Secs. 1609-1628.

² For mandatory injunctions, see Sec. 1608.

³ For effect of decrees of injunction, see Secs. 1642-1646.

⁴ Taylor v. Hulett, 15 Idaho 265, 97 Pac. Rep. 37, 19 L. R. A., N. S. 535.

A remedy by injunction operates *in personam*, so that where defendants were served with process in a suit to obtain an injunction to prevent the continuance of the diversion of water of a stream, and submitted to the jurisdiction of the Court by answering to the merits, the Court had jurisdiction. Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939.

⁴ See Sec. 1601.

⁵ See Sec. 1602.

⁶ See Sec. 1603.

⁷ See Sec. 1604.

⁸ See Sec. 1605.

Atchison v. Peterson, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583, holding that, whether, upon a petition or bill asserting that the prior rights of the first appropriator have been invaded, a court of equity will interfere to restrain the acts of the party complained of, will depend upon the character and extent of the injury alleged; whether it is irreparable in its nature; whether an action at law would afford adequate remedy; whether the parties are able to respond for the damages resulting from the injury, and other considerations, which ordinarily govern a court of equity in the exercise of its preventive process of injunction.

§ 1601. **Injunctions—Must be the existence of the right in the party claiming relief.**—Before a court of equity will intervene to protect a right, by way of injunction or otherwise, there must first be the existence of the right in the party seeking the relief. So, a water company, under contract to furnish a certain amount of water to a city, and under no obligation to furnish water for the use of the public schools, will not be prevented by injunction from shutting off the water from the schools.¹ So, also, an action for an injunction against the diversion of the water of a stream can not be maintained, unless the plaintiff has a right to the waters of which he is being deprived by the defendant.² So, where all the rights claimed by the plaintiff or defendants were as then only evidenced by notices and maps, and the appropriation was not finally consummated, and not a drop of water had been diverted, it was held that there was not such an evidence of the right that an injunction would lie upon behalf of the plaintiff as against the mere intent of the defendant without some overt act.³ While the rule is well settled that, to warrant the granting of the injunction, the party seeking the same must show a satisfactory title to the right involved; and, if such title be denied, or in doubt, a perpetual injunction will generally be refused against a defendant in possession until the complainant's title is established; yet the courts hold that an injunction was properly granted where it was to protect the rights of a settler upon the public domain against the claim of a mere trespasser when the threatened injury to the estate would be irreparable, without first trying the title at law.⁴

But it is well settled in this arid region by abundant authority that when the waters of a natural stream have been appropriated according to law, and put to a beneficial use, the rights thus ac-

¹ *Water Supply Co. v. City of Albuquerque*, 9 New Mex. 441, 54 Pac. Rep. 969.

² *Platte Valley Irr. Co. v. Buckers etc. Co.*, 25 Colo. 77, 53 Pac. Rep. 334; *Carlson v. City of Helena*, 43 Mont. 1, 114 Pac. Rep. 110.

³ *Umatilla Irr. Co. v. Barnhart*, 22 Ore. 389, 30 Pac. Rep. 37.

See, also, *Rincon etc. Co. v. Anaheim etc. Co.*, 115 Fed. Rep. 543.

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⁴ *Browning v. Lewis*, 39 Ore. 11, 64 Pac. Rep. 304; *Kitchenside v. Myers*, 10 Ore. 21; *Jackson v. Jackson*, 17 Ore. 110, 19 Pac. Rep. 847; *Hindman v. Rizor*, 21 Ore. 112, 27 Pac. Rep. 13; *Cardoza v. Calkins*, 117 Cal. 106, 48 Pac. Rep. 1010, 18 Morr. Min. Rep. 689; *Utt v. Frey*, 106 Cal. 392, 39 Pac. Rep. 807.

quired carry with them an interest in the stream from the points where the waters are diverted from the natural channel to the source from which the supply is obtained, and any interference with the stream by a party having no interest therein that materially diminishes or deteriorates the water in quantity or quality previously appropriated, to the damage of those entitled to its use, is unlawful and actionable.⁵ So, too, the owners of a water right, where the water is used for irrigation, may enjoin one who unlawfully diverts water from the ditch, although the ditch may be the property of the third party.⁶

A Court of equity is bound by injunction to protect an equitable as well as a legal estate. Therefore, an injunction will be granted to protect a water right held under an equitable title.⁷

Where there is the existence of the right, the right to injunctive relief is not taken away merely by an action for damages, or the right of action to recover damages for past injuries.⁸

§ 1602. **Injunctions**—There must be an irreparable injury to the right.—When injuries to a right will be regarded as irreparable at law so that the continuance of the same will be enjoined by a suit in equity must depend upon the facts and circumstances of each particular case.¹ Where the title to the use of the water is acquired by appropriation, and the exercise of the right is continually and unlawfully prevented by others having no right to the use of the water, either by obstructing the flow of the natural stream, or the flow of the water in the ditch, canal, or other works,

⁵ *Cole v. Richards Irr. Co.*, 27 Utah 205, 75 Pac. Rep. 376, 101 Am. St. Rep. 962, citing *Kinney on Irr.*, 1st Ed., Sec. 249; *Bear River etc. Co. v. New York etc. Co.*, 8 Cal. 327, 68 Am. Dec. 325, 4 Morr. Min. Rep. 526; *Hill v. King*, 8 Cal. 336; *Butte etc. Co. v. Vaughn*, 11 Cal. 143, 70 Am. Dec. 769, 4 M. M. Rep. 552; *Phoenix W. Co. v. Fletcher*, 23 Cal. 482, 15 Morr. Min. Rep. 185; *Natoma etc. Co. v. McCoy*, 23 Cal. 290, 4 Morr. Min. Rep. 590; *Stein Canal Co. v. Kern Island Irr. Co.*, 53 Cal. 563; *Loddell v. Simpson*, 2 Nev. 274, 90 Am. Dec. 537.

⁶ *Clifford v. Larrien*, 2 Ariz. 202, 11 Pac. Rep. 397.

For injunctions against the unlawful diversion of water, see Secs. 1610-1614.

⁷ *Watts v. Spencer*, 51 Ore. 262, 94 Pac. Rep. 39.

But see *Churchill v. Russell*, 148 Cal. 1, 82 Pac. Rep. 440.

⁸ *Sylvester v. Jerome*, 19 Colo. 128, 34 Pac. Rep. 760.

¹ *Crescent Min. Co. v. Silver King Min. Co.*, 17 Utah 444, 54 Pac. Rep. 244, 70 Am. St. Rep. 810.

after it has left the natural stream, and where the water is necessary to preserve the life of fruit trees, or the crops of the owner thereof, there is such an irreparable injury that an action for an injunction against such an invasion of the right will lie.²

In those States which adhere to the modified form of riparian rights,³ where the right to the use of the water is by virtue of the ownership of riparian lands, and especially where it is accompanied by a reasonable actual use of the water, and something more than a claim for the undiminished flow of the stream, the same rule as to irreparable injury for the unlawful diversion of the water necessary for irrigation applies, and an action for an injunction will lie.⁴ Again, the injuries are deemed to be irreparable, so as to authorize equitable relief by way of injunction, where the flow of the stream is so obstructed by the means of dams or other works causing the water to overflow the lands along the stream, and thus

² An allegation in a complaint to enjoin interference with waters flowing through an irrigation canal that such waters are necessary to irrigate and preserve the life of fruit trees, and that such interference would result in great and irreparable injury, is a sufficient allegation of irreparable injury. *Smith v. Stearns Rancho Co.*, 129 Cal. 58, 61 Pac. Rep. 662.

The rights of a settler upon the public domain will be protected by an injunction "when the threatened injury to the estate would be irreparable, without first trying the title at law." *Browning v. Lewis*, 39 Ore. 11, 64 Pac. Rep. 304.

See, also, *Spargur v. Heard*, 90 Cal. 221, 27 Pac. Rep. 198; *Van Horn v. Decrow*, 136 Cal. 117, 68 Pac. Rep. 473; *Watts v. Spencer*, 51 Ore. 262, 94 Pac. Rep. 39; *Clough v. Wing*, 2 Ariz. 371, 17 Pac. Rep. 453; *Coker v. Simpson*, 7 Cal. 340.

See, also, as to injunctions relating to rights of appropriators, Sec. 1610.

³ For these States, see Secs. 507-621.

For the modified form of riparian rights, see Secs. 508-513.

⁴ The flow of the water of a stream was often insufficient to irrigate the land of a riparian proprietor. The annual rainfall was slight, and, unless irrigated, the land was unfit for cultivation. Overflow water, occasioned by floods, yearly deposited on the land fertilizing materials, increasing its productiveness and enhancing its value. The water overflowing the land was of great benefit to the riparian owner, and, if the flow of the waters was taken away, the land would become arid. Held to show that irreparable injury would result to the riparian owner if the diversion of such waters was accomplished, and authorized equity to interfere by injunction restraining such diversion. *Miller & Lux v. Madera etc. Co.*, 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S. 391.

See, also, *Rogers v. Overacker*, 4 Cal. App. 333, 87 Pac. Rep. 1107.

See, also as to injunctions relating to rights of riparian owners, Secs. 1611-1614.

causing injury to the lands and crops, or retarding the drainage of such lands, so that crops can not be planted until it is too late in the season.⁵ Again, the injuries are deemed irreparable where they are caused by the leakage or seepage from reservoirs, and thereby cause material continuing injuries to the surrounding lands, and an injunction will lie to prevent the diverting of water into or filling the reservoirs while such a condition remains.⁶ Again, the injuries are deemed irreparable where the waters of a stream are being polluted, or mining debris is being discharged into the stream and carried down to the lands below, to such an extent that the waters are rendered unfit for the purposes to which they were put by their lawful owners, or the lands of such owners are injured.⁷ Where a party commits a trespass on real property, does so under a claim of right, and threatens to commit and to repeat numerous trespasses, an injunction will lie to prevent irreparable injury, and to avoid a multiplicity of suits. We will discuss this subject in a subsequent section.⁸

An injury caused by a trespass upon a ditch or canal which does not destroy its efficiency and can be easily repaired does not constitute such an irreparable injury that an action for an injunction will lie.⁹

⁵ Obstructions of a river, materially impeding the flow of its waters, and consequently the drainage from the low lands along and near its course, retarding the planting of crops thereon from one to four weeks, is irreparable injury, authorizing equitable relief. *Krause v. Oregon Iron & Steel Co.*, 45 Ore. 378, 77 Pac. Rep. 833.

⁶ *Sylvester v. Jerome*, 19 Colo. 128, 34 Pac. Rep. 760, and where it is said: "The remedy at law is inadequate because the injuries that were being suffered by plaintiff were irreparable, and also for the reason that a suit at law would not prevent the inflicting of like injuries in the future."

For injunction relating to reservoir rights, see Sec. 1620.

⁷ *Arizona Copper Co. v. Gillespie*,

12 Ariz. 190, 100 Pac. Rep. 465; *Smith v. Stearns Rancho Co.*, 129 Cal. 58, 61 Pac. Rep. 662; *Cushman v. Highland D. Co.*, 3 Colo. App. 437, 33 Pac. Rep. 344.

The action must be irremediable before an action for an injunction will lie. *Atchison v. Peterson*, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583.

See, also, for injunctions against the pollution, Sec. 1143.

⁸ For injunctions for trespass on land, see Sec. 1622.

⁹ See, also, injunctions as to ditches, etc., Secs. 1618, 1619.

Lorenz v. Waldron, 96 Cal. 243, 31 Pac. Rep. 54; *Clark v. Willett*, 35 Cal. 534; *Jacob v. Day*, 111 Cal. 571, 44 Pac. Rep. 243; *Hudson v. Dailey*, 156 Cal. 617, 105 Pac. Rep. 748.

Threatened continuous trespass upon a reservoir, and the unlawful drawing off of the water therefrom, where the defendant owns no property in the State, are deemed such irreparable injuries to the right that an action for an injunction will lie to restrain such acts.¹⁰

In order that an action for an injunction should lie, it is not necessary that the irreparable injuries should be capable of measurement in any considerable sum as monetary damages. The injuries are irreparable if a continuance of the invasion would ripen into a title by prescription and thus defeat the right of the original owner, even though the actual damages for the present invasion is nominal, or there are no monetary damages at all.¹¹ However, an action for an injunction will not lie unless the injuries are deemed to be irreparable. So, where the damages are nominal or there are no actual damages, and where the acts of invasion will not ripen into a title as against an actual right, an action for an injunction will not lie. Such would be the case where there is no injury done or threatened, as where there is plenty of water in the stream for all.¹² Or, where the action is brought to prevent the diversion of the waters of a stream during the period which the plaintiff did not use the water.¹³ Or, where a tunnel was constructed in near proximity to a ditch without injury or the drawing the water therefrom.¹⁴ Or, where the party has abated a nuisance before the action or decreed; ¹⁵ or has taken steps to prevent the injury; ¹⁶ or where the

¹⁰ Koch v. Story, 47 Colo. 335, 107 Pac. Rep. 1093; Hayois v. Salt River etc. Co., 8 Ariz. 285, 71 Pac. Rep. 944.

See, also, for injunctions as to reservoir rights, Sec. 1620.

¹¹ Spargur v. Heard, 90 Cal. 221, 27 Pac. Rep. 198; Heilbron v. Fowler etc. Co., 75 Cal. 246, 17 Pac. Rep. 535, 7 Am. St. Rep. 183; Shields v. Orr etc. D. Co., 23 Nev. 349, 47 Pac. Rep. 194; Rigney v. Tacoma etc. Co., 9 Wash. 576, 38 Pac. Rep. 147, 26 L. R. A. 425.

See, also, injunctions for an injury to the right without damages, Sec. 1606.

¹² Clough v. Wing, 2 Ariz. 371, 17 Pac. Rep. 453, where the Court held that the mere claim of a right to all of the waters of a stream was not sufficient for the exercise of relief by injunction.

¹³ Nevada v. Kidd, 37 Cal. 282; Brown v. Smith, 10 Cal. 508; Morris v. Bean, 123 Fed. Rep. 618, 146 Fed. Rep. 423.

¹⁴ Lorenz v. Waldron, 96 Cal. 243, 31 Pac. Rep. 54.

¹⁵ McCarthy v. Gaston Co., 144 Cal. 542, 78 Pac. Rep. 7.

¹⁶ Atchison v. Peterson, 1 Mont. 561, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583.

injury complained of was slight and not due to the acts of the defendants.¹⁷

In these and many other cases discussed in the following sections of this chapter in relation to particular rights, it was held that the injuries were not irreparable so that the Court would grant relief by injunction.

§ 1603. Injunctions—The injury must be actual, continuing, or threatened.—The general rule is that an action for an injunction will not lie because of the commission of a single trespass. The party seeking the relief must show reasonable grounds for fearing the recurrence of the trespass, with such frequency as seriously to affect the value of his land, or other considerations rendering his remedy at law inadequate.¹ But where the single act is continuous in its nature, and destructive of the property, or the injury irreparable,² or if further acts of the same character are threatened, an action for an injunction will lie.³ But anything short of reasonable probability of future injury is insufficient to warrant the granting of an injunction against the act which it is claimed

¹⁷ Ladd v. Redle, 12 Wyo. 362, 75 Pac. Rep. 691.

¹ Whitehair v. Brown, 80 Kan. 297, 102 Pac. Rep. 783.

See, also, for adequate remedy at law, Sec. 1604.

See for trespass and injunctions against, Sec. 1622.

² For irreparable injury, see Sec. 1602.

³ "The general rule is that injunction will not lie merely because of the commission of a single trespass, unless destructive of the property, or the injury is irreparable; but, if of this character, or if further acts of the same kind are threatened, or where the single act is continuous in its nature, an injunction will lie. Here the wrongful acts consisted in cutting the banks of the reservoirs and placing a water pipe therein through which water was withdrawn to the injury of

the plaintiff." Koch v. Story, 47 Colo. 335, 107 Pac. Rep. 1093, holding that the action would lie.

A purchaser of water rights from an irrigation company, having done nothing to justify its arbitrary action in destroying his headgates and ditches, and threatening to continue to do so, is entitled to an injunction and damages. Hargrave v. Hall, 3 Ariz. 252, 73 Pac. Rep. 400.

See, also, Union etc. Co. v. Lichty, 42 Ore. 563, 71 Pac. Rep. 1044; Hains v. Hall, 17 Ore. 165, 20 Pac. Rep. 831, 3 L. R. A. 609; Miller & Lux v. Rickey, 127 Fed. Rep. 573; Learned v. Castle, 78 Cal. 454, 18 Pac. Rep. 872, 21 Pac. Rep. 11; Crisman v. Heiderer, 5 Colo. 589; United States etc. Co. v. Gallegos, 89 Fed. Rep. 769, 32 C. C. A. 470, 61 U. S. App. 13; Trade Dollar etc. Co. v. Fraser, 148 Fed. Rep. 585, 79 C. C. A. 37.

will cause the injury.⁴ The mere intention to interfere with water rights is not sufficient grounds for an injunction. An intent not acted upon is not actionable. The party seeking the relief must wait for some overt and hostile act before the action will lie.⁵

§ 1604. Injunctions—There must be no adequate remedy at law.—Where the party seeking the injunctive relief has an adequate remedy at law for the recovery of damages an injunction will not be granted. If, therefore, the party seeking the relief can recover damages for the trespass in an amount equivalent or adequate to the injury which he has sustained, such injury can, in no sense of the word, be considered irreparable, and, therefore, an action for an injunction will not lie.¹ So, where the injury consisted of the laying of a pipe line across barren, rocky, uncultivated, and worthless land, without doing more, it was held that an action for an injunction would not lie, and that the plaintiff would be remanded to his action at law for damages.² So, where plaintiff's ditch was filled with sand and gravel from defendant's mining operations, to the extent that the plaintiff was unable to take out the water claimed under a prior appropriation, it was held that an action for an injunction would not lie, where an action at law would afford ade-

⁴ *Orcutt v. Pasadena etc. Co.*, 152 Cal. 599, 93 Pac. Rep. 497; *McCarthy v. Gaston etc. Co.*, 144 Cal. 542, 78 Pac. Rep. 7; *Bryant v. Frank H. Lamb Timber Co.*, 37 Wash. 168, 79 Pac. Rep. 622; *Tenney v. Miners' etc. Co.*, 7 Cal. 335, 11 Morr. Min. Rep. 31; *Clark v. Willett*, 35 Cal. 534, 4 Morr. Min. Rep. 628; *Tuolumne etc. Co. v. Chapman*, 8 Cal. 392, 11 Morr. Min. Rep. 34; *Lorenz v. Waldron*, 96 Cal. 243, 31 Pac. Rep. 54.

⁵ *Umatilla Irr. Co. v. Barnhart*, 22 Ore. 389, 30 Pac. Rep. 37.

¹ For irreparable injury, see Sec. 1602.

"Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law." *Iowa etc. Co. v.*

Temescal etc. Co., 95 Fed. Rep. 320, quoting Sec. 723 of the Revised Statutes of the United States.

² *Crescent Min. Co. v. Silver King Min. Co.*, 17 Utah 444, 54 Pac. Rep. 244, 70 Am. St. Rep. 810; *Id.*, 14 Utah 57, 45 Pac. Rep. 1093; *McGregor v. Silver King Min. Co.*, 14 Utah 47, 45 Pac. Rep. 1091, 60 Am. St. Rep. 883; *Thorn v. Sweeney*, 12 Nev. 251.

So, when the damage caused by the construction and maintenance of a ditch through plaintiff's land was merely nominal, and the defendant was not insolvent and unable to respond in damages, and plaintiff's remedy at law was ample and adequate, the Court refused to grant an injunction. *Hoye v. Sweetman*, 19 Nev. 376, 12 Pac. Rep. 504.

quate remedy, and where the defendant was able to respond for the damages resulting from the injury.³ However, the fact of defendant's insolvency is not essential to the granting of injunctive relief, where money damages are inadequate or the extent of the injuries can not be ascertained, or where the trespasses will destroy the property, although it is an additional ground for relief.⁴

In an action to enjoin the defendant from interfering with the natural flow of a stream, it was held that a Court of equity will not assume jurisdiction of the subject-matter where there is a plain, adequate, and complete remedy at law.⁵ So, in an action to enjoin the pumping and carrying off of subterranean waters, and the monetary injury to the land could be determined, it was held that a prohibitory injunction should only be granted if any and all other forms of relief should be found to be inadequate.⁶ But, upon the other hand, in all cases having other essentials, discussed in these sections, in order for an action for injunctive relief to fail upon this ground, the remedy at law must be direct, certain, and adequate; and, when the remedy at law is not adequate to the particular facts and circumstances surrounding any case, then a Court of equity has jurisdiction.⁷ Therefore, in case an action at law will not afford such adequate relief, the owner of a water right is entitled to an injunction to prevent further interference with the flow of the water to which he is entitled and applies to a beneficial use or purpose, either in the natural stream or the ditch, canal, or other works, and that, too, whether he claims the water by an appropriation or as riparian owner.⁸ As was said in a famous California case: "Here the plaintiff must, indeed, clearly make out his right in equity, and show that money damages will not give him adequate compensation. If he fails to do this, relief in equity will be denied;

³ Atchison v. Peterson, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583.

⁴ Koch v. Story, 47 Colo. 335, 107 Pac. Rep. 1093, citing High on Inj., Sec. 717; Sullivan v. Dooley, 31 Tex. Civ. App. 589, 73 S. W. Rep. 82.

⁵ Union etc. Co. v. Lichty, 42 Ore. 563, 71 Pac. Rep. 1044; Mann v. Parker, 48 Ore. 321, 86 Pac. Rep. 598; Whitehair v. Brown, 80 Kans. 297,

102 Pac. Rep. 783; Cline v. Stock, 71 Neb. 70, 98 N. W. Rep. 454, 102 N. W. Rep. 265.

⁶ Newport v. Temescal W. Co., 149 Cal. 531, 87 Pac. 372, 6 L. R. A., N. S. 1098; Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113.

⁷ Sylvester v. Jerome, 19 Colo. 128, 34 Pac. Rep. 760.

⁸ For the right of riparian owners to an injunction, see Secs. 1610-1615.

but, if he proves his case, relief will be granted, although he has not demanded damages at law."⁹ Neither is it necessary for the party seeking the injunctive relief to make a demand for damages at law, or to bring an action for damages before the relief will be granted.¹⁰ The decisions which bear on that class of cases, which require the plaintiff to show that he has promptly sought redress at law have no applicability to actions for injunctive relief in actions to prevent the unlawful diversion of water, or the unlawful continuous trespass upon the ditches, canals, or other works used in connection with the right to the use of water.¹¹

§ 1605. Injunctions—There must have been no laches in the bringing of the action.—Laches may be defined as unreasonable delay in doing a thing, or the neglect to enforce or protect a right at the proper time, when the delay does not amount to a bar by the statute of limitations.¹

It is said that equity does not encourage stale claims, nor give relief to those who sleep on their rights.² "Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for

⁹ *Lux v. Haggin*, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 647.

See, also, *Fabian v. Collins*, 3 Mont. 215; *Koch v. Story*, 47 Colo. 335, 107 Pac. Rep. 1093; *McCook Irr. Co. v. Crews*, 70 Neb. 109, 96 N. W. Rep. 996; *Id.*, 70 Neb. 115, 102 N. W. Rep. 249; *Trade Dollar etc. Co. v. Fraser*, 148 Fed. Rep. 587, 79 C. C. A. 37.

¹⁰ *Lux v. Haggin*, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; *Tulolumne etc. Co. v. Chapman*, 8 Cal. 392.

¹¹ That an injunction will be granted, when the threatened injury to the estate would be irreparable, without first trying the title at law, see *Browning v. Lewis*, 39 Ore. 11, 64 Pac. Rep. 304; *Hindman v. Rizor*, 21 Ore. 112, 27 Pac. Rep. 13; *Cardoza v. Calkins*, 117 Cal. 106, 48 Pac. Rep. 1010, 18 Morr. Min. Rep. 689; *Utt v. Frey*, 106 Cal. 392, 39 Pac. Rep. 807.

But see *Iowa etc. Co. v. Temescal W. Co.*, 95 Fed. Rep. 320, where it is held that Federal Court of Equity can not entertain a suit to enjoin the defendant from proceeding in a statutory manner to enforce a legal demand until complainant can by judicial determination establish an unliquidated claim for damages so that it will operate under the statute as a compensation of defendant's demand, where it is not alleged that defendant is insolvent; plaintiff having in such a case a plain, adequate, and complete remedy at law for the enforcement of his claim for damages.

See, also, *Heerman v. Beef Slough etc. Co.*, 1 Fed. Rep. 145.

¹ For the bar of the statute of limitations as a defense, see Secs. 1634, 1635.

² *Piatt v. Vattier*, 34 U. S. 9 Peters 405, 9 L. Ed. 173.

his laches in asserting them.”³ Before one will be granted injunctive relief by a court of equity, it must be shown that he has been guilty of no laches or unreasonable delay in the assertion or the protection of his right. But, in general, we will only say here that laches does not depend entirely on the lapse of time; but to constitute laches, there must be something more than mere delay. It must also appear that it would be inequitable to enforce the claim of the party who is charged with the laches.⁴ We will discuss this question more thoroughly when we come to the question of defense to actions for injunctions by laches.⁵

§ 1606. Injunctions where no actual damages are shown.—Although, at times, used in a loose manner as synonymous, there is a decided distinction between the words “injuries” and “damages.” Injuries in this connection are the physical or harmful results of the invasion of rights. Damages are the estimated reparation in money for the injury sustained. The latter is usually the direct result of the former. But there may be injuries for the invasion of a right which can not be estimated in monetary damages.

In certain instances actions for injunctions will lie enjoining the invasion of a right in cases where there are either no actual damages, or where the damages are very slight. Where the right to the use of water is claimed by appropriation, and where the act complained of is committed under a claim of right, which, if allowed to continue for a certain length of time would ripen into a

³ *Speidel v. Henrici*, 120 U. S. 377, 30 L. Ed. 718, 7 Sup. Ct. Rep. 610.

See, also, *Just v. Idaho etc. Co.*, 16 Idaho 639, 102 Pac. Rep. 381, 133 Am. St. Rep. 140; *Lux v. Haggin*, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674, distinguishing laches from acquiescence; *Hudson v. Dailey*, 156 Cal. 617, 105 Pac. Rep. 748; *Cline v. Stock*, 71 Neb. 70, 98 N. W. Rep. 454, 102 N. W. Rep. 265; *Stuart v. Holland*, 179 Fed. Rep. 969; *Loud Gold Mining Co. v. Blake*, 24 Fed. Rep. 249; *Montecito etc. Co. v. Santa Barbara*, 144 Cal. 578, 77 Pac. Rep.

1113; *McCook v. Crews*, 70 Neb. 115, 102 N. W. Rep. 249.

See, also, for loss of right by laches, Sec. 1634.

⁴ *Verdugo etc. Co. v. Verdugo*, 152 Cal. 655, 93 Pac. Rep. 1021; *City of New York v. Pine*, 185 U. S. 93, 46 L. Ed. 820, 22 Sup. Ct. Rep. 592.

Where the evidence shows that one seeking equity has been guilty of laches, the court will deny relief on that ground, though laches was not pleaded. *Stevenson v. San Joaquin etc. Co.*, — Cal. —, 121 Pac. Rep. 398.

⁵ See Sec. 1634.

title by prescription, and thereby deprive the owner of his property, he is not only entitled to such an action for the vindication of his right, but also for its preservation and protection. In such cases it is not necessary to show actual damages to the owner of the right in order that the injury be an actionable one; and, therefore, an action for an injunction will lie for the protection of such a right, without such damages being shown, or upon a showing that such damages are nominal. The injury to the right is deemed irreparable if the continuance of such an invasion of a right would eventually ripen into a title by prescription, and thus deprive the lawful owner of his property.¹

An injunction will not be granted where the act complained of will not ripen into an easement and causes no actual damage. Such, for example, is the case where there is sufficient water for all.² Again, an injunction will not be granted where the defendant uses the water during the period of time that it is not needed by the plaintiff.³ The same may be said where the water is claimed by virtue of riparian ownership, especially where it is accompanied with the actual application of the water to some beneficial use or purpose by the riparian owner. But the old common law rule that a riparian owner is entitled to an injunction merely for the diminished flow of the stream which adjoins or runs through his land, and that, too, without actual use, is practically abrogated in the Western States which still adhere to the modified common law rule

¹ For injunctions, irreparable injury, see Sec. 1602.

"The diversion of water of the stream is an injury to the freehold of the riparian owner, and may be enjoined without a showing of other immediate monetary damages." *Shurtleff v. Bracken*, — Cal. —, 124 Pac. Rep. 724, citing *Anaheim Union W. Co. v. Fuller*, 150 Cal. 333, 88 Pac. Rep. 978, 11 L. R. A., N. S., 1062.

In actions for the diversion of water, where there is a clear violation of an established right, it is not necessary to show actual damages in order to authorize a court to issue an in-

junction and make it perpetual. *Brown v. Ashley*, 16 Nev. 311.

See, also, *Union M. & M. Co. v. Dangberg*, 81 Fed. Rep. 73, citing *Kinney on Irr.*, 1st Ed., Sec. 329; *Cache La Poudre Res. Co. v. Water Supply etc. Co.*, 27 Colo. 532, 62 Pac. Rep. 420.

² *Davis v. Chamberlain*, 51 Ore. 304, 98 Pac. Rep. 154; *Bates v. Hall*, 44 Colo. 360, 98 Pac. Rep. 3; *Clough v. Wing*, 2 Ariz. 371, 17 Pac. Rep. 453.

³ *Hough v. Porter*, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; *Huffner v. Sawday*, 153 Cal. 86, 94 Pac. Rep. 424.

of riparian rights,⁴ and the more modern rule is that a riparian owner must show some damage in order to enjoin the diversion of the water of the stream where such diversion is accompanied by an actual use of the water.⁵ As this Western country becomes settled the demand for water becomes greater and greater, and, therefore, this latter rule, disregarding the old common law precedents, and holding that a right to water can only be based upon actual use, and that, too, whether the right is claimed as an appropriation or by riparian ownership, is undoubtedly the correct rule.⁶

An injunction will lie for the wrongful diversion of percolating waters without actual damages, especially where the wrongful acts may ripen into an adverse right.⁷ So, an action will lie against the owner of a ditch for the escape of water therefrom onto the plaintiff's land, which in time would ripen into a prescriptive right, although the damages are nominal.⁸ So, also, it is held by the Federal Court that the flooding of the plaintiff's land will be enjoined, even though the land may be practically ruined by the

⁴ When a riparian owner is entitled to an injunction, see Secs. 1610-1615.

So, where a claim of a riparian owner was based on use for irrigation, it was held that a wrongful diversion of the water would be enjoined, although no actual damages are averred or proved; the relief being granted to prevent the wrongful acts from ripening into a right. *Anaheim Union W. Co. v. Fuller*, 150 Cal. 327, 88 Pac. Rep. 978, 11 L. R. A., N. S., 1062.

See, also, *Jones v. Conn*, 39 Ore. 30, 64 Pac. Rep. 855, 65 Pac. Rep. 1068, 54 L. R. A. 630, 87 Am. St. Rep. 634, citing *Kinney on Irr.*, 1st Ed., Sec. 329.

See, also, for injunctions by riparian proprietors without use, Sec. 1612.

⁵ *San Joaquin etc. Co. v. Fresno etc. Co.*, 158 Cal. 626, 112 Pac. Rep. 182, 35 L. R. A., N. S., 832; *Modoc etc. Co. v. Booth*, 102 Cal. 151, 36 Pac. Rep. 431; *Fifield v. Spring Valley Water Works*, 130 Cal. 552, 62

Pac. Rep. 1054; *Miller v. Bay Cities W. Co.*, 157 Cal. 256, 107 Pac. Rep. 115, 27 L. R. A., N. S., 772; *Miller & Lux v. Madera Canal Co.*, 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391; *Byers v. Colonial Irr. Co.*, 134 Cal. 553, 66 Pac. Rep. 732; *Mentone Irr. Co. v. Redlands etc. Co.*, 155 Cal. 323, 100 Pac. Rep. 1082, 22 L. R. A., N. S., 382, 17 Am. & Eng. Ann. Cas. 1222; *Ulbricht v. Eufaula W. Co.*, 86 Ala. 587, 6 So. Rep. 78, 4 L. R. A. 572, 11 Am. St. Rep. 72; *Standford v. Felt*, 71 Cal. 249, 16 Pac. Rep. 900; *Conkling v. Pacific etc. Co.*, 87 Cal. 296, 25 Pac. Rep. 399.

⁶ For the right of riparian owners to an injunction, see Sec. 1616.

⁷ *Bonetti v. Ruiz*, 15 Cal. App. 7, 113 Pac. Rep. 118.

See, also, for injunctions relating to percolating or underground waters, Sec. 1616.

⁸ *Shields v. Orr Ex. D. Co.*, 23 Nev. 349, 47 Pac. Rep. 184.

flood which has already occurred, but where the title to the land still remains to be protected.⁹ So, a land owner is entitled to an injunction against a stranger, who, under a claim of right, is taking water from his canal by means of a ditch across his land, even though the amount of water taken is inappreciable, since its continued use would ripen into an easement in the land.¹⁰ The building of a ditch over the land of another, without right, will be enjoined although the actual damage is small.¹¹ So, also, an injunction will be granted against the change in the location of the ditch constructed over the land of another without showing damage.¹²

§ 1607. **Restraining orders or preliminary injunctions.**—As with other cases, upon a proper showing and the furnishing of a bond as required by law, temporary writs of injunction, or restraining orders, may be issued by the Court to restrain, during the pendency of the action, a trespass to a water right, or upon the ditches, canals, or other works necessary for the utilization of the same. The granting of a preliminary injunction is a matter resting largely in the discretion of the trial Court, and its decision thereon will not be disturbed upon appeal in the absence of an abuse of discretion.¹ The purpose of a preliminary injunction is to preserve the *status quo*, or to protect the rights of the party in

⁹ *Salton Sea Cases*, 172 Fed. Rep. 792, 97 C. C. A. 242.

¹⁰ *Walker v. Emerson*, 89 Cal. 456, 26 Pac. Rep. 968.

An injunction will be granted to prohibit the continuance of actions that obstruct a land owner's free use and enjoyment of his land, irrespective of other damage, where such action, if continued, will ripen into an easement. *Vestal v. Young*, 147 Cal. 715, 82 Pac. Rep. 381.

See, also, for injunctions for the interference with ditches, etc., Sec. 1619.

For injunctions relative to easements, see Sec. 1618.

¹¹ *Vestal v. Young*, 147 Cal. 715, 82 Pac. Rep. 381; *Winalow v. Vallejo*,

148 Cal. 725, 84 Pac. Rep. 191, 5 L. B. A., N. S., 851, 113 Am. St. Rep. 349, 7 Am. & Eng. Ann. Cas. 851.

¹² *Vestal v. Young*, 147 Cal. 721, 82 Pac. Rep. 383.

¹ *Miller & Lux v. Madera etc. Co.*, 155 Cal. 59, 99 Pac. Rep. 502, 22 L. B. A., N. S., 391, where it was said upon rehearing: "It would be superfluous to cite authorities to show that the granting or refusing of a preliminary injunction is a matter resting largely in the discretion of the trial court."

See, also, *Porters Bar Dredging Co. v. Beaudry*, 15 Cal. App. 751; 115 Pac. Rep. 951; *Rodgers v. Pitt*, 89 Fed. Rep. 420, 129 Fed. Rep. 932.

whose favor it is granted pending the final determination of the case.² A Court vested with the power to issue preliminary injunctions should not hesitate to issue one *ex parte* upon a proper showing and in a proper case.³ And where the damage or injury is imminent, a preliminary injunction should be granted,⁴ but, upon the other hand, great care should be exercised by the Court in so doing, lest those against whom the writ issues, or who are affected thereby, are irreparably injured instead of the applicant for the writ, if it is refused.⁵ And, in general, it may be said that the preliminary writ should not be granted unless it be in cases where

² *Miller & Lux v. Madera etc. Co.*, 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391; *McLean v. Farmers' etc. Co.*, 44 Colo. 184, 98 Pac. Rep. 16; *Custer Consol. Mines Co. v. City of Helena*, — Mont. —, 122 Pac. Rep. 567.

See *White v. Nuckolls*, 49 Colo. 170, 112 Pac. Rep. 329, where a preliminary injunction was issued upon a defective complaint and a demurrer to which was sustained, but where the court refused to dissolve the injunction. The Court said: "The prevailing doctrine now is that, when a demurrer to a complaint upon which an injunction is issued is sustained, the court in its discretion may continue the injunction pending an amendment to the complaint." Citing 2 High on Injunctions, Sec. 1594; 10 Enc. Pl. & Pr. 983.

A judgment against plaintiff in a suit for an injunction, on demurrer being sustained to the complaint, and he declining to plead further, is not an order denying a temporary injunction, which is unappealable, but a final and appealable judgment. *Peters v. Lewis*, 28 Wash. 366, 68 Pac. Rep. 869; *Id.*, 33 Wash. 617, 74 Pac. Rep. 815.

³ *McLean v. Farmers' etc. Co.*, 44 Colo. 184, 98 Pac. Rep. 16; *Rodgers*

v. Pitt, 89 Fed. Rep. 420, 129 Fed. Rep. 932; *Derry v. Ross*, 5 Colo. 295; *Krause v. Oregon etc. Co.*, 45 Ore. 378, 77 Pac. Rep. 833; *Smith v. Stearns Rancho Co.*, 129 Cal. 58, 61 Pac. Rep. 662; *White v. Nuckolls*, 49 Colo. 170, 112 Pac. Rep. 329; *Copper King v. Wabash M. Co.*, 114 Fed. Rep. 991; *Morris v. Bean*, 123 Fed. Rep. 618, 146 Fed. Rep. 423; *Miocene D. Co. v. Jacobson*, 146 Fed. Rep. 680, 77 C. C. A. 106.

⁴ *Hagerman Irr. Co. v. McMurray*, 16 N. M. 172, 113 Pac. Rep. 823; *Medano Ditch Co. v. Adams*, 29 Colo. 317, 68 Pac. Rep. 341.

⁵ "Rights to the use of water for the purposes of irrigation are of that supreme importance to all entitled to take water from a common source of supply that a court to which an application is made for an interlocutory injunction should exercise great care in granting it *ex parte*." *McLean v. Farmers' etc. Co.*, 44 Colo. 184, 98 Pac. Rep. 16.

In Texas, a temporary injunction will not be granted unless the plaintiff shows that he is actually using the water or is intending to immediately use it. *Biggs v. Leffingwell*, — Tex. Civ. App. —, 132 S. W. Rep. 902.

the rights of the party applying for the same have either been adjudicated in a previous action and determined in his favor, or in cases where his rights are plain. Again, it is a dangerous proposition for the party applying for a preliminary injunction, owing to the fact that the laws of all States require the furnishing by the applicant of a bond; and, therefore, if the applicant should be finally defeated in his action, he is made liable for all damages suffered by the adverse party by reason of the preliminary injunction, up to the amount named in the bond.⁶ In cases involving any class of rights in the waters of artesian basins or saturated strata, preliminary injunctions must be granted, if at all, "only upon the clearest showing that there is imminent danger of irreparable and substantial injury, and that the diversion complained of is the real cause."⁷

And, while in these cases preliminary injunctions are sometimes granted, it is the more common practice to wait until the final determination of the action before the injunctive relief is asked for or granted by the Court. This is especially true in actions where the rights of the parties to the use of the water and the right to a final injunction are to be determined in the same case.⁸ As it is wholly within the discretion of the Court to grant a preliminary writ of injunction, so also it is within its discretion, during the progress of the action, should the Court find that the writ was wrongfully issued, to dissolve the temporary injunction,⁹ or to

⁶ For the recovery of damages on injunction bonds, see Sec. 1680.

Sullivan v. Jones, 13 Ariz. 229, 108 Pac. Rep. 476.

⁷ *Katz v. Walkinshaw*, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

⁸ In California, Sec. 526 of the Code of Civ. Proc. authorizes the granting of a preliminary injunction only where the complaint shows that the plaintiff is entitled to a decree restraining the commission of the act complained of, or, where it appears that, pending the litigation, the commission of some act will produce ir-

reparable injury to the plaintiff. *Van Horn v. Decrow*, 136 Cal. 117, 68 Pac. Rep. 473.

⁹ *Campbell v. Flannery*, 29 Mont. 246, 74 Pac. Rep. 450, where it was held that, under Sec. 878, Code of Civ. Proc. of Montana, providing that if an application to dissolve a temporary injunction be made on affidavits on defendant's part, but not otherwise, plaintiff may oppose the same by affidavits, a plaintiff, on such an application made on the complaint alone, has no right to file an affidavit in support of his pleading.

modify the terms thereof.¹⁰ So, also, where the Court granted a preliminary injunction in a suit to restrain the diversion of water of a stream, while a suit to quiet title to the water was pending in another county, the Court must modify the injunction so as to conform to any determination of the Court to quiet title.¹¹ So, again, in the final determination of the injunction suit, the Court may either dissolve the preliminary injunction, or it may make such modifications of the terms thereof in the decree making the preliminary injunction permanent, as will conform to the rights of the parties as finally determined in the action.¹²

In very rare cases preliminary mandatory injunctions are granted by the Court, but it is only where the party's right to the relief is clear and certain.¹³ As a general proposition, a mandatory injunction will not lie to compel the destruction of buildings or structures prior to a hearing and determination of the case on its merits.¹⁴

§ 1608. Mandatory injunctions.—Mandatory injunctions, or those which command a party to an action to do a certain thing, are often decreed upon the final determination of an action, but are resorted to rarely, and are seldom allowed before the final hearing.¹

Mandatory injunctions may be granted ordering the abatement of nuisances.² Such an injunction may be granted ordering a

¹⁰ McLean v. Farmers' etc. Co., 44 Colo. 184, 98 Pac. Rep. 16; Sullivan v. Jones, 13 Ariz. 229, 108 Pac. Rep. 476.

¹¹ Miller & Lux v. Madera etc. Co., 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391.

¹² Where a court granting a temporary injunction dissolves it on final hearing, error in granting such injunction will not be considered on appeal, but the aggrieved party will be left to his remedy by suit on the injunction bond. Watkins v. Dorris, 24 Wash. 636, 64 Pac. Rep. 840, 54 L. R. A. 199.

See, also, for final decrees in injunction cases, Secs. 1642-1646.

¹³ See next section, 1608.

¹⁴ Ryan v. Weiser Valley etc. Co., 20 Idaho 288, 118 Pac. Rep. 769.

¹ For restraining orders or preliminary injunctions, see Sec. 1607.

² For injunctions abating nuisances, see Sec. 1621.

For injunctions abating the pollution of waters, see Sec. 1143.

Bigney v. Tacoma etc. Co., 9 Wash. 576, 38 Pac. Rep. 147, 26 L. R. A. 425; International etc. R. Co. v. Davis, — Tex. —, 29 S. W. Rep. 483; Ramsey v. Chandler, 3 Cal. 90, 4 Morr. Min. Rep. 240; Nicholson v. Getchell, 96 Cal. 394, 31 Pac. Rep. 265; Bingham v. Walter, 80 Kan. 617, 103 Pac. Rep. 120; Wilhite v. Billings etc. Co., 39 Mont. 1, 101 Pac. Rep. 168.

party to place a weir, or measuring box, in a stream or ditch, and when so granted it is *res judicata* as between the parties in a later action.³ Where the water is being wrongfully diverted from the lawful owners thereof, it may order the removal of the dam or other means of diversion, or all obstructions which prevent the flow of the water to the ditches of the owners thereof.⁴ It may order the removal of dams, embankments, or dikes, by the means of which the land and property of others is flooded to their injury,⁵ and that, too, although the party injured has not established his right to damages by a verdict or a finding of the Court.⁶ However, where the facts do not warrant the Court in granting such an injunction, it, of course, should be denied.⁷

In rare cases mandatory preliminary injunctions are issued by the Court. But, if mandatory injunction may issue at all before the final determination of the case, it is only where the party's right

³ *McPherson v. Alta Irr. Dist.* 14 Cal. App. 353, 112 Pac. Rep. 193; *Elliott v. Whitmore*, 10 Utah 246, 37 Pac. Rep. 461.

A mandatory writ of injunction may be issued *ex parte*. *New Iberia etc. Co. v. Romero*, 105 La. 439, 29 So. Rep. 876.

⁴ *Evans Ditch Co. v. Lakeside Ditch Co.*, 15 Cal. App. 119, 108 Pac. Rep. 1027; *Gurnsey v. Antelope etc. Co.*, 6 Cal. App. 387, 92 Pac. Rep. 326; *Montecito etc. Co. v. City of Santa Barbara*, 144 Cal. 578, 77 Pac. Rep. 1113; *Ramsey v. Chandler*, 3 Cal. 90, 4 Morr. Min. Rep. 240; *Johnson v. Superior Ct. of Tulare Co.*, 65 Cal. 567, 4 Pac. Rep. 575; *Evans v. Ross*, 67 Cal. 19, 8 Pac. Rep. 88; *Allen v. Stowell*, 145 Cal. 666, 79 Pac. Rep. 371, 68 L. R. A. 223, 104 Am. St. Rep. 80.

The restoration of streams to their natural channels may be included in the relief granted against diversion of the waters of such streams. *Rigney v. Tacoma etc. Co.*, 9 Wash. 576, 184—Kin. on Irr.

38 Pac. Rep. 147, 26 L. R. A. 425, ordering the removal of a dam.

⁵ *McPherson v. Alta Irr. Dist.*, 14 Cal. 353, 112 Pac. Rep. 193; *Nicholson v. Getchell*, 96 Cal. 394, 31 Pac. Rep. 265; *International etc. R. Co. v. Davis*, — Tex. Civ. App. —, 29 S. W. Rep. 483; *Wilhite v. Billings etc. Co.*, 39 Mont. 1, 101 Pac. Rep. 168; *Learned v. Castle*, 78 Cal. 454, 18 Pac. Rep. 872, 21 Pac. Rep. 11.

⁶ A mandatory injunction may be awarded to compel the removal of dams which have wrongfully diverted water onto plaintiff's property, the effect of which will be to destroy trees and cut gulches, although the plaintiff has not established his right to damages by a verdict of a jury or a finding of the court. *Allen v. Stowell*, 145 Cal. 666, 79 Pac. Rep. 371, 68 L. R. A. 223, 104 Am. St. Rep. 80.

⁷ *Burris v. People's D. Co.*, 104 Cal. 248, 37 Pac. Rep. 922; *Lanham v. Wenatchee etc. Co.*, 48 Wash. 337, 93 Pac. Rep. 522.

to the relief is clear and certain.⁸ In Arizona a temporary mandatory injunction was granted while the action was pending and before its final determination, requiring the defendant company to deliver water to the plaintiff for use in irrigating his land at such price as should be fixed by the Court. In compliance with this order the price was fixed by the Court and the money paid by the plaintiff to the defendant company.⁹ But where the petition or complaint fails to set up the jurisdictional facts upon which an injunction may be granted, the Court will refuse to grant a temporary mandatory injunction.¹⁰

§ 1609. **Injunctions in the alternative, or conditional.**—An injunction may be granted in the alternative. As, where it was adjudged that the defendants abate a certain nuisance by the mandatory order to remove an embankment or dike made by them, and to fill up a certain ditch enlarged by them to its former level, and they be enjoined from a further continuance of said embankment and ditch in its present condition; but where it was also provided that “the defendants, as an alternative for doing of said

⁸ *Lanham v. Wenatchee Canal Co.*, 48 Wash. 337, 93 Pac. Rep. 522; citing 22 Cyc. 743.

A mandatory injunction pending suit, requiring the removal of logs from plaintiff's land, was proper where defendant had no conceivable right, under any possible view of the case, to float logs on plaintiff's land, and leave them there, as he had done. *White v. Codd*, 39 Wash. 14, 80 Pac. Rep. 836.

“This court will in proper cases order the entry of interlocutory restraining orders, either mandatory or prohibitory, as the case may require.” *Wilhite v. Billings etc. Co.*, 39 Mont. 1, 101 Pac. Rep. 168.

“The jurisdiction of the court to grant a preliminary injunction restraining the defendant from interfering with the flow of the water pending the litigation can not be doubted, and we can not see that its jurisdic-

tion is exceeded when it requires the removal of the means by which the diversion is made.” *Johnson v. Superior Ct. of Tulare Co.*, 65 Cal. 567, 4 Pac. Rep. 575.

⁹ *Salt River etc. Co. v. Nelssen*, 10 Ariz. 9, 85 Pac. Rep. 117, 12 L. R. A., N. S., 711. Upon appeal the Supreme Court in passing upon this point said: “If the granting of this order was an erroneous exercise of power, the error would not have been ground for reversing or modifying the final judgment, upon the rendition of which the interlocutory order expired by its own limitation.”

¹⁰ *Fulton D. Co. v. Twombly*, 6 Colo. App. 554, 42 Pac. Rep. 253; *People ex rel. Hinckley v. District Court, Lake County*, 29 Colo. 277, 68 Pac. Rep. 224, 93 Am. St. Rep. 61; *Wilhite v. Billings etc. Co.*, 39 Mont. 1, 101 Pac. Rep. 168.

acts, may make other suitable and proper provision for the care of the storm waters'' deflected by such works and caused thereby to flow upon the plaintiff's land.¹

So, also, an injunction may be granted conditional upon the non-performance of some order of the Court. Such was the case where an injunction was sought by a riparian owner to restrain the maintaining of a dam and the diversion of the waters of a river, and thereby preventing their natural flow through the lands of the plaintiff, and where the plaintiff had been guilty of laches by permitting the defendants to expend large sums of money in the construction of their works, and to continue the construction for a period covering two years. The Supreme Court of the United States held that an ascertainment and decree for the payment of damages, with an order for injunction in the alternative, and not a permanent injunction, to be entered on a specified date unless the parties shall sooner agree to compensation, was the measure of relief by the riparian owners. That a certain time should be fixed within which the defendant would be required to pay such sum, and that upon the failure to make such payment an injunction would issue as prayed for; and, on the other hand, that upon payment a decree would be entered in favor of the defendant. And, again, if the plaintiffs should prefer to have their damages assessed by a jury, leave may be given to dismiss the bill without prejudice to an action at law.² So, again, in California it was held that, where it was to the interest of the public that subterranean waters be pumped and diverted to supply the needs of a town, and the monetary injury to the land from under which it is taken can be determined, an absolute injunction will not be granted, but merely one conditioned on the failure to make good the damages.³

§ 1610. **An appropriator's right to an injunction for unlawful diversion or diminution of quantity.**—A person who has acquired the right to the use of a certain quantity of water by an appropria-

¹ *Humphreys v. Moulton*, 1 Cal. App. 257, 81 Pac. Rep. 1085.

See, also, *Wilhite v. Billings etc.* Co., 39 Mont. 1, 101 Pac. Rep. 168; *Brown v. Gold Coin etc. Co.*, 48 Ore. 277, 86 Pac. Rep. 361.

² *City of New York v. Pine*, 185 U. S. 93, 46 L. Ed. 820, 22 Sup. Ct. Rep. 592; *rev'g Id.*, 112 Fed. Rep. 98. ³ *Newport v. Temescal W. Co.*, 149 Cal. 531, 87 Pac. Rep. 372, 6 L. R. A., N. S., 1098.

tion of the same, or one who has in some lawful manner succeeded to the rights of an appropriator, is entitled to have the water continue to flow in the natural stream, or, after diversion, in his ditch, canal, or other works, so that he may continue to enjoy its use. Such a right is a property right of which the owner can not be deprived without due process of law, and upon the payment of just compensation.¹ Therefore, for the protection of such a property right, and against the wrong-doer unlawfully diminishing the quantity of water to which the prior appropriator is entitled, by the unlawful diversion of the same, or otherwise, equity affords the appropriate remedy by way of an injunction.² This is no modern

¹ That a water right is a property right, see Secs. 768-771.

For the acquisition of rights by eminent domain, see Secs. 1059-1098.

For condemnation proceedings, see Secs. 1092-1097.

² "The rule is well settled that a bill which discloses, as this does, a continuing trespass on lands of the complainant by a large number of defendants, and a constant and wrongful diversion of water from a stream thereon, which tends to depreciate the value of the land, is sufficient to entitle the complainant to an injunction." *Miller & Lux v. Rickey*, 127 Fed. Rep. 573.

See, also *Hackett v. Larimer etc. Co.*, 48 Colo. 178, 109 Pac. Rep. 965, 1 Water and Min. Cas. Ann. 224.

So soon as the prior appropriation and right of use is established, it is clear, as a proposition of law, that such appropriator is entitled to have sufficient of the unappropriated waters flow down to his point of diversion to supply his right, and an injunction against interference therewith is proper protective relief to be granted. *Moe v. Harger*, 10 Idaho 302, 77 Pac. Rep. 645.

"It has been so often decided that it has become almost axiomatic that

one who appropriates the waters of a stream running through public land acquires a special property therein, as against all persons acquiring rights subsequent in time, either as appropriators or as riparian proprietors, and may, as against such persons, insist that the waters shall be at all times subject to his use, to the extent of his original appropriation." *Britt v. Reed*, 42 Ore. 76, 70 Pac. Rep. 1029; holding that an action for injunction against the unlawful interference of such waters would lie.

Where the title to the water has been obtained by prior appropriation, a decree enjoining one from wrongfully diverting it is not erroneous merely because the party so enjoined owns the land through which the water naturally flows. *Ronnow v. Delmue*, 23 Nev. 29, 41 Pac. Rep. 1074.

See, also, *Union M. & M. Co. v. Dangberg*, 81 Fed. Rep. 73; *King v. Stuart*, 84 Fed. Rep. 546; *United States etc. Co. v. Gallegos*, 89 Fed. Rep. 769, 32 C. C. A. 470, 61 U. S. App. 13; *Henderson v. Nichols*, 67 Cal. 152, 7 Pac. Rep. 412; *Medano D. Co. v. Adams*, 29 Colo. 317, 68 Pac. Rep. 431; *Santa Rosa Irr. Co. v. Pecos River Irr. Co.* — Tex. Civ. App. —, 92 S. W. Rep. 1014; *Ne-*

rule of law, but has been enforced ever since the earliest times when the Arid Region Doctrine of appropriation was adopted in the Western States of this country.³ Not only does an action for an injunction lie where the interference of the water occurs while it is still running in the natural stream, but it also lies for an unlawful interference with the water after it has been diverted into the ditch, canal, or other works of the owner.⁴ An injunction will be granted

vada D. Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777; *Fuller v. Swan River etc. Co.*, 12 Colo. 12, 19 Pac. Rep. 836, 16 Morr. Min. Rep. 252; *Salazar v. Smart*, 12 Mont. 395, 30 Pac. Rep. 676; *Simpson v. Harrah*, 54 Ore. 448, 103 Pac. Rep. 58; *Hagerman Irr. Co. v. McMurry*, 16 N. M. 172, 113 Pac. Rep. 823; *Montpelier Milling Co. v. City of Montpelier*, 19 Idaho 212, 113 Pac. Rep. 741; *Desmond v. Sander*, 46 Wash. 58, 89 Pac. Rep. 179; *City of Pocatello v. Bass*, 15 Idaho 1, 96 Pac. Rep. 120; *City of Telluride v. Blair*, 33 Colo. 353, 80 Pac. Rep. 1053; *Parker v. Gregg*, 136 Cal. 413, 69 Pac. Rep. 22; *Medano D. Co. v. Adams*, 29 Colo. 317, 68 Pac. Rep. 431; *Barnes v. Gerberg*, 27 Wash. 126, 67 Pac. Rep. 568; *Ogilvy Irr. & L. Co. v. Insinger*, 19 Colo. App. 380, 75 Pac. Rep. 598; *Browning v. Lewis*, 39 Ore. 11, 64 Pac. Rep. 304; *McCall v. Porter*, 42 Ore. 49, 70 Pac. Rep. 820, 71 Pac. Rep. 976; *McPhail v. Forney*, 4 Wyo. 556, 35 Pac. Rep. 773; *Wold v. May*, 10 Wash. 157, 38 Pac. Rep. 875; *Moore v. Clear Lake etc. Co.*, 68 Cal. 147, 8 Pac. Rep. 816; *Riverside W. Co. v. Gage*, 89 Cal. 410, 26 Pac. Rep. 889; *Roberts v. Arthur*, 15 Colo. 456, 24 Pac. Rep. 922; *Bartlett v. O'Connor*, 102 Cal. 17, 36 Pac. Rep. 513; *Britt v. Reed*, 42 Ore. 76, 70 Pac. Rep. 1029; *Jerrett v. Mahan*, 20 Nev. 89, 17 Pac. Rep. 12; *Cole v. Logan*, 24 Ore. 304, 33 Pac. Rep. 568.

³ For the history of the Arid Re-

gion Doctrine of appropriation, see Secs. 595-626.

See, also, *Cole v. Virginia etc. Co.*, 1 Sawy. 470, Fed. Cas. No. 2989; *Park v. Kilham*, 8 Cal. 77, 68 Am. Dec. 310, 4 Morr. Min. Rep. 552; *Kelly v. Natoma etc. Co.*, 6 Cal. 105, 1 Morr. Min. Rep. 592; *Tuolumne W. Co. v. Chapman*, 8 Cal. 392, 11 Morr. Min. Rep. 34; *Phoenix W. Co. v. Fletcher*, 23 Cal. 482, 15 Morr. Min. Rep. 185; *Rupley v. Welch*, 23 Cal. 452, 4 Morr. Min. Rep. 243; *Hill v. Smith*, 27 Cal. 476; *Lake v. Tolles*, 8 Nev. 285; *Barnes v. Sabron*, 10 Nev. 217, 4 Morr. Min. Rep. 673; *Harris v. Shontz*, 1 Mont. 212; *Basey v. Gallagher*, 87 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683; *aff'g Id.*, 1 Mont. 457; *Barkley v. Tieleke*, 2 Mont. 59, 4 Morr. Min. Rep. 666; *Fabian v. Collins*, 3 Mont. 215; *Schilling v. Rominger*, 4 Colo. 100; *Keeney v. Carillo*, 2 N. M. 480; *Ellis v. Tone*, 58 Cal. 289.

⁴ An injunction lies to prevent the unlawful interference with water rights of the owner of an irrigation ditch by the owners of the land through which it extends. *Shaw v. Proffitt*, 57 Ors. 192, 109 Pac. Rep. 584.

So, also, with the interference with a dam. *Hagerman Irr. Co. v. McMurry*, 16 N. M. 172, 113 Pac. Rep. 823.

See, also, *Hoyt v. Hart*, 149 Cal. 722, 87 Pac. Rep. 569; *Salt River etc. Co. v. Nelssen*, 10 Ariz. 9, 85 Pac. Rep. 117, 12 L. R. A., N. S., 711; *Mc-*

to enjoin the acts of a junior appropriator by taking water from a tributary of the main stream, and that, too, where the plaintiff's point of diversion is above the junction of the main stream and tributary, provided, that there are those below who own rights prior in time to those of the plaintiff.⁵ So, an action will lie for obstructing the flow of springs.⁶ But where the water was appropriated from a stream and a spring was found not to be one of its sources of supply, an injunction will not be granted in a suit by the appropriator.⁷ Again, an action for an injunction will lie not only against the unlawful diversion of the water by obstructions in the natural stream or ditch, but it will lie also against the continuance of any unlawful acts whereby the flow of the quantity of water to which the appropriator is entitled is materially diminished. So, such an action will lie for the converse of diversion; that is, against the repetition of trespass in tearing out of the diverting works of the appropriator,⁸ or by the diminishing of the velocity of the stream, or causing the irregularity of its flow,⁹ or where the diminution is caused by a sawmill discharging sawdust into the stream and causing the clogging up of the stream and the ditches of the appropriator.¹⁰

Also a prior appropriator may maintain an action against a

Phail v. Forney, 4 Wyo.: 556, 35 Pac. Rep. 773.

See, also, for injunctions for interference with ditches, etc., Sec. 1619.

⁵ *Water Supply etc. Co. v. Larimer etc. Co.*, 25 Colo. 87, 53 Pac. Rep. 386; *rev'g Id.*, 7 Colo. App. 225, 42 Pac. Rep. 1020.

See, also, *Buckers etc. Co. v. Platte Valley etc. Co.*, 28 Colo. 187, 63 Pac. Rep. 305; *Cole v. Richards etc. Co.*, 27 Utah 205, 75 Pac. Rep. 376, 101 Am. St. Rep. 962.

See, also, for the rights to the water of tributaries, Sec. 649.

⁶ *Town of Suisun City v. De Freitas*, 142 Cal. 350, 75 Pac. Rep. 1092; *Williams v. Harter*, 121 Cal. 47, 53 Pac. Rep. 405; *Berry v. Equitable etc. Co.*, 29 Nev. 451, 91 Pac. Rep. 537; *City of Pocatello v. Bass*, 15

Idaho 1, 96 Pac. Rep. 120; *Bruening v. Dorr*, 23 Colo. 195, 47 Pac. Rep. 290, 35 L. R. A. 640; *Shenandoah etc. Co. v. Morgan*, 106 Cal. 409, 39 Pac. Rep. 802; *Mason v. Yearwood*, 58 Wash. 276, 108 Pac. Rep. 608.

⁷ *Leonard v. Shatzer*, 11 Mont. 422, 28 Pac. Rep. 475; *Sparlin v. Gotcher*, 23 Ore. 186, 31 Pac. Rep. 399.

See, also, for rights to the waters of springs, Sec. 648.

⁸ *Parker v. Gregg*, 136 Cal. 413, 69 Pac. Rep. 22.

⁹ *Natoma etc. Co. v. McCoy*, 23 Cal. 490, 4 Morr. Min. Rep. 590; *Phoenix W. Co. v. Fletcher*, 23 Cal. 482, 15 Morr. Min. Rep. 185; *Stone v. Bumpers*, 40 Cal. 428; *Parker v. Gregg*, 136 Cal. 413, 69 Pac. Rep. 22.

¹⁰ *Phoenix W. Co. v. Fletcher*, 23 Cal. 482, 15 Morr. Min. Rep. 185.

junior appropriator to abate a ditch so constructed along the stream as to withdraw water by seepage.¹¹ Again, an action will lie by an appropriator whose rights are interfered with by another appropriator in changing his point of diversion,¹² his place of use,¹³ the change of the use itself,¹⁴ or the change of the location of a ditch or canal,¹⁵ whereby the quantity of the water to which the appropriator is entitled is unlawfully diminished. But, upon the other hand, an action for an injunction can not be successfully maintained against those who did not cause the injury,¹⁶ nor can a prior appropriator maintain such an action against a subsequent appropriator, where the latter takes only the surplus water of a stream, which is not covered by the claim of the former,¹⁷ nor during those periods of time when the prior appropriator has no use for the water.¹⁸ If the contrary were the rule, the first appropriator upon a stream might claim all of its waters, regardless of use. If the prior appropriator receives the water to which he is

¹¹ Platte Valley Irr. Co. v. Buckers, 25 Colo. 77, 53 Pac. Rep. 334.

¹² For changing point of diversion, see Secs. 857-859.

¹³ For the change of place of use, see Secs. 867-871.

¹⁴ For change of use, see Secs. 870-872.

¹⁵ North Powder M. Co. v. Coughanour, 34 Ore. 9, 54 Pac. Rep. 223.

¹⁶ For change of location of ditch or canal, See Sec. 860.

¹⁷ For injunctions relating to ditches, etc, see Sec. 1619.

¹⁸ In order to successfully maintain an injunction proceeding, it must appear that the acts of those sued caused the injury. West Point Irr. Co. v. Moroni etc. Co., 21 Utah 229, 61 Pac. Rep. 16.

¹⁹ For the rights of prior and subsequent appropriators, see Secs. 776-786.

Smith v. Hawkins, 120 Cal. 86, 52 Pac. Rep. 139, 19 Morr. Min. Rep. 243; Senior v. Anderson, 130 Cal. 290, 62 Pac. Rep. 563; *Id.*, 115 Cal. 496,

47 Pac. Rep. 454; Hillman v. Newton, 57 Cal. 56; Barrows v. Fox, 98 Cal. 63, 32 Pac. Rep. 811; Santa Paula Waterworks v. Peralta, 113 Cal. 38, 45 Pac. Rep. 168; Kelly v. Natoma etc. Co., 6 Cal. 105, 1 Morr. Min. Rep. 592; Smith v. O'Hara, 43 Cal. 371, 1 Morr. Min. Rep. 671; Junkans v. Bergin, 67 Cal. 267, 7 Pac. Rep. 684; Edgar v. Stevenson, 70 Cal. 286, 11 Pac. Rep. 704; Salt Lake City v. Salt Lake City etc. Co., 24 Utah 249, 67 Pac. Rep. 672, 25 Utah 441, 71 Pac. Rep. 1069, 61 L. R. A. 648; Mann v. Parker, 48 Ore. 321, 86 Pac. Rep. 598; Saint v. Guerrero, 17 Colo. 448, 30 Pac. Rep. 335, 31 Am. St. Rep. 320; Cole v. Logan, 24 Ore. 304, 33 Pac. Rep. 568.

¹⁸ Sand Point etc. Co. v. Panhandle Dev. Co., 11 Idaho 405, 83 Pac. Rep. 347; Faulkner v. Rondoni, 104 Cal. 140, 37 Pac. Rep. 883; Natoma W. Co. v. Hancock, 101 Cal. 42, 31 Pac. Rep. 112, 35 Pac. Rep. 334.

See, also, for periodical appropriations, Sec. 786.

entitled, at a point where he can apply the same to the entire beneficial use for which the appropriation was made, he can not complain. Therefore, where the subsequent appropriator diverted the water of a prior appropriator and used it for the generation of power, and thereafter turned the water into the prior appropriator's ditch above his place of use, an injunction will not lie against the later appropriation.¹⁹ Neither does an injunction lie against the cutting or felling of timber, by the owner of the land above the appropriator's point of diversion, and thereby diminishing the flow of the stream by facilitating evaporation.²⁰ Nor will an injunction be granted where the plaintiff bases his right of action upon a prior appropriation and the proof discloses the fact that it was based upon a contract.²¹

But, in all cases, whether a court of equity will interfere and enjoin acts claimed to be injurious to the rights of the prior appropriator will depend entirely upon the character and extent of the injury alleged; whether it is irremediable in its nature; whether it is continuing or is threatened; whether an action at law would afford adequate remedy; whether the parties defendant are able to respond in damages resulting from the injury; whether if the injury is continued it will ripen into an adverse title by prescription, and other considerations which ordinarily govern a court of equity in the exercise of its preventive process of injunction. As was said by Mr. Justice Field, in speaking for the Supreme Court of the United States, of the rights of the prior appropriator to an injunction: "In all cases, therefore, between him and the parties subsequently claiming the water, the question for determination is necessarily whether his use and enjoyment of the water to the extent of his original appropriation have been impaired by the acts of the defendant." ²²

¹⁹ *Austin v. Chandler*, 4 Ariz. 346, 42 Pac. Rep. 483.

See, also, *Harrington v. Demaris*, 46 Ore. 111, 77 Pac. Rep. 603, 82 Pac. Rep. 14, 1 L. R. A., N. S., 756.

²⁰ *Fisher v. Feige*, 137 Cal. 39, 69 Pac. Rep. 618, 59 L. R. A. 333, 92 Am. St. Rep. 77.

²¹ *City and County of Denver v. Walker*, 45 Colo. 387, 101 Pac. Rep. 348.

²² *Atchison v. Peterson*, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583; affirming *Id.*, 1 Mont. 561, denying the writ.

§ 1611. **Riparian owner's right to injunction for diminution of quantity.**—As to when a riparian owner is entitled to an injunction to enjoin the diminishing of the flow of a natural stream which flows through or by his land depends upon a number of considerations. As we have discussed in previous portions of this work, a number of the Western States have attempted to reconcile the common law of riparian rights with the Arid Region Doctrine of appropriation in the government and control of the waters flowing within their respective boundaries. And, they have, therefore, both systems.¹ We have also discussed as to how the strict rule of the common law of riparian rights, as the same is known in England and the Eastern States, when it was found that such a rule was inapplicable to the arid conditions of this Western country, had been gradually modified by court decisions.² These modifications have continued until certain fundamental propositions have been established and may now be regarded as settled. First, that all of the waters of this Western country are for some beneficial use or purpose; and, second, the right of a riparian owner to maintain an injunction against the diminished flow of a stream depends largely upon the use to which he himself is applying it. In other words, the right to a certain flow of water, as a riparian owner, must be accompanied by a use of the water.³

The time has passed when a riparian owner will be aided by a court of equity in insisting upon the undiminished flow of a stream, without use, simply because it adds to the beauty of the scenery. As was said upon this subject by one of the latest cases decided by the Supreme Court of California, which Court, by the way, has been the one most strenuous to insist upon the rights of riparian proprietors: "Even if at common law, or under the civil law, it was a part of the usufructuary right of a riparian owner to have the water flow by for no purpose other than to afford him pleasure at its prospect, such is not the rule of decision in this State."⁴

Then, again, where the right of an injunction is claimed as

¹ For these States, see Secs. 507, 621.

² For the modifications of the common law, see Secs. 508-513.

For irrigation as a riparian right, see Secs. 498-525.

³ See the following sections, 1612-1615.

⁴ *San Joaquin etc. Co. v. Fresno etc. Co.*, 158 Cal. 626, 112 Pac. Rep. 182, 35 L. R. A., N. S., 832.

against the excessive diversion by other riparian owners on the same stream, the relative rights of all of such owners must be considered, the damage which has been suffered by the plaintiff, and the beneficial uses to which those who are diverting the water are applying it.⁵

And, again, where the right is claimed as against non-riparian owners, or appropriators, the question as to the use which the party applying for such relief is making of the water, the actual damages which he is sustaining by reason of the diversion of the water by the others, and the other facts and circumstances surrounding each particular case must be considered by the Court. And, in this connection, it may be added that there is another modification of the common law rule of riparian rights which has become practically settled in this Western country, and that is, as stated by the California Court: "The lower claimant must show damage to justify a court of equity in restraining an upper claimant from his beneficial use of the water."⁶ Such a rule is necessary for the reason that, as stated in the same case: "The fair apportionment and economic use of the waters of this State are of the utmost importance to its development and well-being. The problems presented never came within the purview of the common law." The same reason applies also to the other Western States which still adhere to the common law rule of riparian rights.⁷

§ 1612. A riparian owner's right without use to injunction against diversion for use—The California cases.—Under the old common law rule of riparian rights, as construed in England and in most of the Eastern States of this country, and indeed by the Western courts, in those States which still adhere to the common law of riparian rights,¹ until a comparatively recent date, a riparian pro-

⁵ For the apportionment of water between riparian owners, see Sec. 1538.

Perry v. Calkins, 159 Cal. 175, 113 Pac. Rep. 136.

That an action for apportionment is distinct from one for an injunction, see Jones v. Conn, 39 Ore. 30, 64 Pac. Rep. 855, 65 Pac. Rep. 54 L. R. A. 630, 87 Am. St. Rep. 634.

⁶ San Joaquin etc. Co. v. Fresno etc. Co., 158 Cal. 626, 112 Pac. Rep. 182, 35 L. R. A., N. S., 832.

⁷ That the common law is inapplicable to govern waters of an arid region, see Secs. 588-594.

¹ For these States, see Secs. 507, 621.

prietor is given the aid of equity to prevent the diversion of the waters of a stream which runs through or adjoins his land, to prevent the diversion of the waters of such stream from their natural channel, although he may have made no use of the water himself, or have sustained small, or no pecuniary damages. In other words, under this construction, an action in equity will lie to maintain the undiminished flow of the stream as it was wont to flow by nature, unimpaired in quantity and undeteriorated in quality.² This right is regarded as absolute, and as a part and parcel of the land adjoining which the stream naturally flows, and that, too, regardless of the fact as to whether the water is put by the riparian owner to any actual use, other than the incidental benefit of having the stream flow by the land. The party diverting the water might go to great expense in the construction of his works, and yet the Court will compel the restoration of the flow to the natural channel of the stream. As was said in this regard in a Pennsylvania case: "The necessity of one man's business can not be the standard of another's right in a thing which belongs to both."³ The injunction, under such a construction of the common law, will be granted, and that, too, without proof of use by or damages to the riparian owner bringing the action. This construction of the common law rule, until a comparatively recent date was followed by some of the Western courts.⁴ As stated by the California Court: "If he does not in fact use any of the water himself, the inferior proprietor has a right to the flow of the entire stream."⁵ The plaintiff's right to an injunction does not depend upon the amount of injury which he

² See, for rights of riparian proprietors in this respect, Secs. 1611, 1612.

³ *Wheatley v. Crisman*, 24 Pa. St. 302, 64 Am. Dec. 657, 11 Morr. Min. Rep. 24.

See, also, Angell on Watercourses, Sec. 135; Wood on Nuisances, p. 348.

⁴ Where non-riparian owners divert part of the waters of a stream, and claim the right to do so, the right of the riparian owner to an injunction does not depend upon the amount of injury received, since he is entitled to the flow of the entire stream as against

them. *Gould v. Eaton*, 117 Cal. 539, 49 Pac. Rep. 577, 38 L. R. A. 181.

⁵ *Gould v. Eaton*, 117 Cal. 539, 49 Pac. Rep. 577, 38 L. R. A. 181, citing the English cases of *Stockport Waterworks Co. v. Potter*, 3 Hurl. & C. 300, 10 Jur., N. S., 1005, 10 L. T., N. S., 748; *Ormerod v. Todmorden Mill Co.*, 11 Q. B. Div. 155, 52 L. J. Q. B., N. S., 445, 31 Week. Rep. 759, 47 J. P. 532; *Swindon Waterworks Co. v. Wilts etc. Co.*, L. R. 7 H. L. 697, 45 L. Ch., N. S., 638, 33 L. T., N. S., 513, 24 Week. Rep. 284.

has received." ⁶ And, upon this subject the California Courts are in an almost inextricable confusion, as regards the right of a riparian proprietor without using the water to an injunction as against both an appropriator, or non-riparian owner actually using the water for some beneficial purpose, and against another riparian owner for the use of what is an excessive amount of water without regard to the equal or correlative rights of all. There is a line of decisions which follow the decision in the case of *Modoc etc. v. Booth*,⁷ which held that a riparian owner is not entitled to an injunction to restrain the diversion of water above him by a non-riparian owner or appropriator actually using the water, where the amount diverted would not be used by the former, nor cause any loss or injury to him or his land, present or prospective, and would greatly benefit the party diverting it.⁸

⁶ See, also, *Ferreira v. Knipe*, 28 Cal. 340, 87 Am. Dec. 128; *Lux v. Haggin*, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; *Bliss v. Johnson*, 76 Cal. 597, 16 Pac. Rep. 542, 18 Pac. Rep. 785; *Creighton v. Evans*, 53 Cal. 55, 8 Morr. Min. Rep. 123; *Moore v. Clear Lake Water Co.*, 68 Cal. 147, 8 Pac. Rep. 816; *Heilbron v. Fowler etc. Co.*, 75 Cal. 426, 17 Pac. Rep. 535, 7 Am. St. Rep. 183; *Conklin v. Pacific Imp. Co.*, 87 Cal. 296, 25 Pac. Rep. 399; *Walker v. Emerson*, 89 Cal. 456, 26 Pac. Rep. 968; *Spargur v. Heard*, 90 Cal. 221, 27 Pac. Rep. 198; *Mott v. Ewing*, 90 Cal. 237, 21 Pac. Rep. 194; *Hargrave v. Cook*, 108 Cal. 72, 41 Pac. Rep. 18, 30 L. R. A. 390; *Huffner v. Sawday*, 153 Cal. 86, 94 Pac. Rep. 424; *Stanford v. Felt*, 71 Cal. 249, 16 Pac. Rep. 900; *Duckworth v. Watsonville etc. Co.*, 150 Cal. 520, 89 Pac. Rep. 338; *Southern Cal. etc. Co. v. Wilshire*, 144 Cal. 68, 77 Pac. Rep. 767; *Anaheim Union W. Co. v. Fuller*, 150 Cal. 327, 88 Pac. Rep. 978, 11 L. R. A., N. S., 1062; *Brown v. Baker*, 39 Ore. 66, 65 Pac. Rep. 799, 66 Pac. Rep. 193; *Stein Canal Co. v. Kern Island etc. Co.*, 53 Cal. 563; *Vineland*

Irr. Dist. v. Azusa Irr. Co., 126 Cal. 486, 58 Pac. Rep. 1057, 46 L. R. A. 820; *Anaheim etc. Co. v. Semi-Tropic etc. Co.*, 64 Cal. 185, 30 Pac. Rep. 623; *Heilbron v. 76 Land etc. Co.*, 80 Cal. 189, 22 Pac. Rep. 62; *Last Chance etc. Co. v. Heilbron*, 86 Cal. 1, 26 Pac. Rep. 523; *Bathgate v. Irvine*, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158; *Benton v. Johncox*, 17 Wash. 277, 49 Pac. Rep. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912; *Baxter v. Gilbert*, 125 Cal. 580, 58 Pac. Rep. 129.

Under the laws of California, a riparian proprietor on a stream is entitled to an injunction to restrain the unlawful diversion of water, although the injury is incapable of ascertainment or of being estimated in damages. *California etc. Co. v. Enterprise etc. Co.*, 127 Fed. Rep. 741.

⁷ 102 Cal. 151, 36 Pac. Rep. 431.

⁸ See *Fifield v. Spring Valley Water Works*, 130 Cal. 552, 62 Pac. Rep. 1054; *Miller v. Bay Cities W. Co.*, 157 Cal. 256, 107 Pac. Rep. 115, 27 L. R. A., N. S., 772; *Miller & Lux v. Madera Canal Co.*, 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391.

There is another line of decisions which follow the case of *Gould v. Eaton*,⁹ which held exactly to the contrary to the case last cited, that as against an appropriator, or a non-riparian owner, the right of a riparian owner to an injunction does not depend upon the amount of injury received, since he is entitled to the entire flow of the stream as against them.¹⁰ And in *Huffner v. Sawday*,¹¹ it is said: The right of riparian proprietors "to restrain the diversion, by others than riparian owners, of water which would, if undisturbed, flow past their lands, does not rest upon the extent to which they have used the water, nor upon the injury which might have been done to their present use. Even if these plaintiffs had never made any use of the water flowing past their land, they had the right to have it continue in its customary flow, subject to such diminution as might result from a reasonable use by other riparian proprietors. This is a right of property, 'a part and parcel' of the land itself,¹² and plaintiffs are entitled to have restrained any act which would infringe upon this right."¹³ And then comes the late case of *San Joaquin etc. Co. v. Fresno etc. Co.*,¹⁴ in which the Court held that as against the use of an upper riparian owner for what might be termed an excessive use of the water, a lower owner must show substantial damage before the Court would grant an injunction against the upper owner, and modifying the doctrine as laid down in *Gould v. Eaton* to this extent, and holding that, if the rule of the common law is unfitted to the changed conditions existing in that State, so that its application will work hardship, the Supreme Court will not follow it. And then later comes the case of *Porters etc. Co. v. Beaudry*, decided by the Court of Appeals,¹⁵ in which the Court reaffirmed the old common law doctrine as announced in the case of *Gould v. Eaton*,¹⁶ and where the Court said:

⁹ 117 Cal. 539, 49 Pac. Rep. 577, 38 L. R. A. 181.

¹⁰ See the late cases of *Duckworth v. Watsonville*, 150 Cal. 520, 89 Pac. Rep. 338; *Anaheim Union W. Co. v. Fuller*, 150 Cal. 327, 88 Pac. Rep. 978, 11 L. R. A., N. S., 1062, in which the doctrine is reaffirmed.

¹¹ 153 Cal. 86, 94 Pac. Rep. 426.

¹² Citing *Duckworth v. Watsonville etc. Co.*, *supra*.

¹³ See, also, the cases cited in the first notes of this section.

¹⁴ 158 Cal. 626, 112 Pac. Rep. 182, 35 L. R. A., N. S., 832.

¹⁵ 15 Cal. App. 751, 115 Pac. Rep. 951.

¹⁶ *Supra*. Also as announced in *Huffner v. Sawday*, and *Duckworth v. Watsonville*, *supra*.

"The rights of a riparian proprietor as such are not to be tested by the use or uses to which he puts the riparian waters, or whether he uses them at all or not. If one's lands are riparian to a stream of water, the owner of the lands can not be divested of his rights as a riparianist merely because he may either put the waters flowing in such stream to other than a riparian use or not use them for any purpose at all. Nor would a non-riparian owner of the waters of the same stream for such reason alone be permitted to divert the waters of such stream." ¹⁷

The latest exposition of the California Court upon this subject was in the case of *Shurtleff v. Bracken*,¹⁸ in which the Court said: "The diversion of water of the stream is an injury to the freehold of the riparian owner, and may be enjoined without a showing of other immediate monetary damages." ¹⁹

§ 1613. A riparian owner's right without use to injunction against diversion for use—The more modern rule.—But in the evolution of the law of water rights in the Western States, the courts of those States have considerably changed their attitude upon the question of the right of a riparian proprietor to maintain an action for an injunction against the diversion of the waters of a stream, where such waters flow mostly over public lands and are needed for irrigation, and where the riparian owner is not actually applying the water to some beneficial purpose, and where he is not materially injured by the diversion of a certain quantity of the flow before it reaches his land. Therefore, a distinction must be noticed in the more recent decisions of the courts of these States; where the right claimed is merely the undiminished flow of the stream by a riparian proprietor, as between the construction of the strict common law rule of riparian rights as the same is recognized and enforced in England and in the Eastern States, and even as between the earlier decisions of some of the Western courts and their more modern decisions. Upon the theory that all of the existing water supply should be for actual use, in those Western States

¹⁷ See, also, *Davis v. Martin*, 157 Cal. 657, 108 Pac. Rep. 866; *Perry v. Calkins*, 159 Cal. 175, 113 Pac. Rep. 136.

¹⁸ — Cal. —, 124 Pac. Rep. 724.

¹⁹ Citing *Anaheim Union W. Co. v. Fuller*, 150 Cal. 333, 88 Pac. Rep. 978, 11 L. R. A., N. S., 1062.

which adhere to a modified form of the common law, the courts are now loth to grant equitable relief on behalf of a riparian proprietor on account of the mere diminished flow of a stream, caused by the diversion of the water above his lands, without actual material damage to him, and where the water diverted is applied to some beneficial use or purpose. And, therefore, it may be regarded as the settled rule that, in such cases, the Court will consider all of the equities of the case; and, without prejudice to an action for damages, will refuse to grant the injunction.

We deem the true rule to be that the lower riparian owner seeking the injunction must show some real, material, and substantial damage to justify a court of equity in enjoining an upper claimant from his actual beneficial use of the water; and, that, too, regardless of the fact as to whether such upper claimant claims his right to the use of the water as an appropriator, or as a riparian owner using more than his just proportion of the water, after taking into consideration the equal or correlative rights of the other owners, under the strict construction of the common law doctrine. And, we will add that, owing to the great need and scarcity of water in this Western country, and the necessity that all of the available water supply be put to some beneficial use or purpose, the courts are rapidly coming to this view.¹ Such was the ruling of the Su-

¹ San Joaquin etc. Co. v. Fresno etc. Co., 158 Cal. 626, 112 Pac. Rep. 182, 35 L. R. A., N. S., 832; Modoc etc. Co. v. Booth, 102 Cal. 151, 36 Pac. Rep. 431; Miller & Lux v. Madera C. Co., 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391; Miller v. Bay Cities W. Co., 157 Cal. 256, 107 Pac. Rep. 115, 27 L. R. A., N. S., 772; Fifield v. Spring Valley Water Works, 130 Cal. 552, 62 Pac. Rep. 1054; City of Los Angeles v. Los Angeles etc. Co., 152 Cal. 645, 93 Pac. Rep. 869; dis., 217 U. S. 217, 54 L. Ed. 736, 30 Sup. Ct. Rep. 452; Jones v. Conn., 39 Ore. 30, 64 Pac. Rep. 1068, 54 L. R. A. 630, 87 Am. St. Rep. 634; Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697; Cline v. Stock, 71 Neb. 70, 98 N. W. Rep. 454, 102 N. W. Rep. 265; Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; McCook Irr. Co. v. Crews, 70 Neb. 115, 102 N. W. Rep. 249; Clark v. Allaman, 71 Kan. 206, 80 Pac. Rep. 571, 70 L. R. A. 971; Cruse v. McCauley, 96 Fed. Rep. 369; Morris v. Bean, 146 Fed. Rep. 423; Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655; California etc. Co. v. Enterprise etc. Co., 127 Fed. Rep. 741; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35; Wiggins v. Muscupiabe etc. Co., 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54

preme Court of the United States in a case where the State of Kansas as riparian proprietor claimed the right to the undiminished flow of the stream, without actual use, as against the State of Colorado, and certain appropriators therein where the water diverted was used for the irrigation of arid lands, although the Court found that there was "perceptible injury to portions of the Arkansas Valley in Kansas, particularly those portions closest to the Colorado line, yet, to the great body of the valley it has worked little, if any detriment."² And Mr. Justice King, in commenting upon

Am. St. Rep. 337; *Senior v. Anderson*, 130 Cal. 290, 62 Pac. Rep. 563; *Riverside W. Co. v. Gage*, 89 Cal. 410, 26 Pac. Rep. 889; *Charnock v. Higuerra*, 111 Cal. 471, 44 Pac. Rep. 171, 32 L. R. A. 190, 52 Am. St. Rep. 195; *Coleman v. La Franc*, 137 Cal. 214, 69 Pac. Rep. 1011; *Boehmer v. Big Rock Irr. Dist.*, 117 Cal. 19, 48 Pac. Rep. 908; *Barneich v. Mercy*, 136 Cal. 205, 68 Pac. Rep. 589; *Arroyo Ditch Co. v. Baldwin*, 155 Cal. 280, 100 Pac. Rep. 874; *Anderson v. Bassman*, 140 Fed. Rep. 14; *Ison v. Nelson Mfg. Co.*, 47 Fed. Rep. 199; *Lone Tree Ditch Co. v. Cyclone Ditch Co.*, 51 S. D. 519, 91 N. W. Rep. 352; *Id.*, 26 S. D. 307, 129 N. W. Rep. 596; *Redwater etc. Co. v. Jones*, — S. D., —, 130 N. W. Rep. 85; *North Port Brew. Co. v. Perrott*, 22 Wash. 243, 60 Pac. Rep. 403; *Vernon Irr. Co. v. City of Los Angeles*, 106 Cal. 237, 39 Pac. Rep. 762; *Hough v. Porter*, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

In Washington, a defendant's answer claiming ownership of the water, and right to its use, because of a homestead entry made prior to the appropriation of the plaintiff, was held to be fatally defective because the defendant did not show that he was making any beneficial use of the water. *Northport Brewing Co. v. Perrott*, 22 Wash. 243, 60 Pac. Rep. 403.

An injunction will not be issued to restrain the unlawful diversion of the

water of a stream in favor of a riparian proprietor who is taking no advantage of his usufructuary right, but allows the water to flow by unutilized, further than to vindicate his rights, and prevent a loss of it by adverse user and lapse of time, especially where the diverted water is of great value to defendant. *Ulbricht v. Eufalia W. Co.*, 86 Ala. 587, 6 So. Rep. 78, 4 L. R. A. 572, 11 Am. St. Rep. 72.

In Colorado, it was recently held that the common-law doctrine of riparian rights that the riparian proprietor is entitled to the continuous flow of the stream does not obtain in that State. *Sternberger v. Seaton etc. Co.*, 45 Colo. 401, 102 Pac. Rep. 168.

In a recent case in Texas, it was held that a lower riparian owner is not entitled to a temporary injunction against the diversion of water for the irrigation of non-riparian land in the absence of a showing that his land is now being used, or is intended for immediate use, or is prepared for agricultural or other purposes, rendering the use of the water of the river necessary and beneficial. *Biggs v. Lefingwell*, — Tex. Civ. App. —, 132 S. W. Rep. 902.

² *Kansas v. Colorado*, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. St. Rep. 655, on demurrer, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552.

this last case in a recent case in Oregon, said that it "is a strong and commendable tendency on the part of that great Court to recognize that the rigid rules of common law, as interpreted and sought to be applied by those insisting upon the 'undiminished flow' theory, are inapplicable to the many new and intricate questions necessarily arising under our form of Government and throughout the arid and semi-arid sections."³ And, the Supreme Court of California, in deciding the same question, in one of its very late decisions, said: "The problems presented never came within the purview of the common law. They have been of necessity, therefore, and must continue to be solved by this Court as the cases of first impression, and, as in the past, so in the future, if a rule of decision at common law shall be found to the radically changed conditions existing in this State, so that its application will work wrong and hardship rather than betterment and good, this Court will refuse to approve and follow the doctrine." And, commenting upon an earlier decision of the same Court, it is said: "If the doctrine announced in *Gould v. Eaton*,⁴ may be thought to confer upon a riparian proprietor a greater right than these, namely, the right to have all the water of the stream at all times flow past his land, without regard to the question as to whether or not any diminution of the flow does or could injure him, then it must be said that the doctrine of *Gould v. Eaton* is to this extent modified by later decisions."⁵

The above rule, applying as it does to the ordinary flow of a stream, applies with much greater force where the flow is augmented by flood water.⁶ And, again, under the modern rule as

³ *Hough v. Porter*, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

⁴ 117 Cal. 539, 49 Pac. Rep. 577, 38 L. R. A. 181.

⁵ *San Joaquin etc. Co. v. Fresno etc. Co.*, 158 Cal. 626, 112 Pac. Rep. 182, 35 L. R. A., N. S., 832.

⁶ The impounding and distribution of flood and storm waters is not prohibited by law, but is rather encouraged, where it does not substantially damage the existing riparian rights of others. *San Joaquin etc. Co. v. Fresno*

etc. Co., 158 Cal. 626, 112 Pac. Rep. 182, 35 L. R. A., N. S., 832.

See, also, *Modoc etc. Co. v. Booth*, 102 Cal. 151, 36 Pac. Rep. 431; *Miller & Lux v. Madera etc. Co.*, 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391; *Fisfield v. Spring Valley Water Works*, 130 Cal. 552, 62 Pac. Rep. 1054; *Edgar v. Stevenson*, 70 Cal. 286, 11 Pac. Rep. 704; *Heilbron v. 76 Land & W. Co.*, 80 Cal. 189, 22 Pac. Rep. 62; *Brown v. Smith*, 10 Cal. 508; *Ortman v. Dixon*, 13 Cal. 33; *McKinney v. Smith*, 21 Cal. 374, 1 Morr. Min.

185—Kin. on Irr.

stated above, an injunction will not lie against the diversion of water by a riparian proprietor, during the period of time that the water is not put to an actual use.⁷

Neither is it the rule that a lower riparian proprietor must show some material damage to his rights before a court of equity will grant an injunction against an upper claimant who is applying the water of the stream to some beneficial use or purpose, entirely confined to the Western States. Some of the eminent authorities of the Eastern States, in effect, hold the same rule.⁸

§ 1614. A riparian owner with use has a right to injunction for unlawful diversion.—Having discussed in the preceding section the question of the right of a riparian owner without use to an injunction against the continuing diversion of the waters of a stream which flows through or by his land,¹ we will now discuss the proposition of the right of a riparian proprietor, who, up to the time of the unlawful diversion was actually applying the water to some beneficial use or purpose, to an injunction restraining such diversion. And, in general, we will say that in those States which

Rep. 650; Nevada etc. Co. v. Kidd, 37 Cal. 282; Smith v. O'Hara, 43 Cal. 371, 1 Morr. Min. Rep. 671; Coleman v. La Franc, 137 Cal. 214, 69 Pac. Rep. 1101; Anaheim W. Co. v. Fuller, 150 Cal. 327, 88 Pac. Rep. 978, 11 L. R. A., N. S., 1062; Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Miller & Lux v. Enterprise etc. Co., 145 Cal. 652, 79 Pac. Rep. 439; Crawford v. Hathaway, 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Miller v. Bay Cities W. Co., 157 Cal. 256, 107 Pac. Rep. 115, 27 L. R. A., N. S., 772; Turner v. James Canal Co., 155 Cal. 82, 99 Pac. Rep. 520, 22 L. R. A., N. S., 401, 132 Am. St. Rep. 59, 17 Am. & Eng. Ann. Cas. 823.

But see Baxter v. Gilbert, 125 Cal. 580, 58 Pac. Rep. 129; California etc. Co. v. Enterprise etc. Co., 127 Fed. Rep. 741.

⁷ Gardner v. Wright, 49 Ore. 609, 91 Pac. Rep. 286; Mann v. Parker, 48 Ore. 321, 86 Pac. Rep. 598.

⁸ "The true test of the principle and extent of the use is, whether it is to the injury of the other proprietors or not." Mr. Justice Story in Tyler v. Wilkinson, 4 Mason 397, Fed. Cas. No. 14312.

See, also, Elliott v. Fitchburg R. Co., 10 Cush. (Mass.) 191, 57 Am. Dec. 85; Howard v. Ingersoll, 54 U. S. 13 How. 381, 14 L. Ed. 189; Parker v. American etc. Co., 195 Mass. 591, 81 N. E. Rep. 468, 10 L. R. A., N. S., 584; Ulbright v. Eufaula W. Co., 86 Ala. 587, 6 So. Rep. 78, 4 L. R. A. 572, 11 Am. St. Rep. 72; 3 Kent's Comm. 429; Gould on Waters, 3d Ed., p. 422, and cases.

¹ See Sec. 1613.

still adhere to the modified rule of the common law of riparian rights, the right of a riparian owner to maintain an injunction against a continuing diversion which invades his rights is practically the same as is the right of an appropriator to maintain such an action for such a purpose and discussed in a previous section.² This is also true, regardless of the fact as to whether the unlawful diversion is made by an appropriator, or by another riparian owner upon the same stream.³ If one riparian proprietor is taking more water out of the stream than he is justly entitled to, bearing in mind the relative rights of all of the other riparian proprietors upon the same stream, he may be enjoined by another riparian proprietor whose rights are materially injured thereby.⁴ If the water is being diverted by an appropriator, and the rights of the riparian owner are materially injured by such diversion, he has the same right of action.⁵ But, according to the better rule, the rights

² See Sec. 1610.

³ *Union M. & M. Co. v. Dangberg*, 2 Sawyer 450, Fed. Cas. No. 11,370, 8 Morr. Min. Rep. 113; *Spargur v. Heard*, 90 Cal. 221, 27 Pac. Rep. 198; *Miller & Lux v. Madera etc. Co.*, 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391; *Huffner v. Sawday*, 153 Cal. 86, 94 Pac. Rep. 424; *Anaheim W. Co. v. Fuller*, 150 Cal. 327, 88 Pac. Rep. 978, 11 L. R. A., N. S., 1062; *Senior v. Anderson*, 130 Cal. 290, 62 Pac. Rep. 563; *Heilbron v. 76 Land & W. Co.*, 80 Cal. 189, 22 Pac. Rep. 62; *Slattey v. Harley*, 58 Neb. 575, 79 N. W. Rep. 151; *Moore v. Clear Lake Water Works*, 68 Cal. 147, 8 Pac. Rep. 816; *Conkling v. Pac. Imp. Co.*, 87 Cal. 296, 25 Pac. Rep. 399; *Gould v. Eaton*, 117 Cal. 539, 49 Pac. Rep. 577, 38 L. R. A. 181; *Rigney v. Tacoma, etc. Co.*, 9 Wash. 576, 38 Pac. Rep. 147, 26 L. R. A. 425; *Santa Rosa Irr. Co. v. Pecos etc. Co.*, — Tex. Civ. App. —, 92 S. W. Rep. 1014.

⁴ *Jones v. Conn*, 39 Ore. 30, 64 Pac. Rep. 855, 65 Pac. Rep. 1068, 54 L. R. A. 630, 87 Am. St. Rep. 634;

Williams v. Altnow, 51 Ore. 275, 95 Pac. Rep. 200, 97 Pac. Rep. 539; *Rogers v. Overacker*, 4 Cal. App. 333, 87 Pac. Rep. 1107; *Harrington v. Demaris*, 46 Ore. 111, 77 Pac. Rep. 603, 82 Pac. Rep. 14, 1 L. R. A., N. S., 756; *Strong v. Baldwin*, 137 Cal. 432, 70 Pac. Rep. 288; *Id.*, 154 Cal. 150, 97 Pac. Rep. 178; *Coleman v. La Franc*, 137 Cal. 214, 69 Pac. Rep. 1011; *Van Bibber v. Hilton*, 84 Cal. 585, 24 Pac. Rep. 308, *Huffner v. Sawday*, 153 Cal. 86, 94 Pac. Rep. 424; *Mace v. Mace*, 40 Ore. 586, 67 Pac. Rep. 660, 68 Pac. Rep. 737.

But a diversion of water will not be restrained at the suit of a riparian owner, unless such diversion diminishes the quantity of water which would otherwise have flowed in the natural channel. *Creighton v. Kaweah etc. Co.*, 67 Cal. 221, 7 Pac. Rep. 658.

⁵ *Miller & Lux v. Madera etc. Co.*, 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391; *Anaheim Union W. Co. v. Fuller*, 150 Cal. 327, 88 Pac. Rep. 978, 11 L. R. A., N. S., 1062;

of an upper proprietor to the use of the waters of a stream for irrigation purposes are superior to those of a lower owner without use.⁶ But, in each case, under the latest exposition of the law upon the subject, a lower riparian owner must show some damage in order to restrain a diversion above his land, where the water so diverted is applied to a beneficial use or purpose.⁷ In other words, a riparian owner will not be permitted to invoke the power of a court of equity to enjoin the diversion of water above him, when the amount diverted would not be used by him, and would cause no loss or injury to him or his land, present or prospective, but would greatly benefit the party diverting it.⁸ And, upon this subject the Texas Court has, as it seems to us, adopted the proper rule of law. It was there held that a lower riparian owner can not invoke a court of equity to enjoin the use of water by an appropriator, or a non-riparian owner, without showing that his own land is being used, or intended for immediate use, or is prepared for agricultural or other purposes, which render the use of the water necessary and beneficial.⁹ So, also, where a spring rises on the land of one person and has sufficient flow to form a water course, which runs through the land of a lower owner, an injunction will be granted the latter owner, who insists that the stream be permitted to flow without material alteration or diminution of the quantity of water.¹⁰

In a preceding section we discussed the proposition that unreasonable delay, or laches, to enforce or protect a right at the proper

Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; *Andrews v. Donnelly*, — Ore. —, 116 Pac. Rep. 569; *Miller v. Baker*, — Wash. —, 122 Pac. Rep. 604.

⁶ *Cormick v. Arthur*, 31 Tex. Civ. App. 579, 73 S. W. Rep. 410.

⁷ See previous section, 1613.

⁸ *Modoc etc. Co. v. Booth*, 102 Cal. 151, 36 Pac. Rep. 431; *San Joaquin etc. Co. v. Fresno etc. Co.*, 158 Cal. 626, 112 Pac. Rep. 182, 35 L. R. A., N. S., 832; *Mentone Irr. Co. v. Redlands etc. Co.*, 155 Cal. 323, 100 Pac. Rep. 1082, 22 L. R. A., N. S., 382, 17 Am. & Eng. Ann. Cas. 1222; *Fisher*

v. Feige, 137 Cal. 39, 69 Pac. Rep. 618, 59 L. R. A. 333, 92 Am. St. Rep. 77; *Vernon Irr. Co. v. City of Los Angeles*, 106 Cal. 237, 39 Pac. Rep. 762; *Cruse v. McCauley*, 96 Fed. Rep. 369; *Peregoy v. McKissick*, 79 Cal. 572, 21 Pac. Rep. 967; *Mason v. Cotton*, 2 McCreary 82, 4 Fed. Rep. 792; *Gutierrez v. Wege*, 145 Cal. 730, 79 Pac. Rep. 449.

⁹ *Biggs v. Leffingwell*, — Tex. Civ. App. —, 132 S. W. Rep. 902.

¹⁰ *Hollett v. Davis*, 54 Wash. 326, 103 Pac. Rep. 423; *Bartlett v. O'Connor*, 102 Cal. 17, 36 Pac. Rep. 513.

time would bar a right of action for an injunction.¹¹ This proposition applies with equal force to a riparian owner who has unreasonably delayed bringing his action to protect his rights, where otherwise he could maintain such an action.¹² But, although the Court may refuse to grant the injunction, he may still have his action for damages for the injuries incurred.¹³

§ 1615. Riparian owner's right to protection for future use.—

The great weight of the modern authority being to the effect that a lower riparian owner is not entitled to an injunction, where he is not actually using the water flowing by his lands, and where his rights are not materially and substantially injured by a diversion by an upper claimant who is actually putting the water to beneficial use;¹ but that he is entitled to injunctive relief where he was actually using the water, and his rights are substantially injured,² the question naturally arises as to how long a time such a riparian owner, after his rights have vested as such, is to be given within which to put the water to a beneficial use. In other words, what right has a riparian owner to protection by injunction of his rights for future use? In answer to this we will say it should depend upon the facts and circumstances of each particular case. In some cases he is not entitled to any protection at all, as where the water could not be used by him, and where, by the diversion above, there is "no loss or injury to him or to his land, present or prospective." Such would be a case where the land was high and rocky and incapable of cultivation; or, again, where the land was so low that the riparian owner had too much water as it was,³ or where there was ample water for all.⁴

¹¹ That there must be no laches, see Sec. 1605.

See, also, for the defense of laches, Sec. 1634.

¹² *City of New York v. Pine*, 185 U. S. 93, 46 L. Ed. 820, 22 Sup. Ct. Rep. 592; modifying *Id.*, 112 Fed. Rep. 98; *Loud Gold M. Co. v. Blake*, 24 Fed. Rep. 249; *Verdugo etc. Co. v. Verdugo*, 152 Cal. 655, 93 Pac. Rep. 1021; *Thomas v. Woodman*, 23 Kan. 217, 33 Am. Rep. 156; *Clark v. Cambridge Irr. Co.*, 45 Neb. 798, 64 N. W. Rep. 239; *Lux v. Haggin*, 69

Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674.

¹³ See Secs. 1660 *et seq.*

¹ See Secs. 1611-1614.

² See Sec. 1614.

³ *Modoc etc. Co. v. Booth*, 102 Cal. 151, 36 Pac. Rep. 431; *Vernon Irr. Co. v. Los Angeles*, 106 Cal. 237, 39 Pac. Rep. 762.

⁴ *Clark v. Allaman*, 71 Kan. 206, 80 Pac. Rep. 571, 70 L. R. A. 971; *Morris v. Bean*, 123 Fed. Rep. 618, 146 Fed. Rep. 423.

See, also, *Jones v. Conn*, 39 Ore. 30,

Where the use of the water by the lower riparian proprietor is possible, as is the case with appropriators, he should be given a reasonable time within which to actually apply the water to that use; and, as to what constitutes such a reasonable time is a question of fact dependent upon the circumstances of each particular case. He should not by the aid of a court of equity in granting an injunction against the diversion by upper claimants for actual use be permitted to hold his rights indefinitely, upon the theory that he may possibly some time in the future use the water for some indefinite purpose; and, in the meantime, with the assistance of the Court, permit the water to run to waste. The Texas Court has gone even further than this in a recent case, in holding that a lower riparian proprietor without actual use is not entitled to even a temporary injunction against the diversion of water for the irrigation of non-riparian land by an appropriator, in the absence of a showing that the water is intended for immediate use, or that his land is prepared for agricultural or other purposes, rendering the use of the water therefor necessary and beneficial.⁵

§ 1616. **Injunctions against unlawful diversion of subterranean waters.**—In a previous portion of this work we have discussed at length the subject of the acquisition of rights to the use of the waters of subterranean, or underground waters.¹ The right of action to enjoin the wrongful diversion of the waters of subterranean streams whose courses are known and defined, does not differ materially from the right of such an action for the wrongful diversion of the waters of surface streams.² But the party seeking

64 Pac. Rep. 855, 65 Pac. Rep. 1068, 54 L. R. A. 630, 87 Am. St. Rep. 634; Meng v. Coffey, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697; Crawford Co. v. Hathaway (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; McCook Irr. Co. v. Crews, 70 Neb. 109, 102 N. W. Rep. 249; Cline v. Stock, 71 Neb. 70, 98 N. W. Rep. 454, 102 N. W. Rep. 265.

⁵ Biggs v. Leffingwell, — Tex. Civ. App. —, 132 S. W. Rep. 902.

The right of a riparian owner to the use of the stream for irrigation is limited to the amount actually used by him for proper irrigation purposes within a reasonable time after settlement on the land, not exceeding the carrying capacity of his ditch. Stenger v. Tharp, 17 S. D. 13, 94 N. W. Rep. 402.

See, also, McCook Irr. Co. v. Crews, 70 Neb. 109, 96 N. W. Rep. 996.

¹ See Chaps. 59-62, Secs. 1148-1211.

² For subterranean known and defined streams, see Secs. 1115-1160.

the injunction must, by proper and competent testimony, prove that the stream from which he claims the wrongful diversion was made is the same as that from which he claims his rights; and, where he does not do this the injunction will be refused.³

When we come to the subject of those underground waters whose courses are unknown and undefined, such as the waters of artesian basins,⁴ saturated strata,⁵ and percolations,⁶ which waters underlie in common the lands of several or many land owners, the right of one of these land owners to enjoin another from drawing off more than his proportion of these waters by means of wells or other devices upon his own lands, depends upon the rule of law governing such waters in the jurisdiction where such acts are being carried on. In those jurisdictions which follow the strict rule of the common law governing all forms of percolations, an action in equity to enjoin one land owner from drawing off all of the percolating waters found in his lands will not lie, such waters being considered a part of the very soil itself, to which the owner is entitled as much as he is to the very stones and gravel thereon, and any interference by

For injunctions against the wrongful diversion of water, see Secs. 1610-1615.

Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; McClellan v. Hurdle, 3 Colo. App. 434, 33 Pac. Rep. 280; Whitmore v. Utah Fuel Co., 26 Utah 488, 73 Pac. Rep. 764; Medano D. Co. v. Adams, 29 Colo. 317, 68 Pac. Rep. 431; Stillwater W. Co. v. Farmer, 89 Minn. 58, 93 N. W. Rep. 907, 60 L. R. A. 875, 99 Am. St. Rep. 541.

Where the rights of a riparian owner were not affected by the diversion of the underflow of a stream by means of pipe lines and a dam above his lands, an action for an injunction will not lie in his behalf. Mentone Irr. Co. v. Redlands etc. Co., 155 Cal. 323, 100 Pac. Rep. 1082, 22 L. R. A., N. S., 382, 17 Am. & Eng. Ann. Cas. 1222.

See, also, *Yarwood v. West Los Angeles W. Co.*, 132 Cal. 204, 64 Pac. Rep. 275.

³ *McClellan v. Hurdle*, 3 Colo. App. 434, 33 Pac. Rep. 280.

The burden of proof to show the existence of an underground stream of water is upon the one asserting the right to its use. *Barclay v. Abraham*, 121 Iowa 619, 96 N. W. Rep. 1080, 64 L. R. A. 255, 100 Am. St. Rep. 365.

The only difference in the application of the law to surface and subsurface streams is in ascertaining the character of the stream. *Tampa Waterworks Co. v. Cline*, 37 Fla. 586, 20 So. Rep. 780, 33 L. R. A. 376, 53 Am. St. Rep. 262.

⁴ For the rights in artesian waters, see Secs. 1166-1184.

⁵ See Sec. 1196.

⁶ See Secs. 1197-1200.

him with such waters found on his own lands, as to the neighboring land owners, is considered *damnum absque injuria*.⁷

But in those jurisdictions which follow the rule of correlative rights of the owners of lands overlying these waters, especially as laid down in the case of *Katz v. Walkinshaw*,⁸ such waters being considered the property of all the land owners whose lands overlie them in common, it is held that an action for an injunction in behalf of one land owner against another, who is drawing off more than his fair proportion of such common waters, will lie, especially where the actual use of the plaintiff to his proportion of such waters is being interfered with by such acts.⁹ In a recent case, holding that an injunction would lie against such an invasion of a land owner's right, and reaffirming the doctrine as decided in the case of *Katz v. Walkinshaw*, the Supreme Court of California said: "The common law rule was rejected as inapplicable to the conditions of this State, and the rule of *sic utere tuo* announced, and, applying it, it was held that the rights of the parties in the suit to take these particular waters were correlative, and that the defendant could not divert them for sale elsewhere, so as to prevent the plaintiff from obtaining a reasonable supply for irrigation and

⁷ See Sec. 1188.

See, also, Gould on Waters, 3d Ed., Secs. 282-290; *Acton v. Blundell*, 12 Mees. & W. 324, 13 L. J. Exch., N. S., 289.

Water standing in land underneath the surface, or passing through it by filtration, percolation, chemical attraction, or in undefined and unknown streams, belongs to the land, and the incidental drying up of springs caused by the escape of such waters into and out through a tunnel driven by one on his own land is *damnum absque injuria*. *Herriman Irr. Co. v. Keel*, 25 Utah 96, 69 Pac. Rep. 719, holding that an injunction would not lie.

See, also, *Herriman Irr. Co. v. Butterfield etc. Co.*, 19 Utah 453, 57 Pac. Rep. 537, 51 L. R. A. 930; *Boyce v. Cupper*, 37 Ore. 256, 61 Pac. Rep. 642; *Crescent M. Co. v. Silver King*

M. Co., 17 Utah 444, 54 Pac. Rep. 244, 70 Am. St. Rep. 810; *Mosier v. Caldwell*, 7 Nev. 363; *Willow Creek Irr. Co. v. Michaelson*, 21 Utah 248, 60 Pac. Rep. 943, 51 L. R. A. 280, 81 Am. St. Rep. 687; *Sullivan v. Northern Spy Min. Co.*, 11 Utah 438, 40 Pac. Rep. 709, 30 L. R. A. 186; *Hansen v. McCue*, 42 Cal. 303, 10 Am. Rep. 299; *Cross v. Kitts*, 69 Cal. 217, 10 Pac. Rep. 409, 58 Am. St. Rep. 558.

⁸ 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

⁹ *Katz v. Walkinshaw*, *supra*.

An injunction will lie to restrain a threatened permanent interference with the rights of the owner of the fee with respect to percolating water. *Bonetti v. Ruiz*, 15 Cal. App. 7, 113 Pac. Rep. 118.

other ordinary uses upon his land. The doctrine thus announced in this pioneer case has been subsequently followed, so that the rule is now settled beyond further question."¹⁰ But, before either a preliminary or a final injunction in such cases will be granted, there must be the clearest showing upon the part of the party seeking such relief, that there is imminent danger of irreparable and substantial injury to his rights, and that the diversion complained of is the real cause of such injury, and, further, that he has not been guilty of laches or unreasonable delay in seeking to protect such rights.¹¹ Therefore, it is held that percolating waters may be developed by means of a tunnel and conducted away from the land, as against the owners of adjoining lands, where the waters would otherwise, in their natural flow, sink into the ground and be lost.¹² Also, where the complainant stood by while a development was made for public use, and had suffered it to proceed at large expense to a successful operation, having reasonable cause to

¹⁰ *Miller v. Bay Cities W. Co.*, 157 Cal. 256, 107 Pac. Rep. 115, 27 L. R. A., N. S., 772, citing *McClintock v. Hudson*, 141 Cal. 275, 74 Pac. Rep. 849.

See, also, *Cohen v. La Canada*, 142 Cal. 437, 76 Pac. Rep. 47; *Id.*, 151 Cal. 680, 91 Pac. Rep. 584, 11 L. R. A., N. S., 752; *Montecito etc. Co. v. Santa Barbara*, 144 Cal. 578, 77 Pac. Rep. 1113; *Verdugo Canyon W. Co. v. Verdugo*, 152 Cal. 655, 93 Pac. Rep. 1021; *Burr v. Maclay Rancho Co.*, 154 Cal. 428, 98 Pac. Rep. 260; *Id.*, 160 Cal. 268, 116 Pac. Rep. 715; *Hudson v. Dailey*, 156 Cal. 617, 105 Pac. Rep. 748.

See, also, *Los Angeles v. Hunter*, 156 Cal. 603, 105 Pac. Rep. 755; *Newport v. Temescal W. Co.*, 149 Cal. 531, 87 Pac. Rep. 372, 6 L. R. A., N. S., 1098; *Bonetti v. Ruiz*, 15 Cal. App. 7, 113 Pac. Rep. 118.

¹¹ *Katz v. Walkinshaw*, *supra*.

"The decision of *Katz v. Walkin-*

shaw is adhered to, but as plaintiffs, on the facts, failed to establish any ground for relief under the principles there laid down, no amplification of those principles becomes necessary." *Newport v. Temescal W. Co.*, 149 Cal. 531, 87 Pac. Rep. 372, 6 L. R. A., N. S., 1098.

The doctrine of correlative rights in percolating waters was a change in the law, so that a clear case must be made thereunder to justify an injunction to prevent a continuance of the use of such waters, taken in good faith before such doctrine was enunciated, and which use was in full operation at that time. *Barton v. Riverside W. Co.*, 155 Cal. 509, 101 Pac. Rep. 790, 23 L. R. A., N. S., 331.

¹² *Cohen v. La Canada etc. Co.*, 151 Cal. 680, 91 Pac. Rep. 584, 11 L. R. A., N. S., 752; for first appeal, see 142 Cal. 437, 76 Pac. Rep. 47.

believe that it would affect his own water supply, an injunction against the continued use of such waters would be refused.¹³

The general rule that an injunction will not be issued enjoining the use of water by the defendant when the plaintiff does not need the same, also applies to subterranean waters.¹⁴

§ 1617. **Right of riparian owner to an injunction against negligent logging.**—As we discussed in a previous section of this work, streams of water, which in their natural condition are capable of floating logs and timber to market are deemed to be navigable waters.¹ Again, streams of water, which are not in their nature capable of floating logs, may by dams and other artificial works be made capable of such service. And when such is the case, where the rights of riparian owners and appropriators are not materially and irreparably injured by such a use of the stream, it is always permitted. But such operations must be carefully conducted and if material, irreparable injury is caused thereby, either in the interference with the flow of the stream or to the banks of the stream or the lands of the riparian owners, an action for damages will lie,² or if such acts are continued or threatened, an action for an injunction will lie against such use.³

But, if there is no such material, irreparable injury, or if there is

¹³ *Barton v. Riverside W. Co.*, 155 Cal. 509, 101 Pac. Rep. 790, 23 L. R. A., N. S., 331.

¹⁴ *Burr v. Maclay Rancho Co.*, 154 Cal. 428, 98 Pac. Rep. 260.

¹ See Secs. 344-346.

² For damages for negligent logging, see Sec. 1679.

³ Where the facts show that a stream is not navigable for floating logs without doing irreparable injury to an estate through which it flows, and the defendant claims the right to use such stream for that purpose, not only for himself, but for the public, and threatens to commit and claims the right to repeat numerous trespasses which the exercise of such right necessarily involves, it was held by the Oregon Court that the plain-

tiff was entitled to an injunction to prevent irreparable injury, and to avoid a multiplicity of suits. *Hains v. Hall*, 17 Ore. 165, 20 Pac. Rep. 831, 3 L. R. A. 609.

See, also, *Watkinson v. McCoy*, 23 Wash. 372, 63 Pac. Rep. 245; *Monroe Mill Co. v. Menzel*, 35 Wash. 487, 77 Pac. Rep. 813, 70 L. R. A. 272, 102 Am. St. Rep. 905; *Matthews v. Belfast Mfg. Co.*, 35 Wash. 662, 77 Pac. Rep. 1046; *White v. Codd*, 39 Wash. 14, 80 Pac. Rep. 836; *Shepherd v. Coeur d'Alene Lbr. Co.*, 16 Idaho 293, 101 Pac. Rep. 591; *Kamm v. Normand*, 50 Ore. 9, 91 Pac. Rep. 448, 11 L. R. A., N. S., 290, 126 Am. St. Rep. 698; *Berryman v. East Hoquiam Boom & Log Co.*, — Wash. —, 124 Pac. Rep. 130.

an adequate remedy at law, or the waters of the stream can be used for both purposes, an action for an injunction can not be maintained; but the party claiming to be injured will be left to an action at law for damages.⁴

And therefore when the interference with the flow of the stream was by the construction of dams and it was sought to enjoin such interference by a riparian owner, it was held in a very recent case by the Supreme Court of California that a riparian owner must show some damage in order to restrain an upper owner from the beneficial use of the water and that an upper riparian owner may dam the waters of a stream for the purpose of floating logs therein if such use did not interfere with the water rights of the lower owner. In other words, the Court held that the lower riparian owner was not entitled to the undiminished flow of a stream, without damage, where the water was used above for this beneficial purpose.⁵

§ 1618. Injunctions against the interference with easements.—

An action for an injunction will lie to prevent the continuous or threatened interference with the use of an easement, granted for the purpose of the construction and operation of ditches, canals, or other works over the lands of another.¹ So, the owner of an estate

⁴ For damages for negligent logging, see Sec. 1679; Winsor v. Hanson, 40 Wash. 423, 82 Pac. Rep. 710; Sengstacken v. McCormac, 46 Ore. 171, 79 Pac. Rep. 412; Bryant v. Frank H. Lamb Co., 37 Wash. 168, 79 Pac. Rep. 622; Lownsdale v. Gray's Harbor Boom Co., 36 Wash. 198, 78 Pac. Rep. 904; Watkins v. Dorris, 24 Wash. 636, 64 Pac. Rep. 840, 54 L. R. A. 199.

⁵ San Joaquin etc. Co. v. Fresno etc. Co., 158 Cal. 626, 112 Pac. Rep. 182, 35 L. R. A., N. S., 832.

See, also, Secs. 1611-1615.

¹ For the acquisition of rights of way over private lands, see Secs. 972-993.

Where the owners of certain real estate threatened to prevent plaintiff

from operating under a grant of right of way for a pipe line, together with the right to divert the waters of a certain stream, plaintiff was entitled to prevent such threatened interference by injunction. Everett W. Co. v. Powers, 37 Wash. 143, 79 Pac. Rep. 617.

See, also, Tew v. Powar, 37 Colo. 392, 86 Pac. Rep. 342; Castle Rock etc. Co. v. Jurisch, 67 Neb. 377, 93 N. W. Rep. 690.

An injunction will be granted against the interference with a right of way granted to a city for a pipe line, where the grantor interferes with the construction of a telephone line convenient for the proper repair, maintenance, and operation of the pipe line, where the same does not

in a dominant tenement, or the occupant of such tenement, may maintain an action for the enforcement of an easement attached thereto.² The owner of an easement has a right of entry upon the servient estate, to make repairs and to clean out his ditch and canal and if the land owner interferes he may maintain an action for an injunction.³ But it is held that a city owning an easement across the lands of a person will not be granted an injunction against the owner of the land to restrain him from allowing his cattle to feed and graze in the field along the banks of the ditch and to cross over and wade through the waters thereof, for the reason that the duty of protecting the easement is upon the owner of the easement and not upon the owner of the fee.⁴

An action for an injunction will also lie by a land owner to restrain the defendants from conducting or maintaining any ditch, canal, or other works on his land, or from maintaining any flow of water over his lands.⁵

interfere with the land owner's use of the land. *City of Portland v. Metzger*, 58 Ore. 276, 114 Pac. Rep. 106.

See, also, for the interference with ditches and canals, etc., Sec. 1619.

² *Los Robles W. Co. v. Stoneman*, 146 Cal. 203, 79 Pac. Rep. 880; *Hoyt v. Hart*, 149 Cal. 722, 87 Pac. Rep. 569, where the right to the joint use of a ditch was determined as between the parties in an action brought to enjoin the defendant from interfering with his easement to carry water from an irrigation ditch through the defendant's land.

³ *Stufflebeem v. Adelsbach*, 135 Cal. 221, 67 Pac. Rep. 140; *Hutchinson v. Watson D. Co.*, 16 Idaho 484, 101 Pac. Rep. 1059; 133 Am. St. Rep. 125.

See, also, for the right of entry to make repairs, Sec. 992, 993.

⁴ *City of Bellevue v. Daly*, 14 Idaho 545, 94 Pac. Rep. 1037, 15 L. R. A., N. S., 992; *Swanson v. Groat*, 12

Idaho 148, 85 Pac. Rep. 384; *Durfee v. Garvey*, 78 Cal. 546, 21 Pac. Rep. 302.

But see *City of Portland v. Metzger*, 58 Ore. 276, 114 Pac. Rep. 106, where under a grant of a right of way no right was given to fence a right of way.

⁵ *Logan v. Guichard*, 159 Cal. 562, 114 Pac. Rep. 989, where it was held that in order to sustain a plea to a prescriptive right to take water from a stream over another's land, the defendant must show that he took some definite quantity of water therefrom in the past; it being insufficient merely to show that he had taken some water. Citing *Hayes v. Silver Creek etc. Co.*, 136 Cal. 238, 68 Pac. Rep. 704; *Walsh v. Wallace*, 26 Nev. 299, 67 Pac. Rep. 914, 99 Am. St. Rep. 692; *Sterritt v. Young*, 14 Wyo. 146, 82 Pac. Rep. 946, 4 L. R. A., N. S., 169, 116 Am. St. Rep. 994.

§ 1619. Injunctions against the interference with ditches and other works.—An action will lie to enjoin an unlawful interference with the ditch, canal, or other works of another where the facts show the injury to be irreparable and for which an action at law will not afford adequate remedy and to prevent a multiplicity of suits. The interference with a ditch which the owner thereof is authorized to maintain and with the flow of the water therein is a continuous trespass which a court of equity will enjoin.¹ So, where an abutting owner maintaining an irrigation ditch in the non-traveled portion of a highway adjoining his land brought an action against the interference therewith by the defendant, it was held that such acts constituted a continuous trespass causing irreparable and special damage to plaintiff and that he was entitled to relief by injunction.²

It is held in Wyoming that where the proceedings in the condemnation of a right of way were invalid, that the land owner was

¹ See, also, for injunctions for trespass on land, Sec. 1622.

For injunctions concerning easements, see Sec. 1618.

For rights of way over private lands, see Secs. 972-993.

See, also, *Derry v. Ross*, 5 Colo. 295.

² *Holm v. Montgomery*, 62 Wash. 398, 113 Pac. Rep. 1115, 34 L. R. A., N. S., 506.

An injunction will lie to prevent the construction of a lateral ditch across the right of way of an irrigation canal, by one having no legal authority to do so. *Castle Rock etc. Co. v. Jurisch*, 67 Neb. 377, 93 N. W. Rep. 690.

A purchaser of water rights from an irrigation company, having done nothing to justify an action in destroying his headgates and ditches, is entitled to an injunction and damages. *Hargrave v. Hall*, 3 Ariz. 252, 73 Pac. Rep. 400.

See, also, *Jacob v. Lorenz*, 98 Cal. 332, 33 Pac. Rep. 119.

See, also, *Park v. Ackerman*, 60 Neb.

405, 83 N. W. Rep. 193; *Mabee v. Platte Land Co.*, 17 Colo. App. 476, 68 Pac. Rep. 1058; *Strong v. Baldwin*, 154 Cal. 150, 97 Pac. Rep. 178, 129 Am. St. Rep. 141; but see *Id.*, 137 Cal. 432, 70 Pac. Rep. 288; *Hayois v. Salt River Valley C. Co.*, 8 Ariz. 285, 71 Pac. Rep. 944; *Wilson v. Eagleson*, 10 Idaho 755, 81 Pac. Rep. 434; *Kleyenstuber v. Robinson*, 6 Ariz. 31, 52 Pac. Rep. 1117; *Salem etc. Co. v. Stayton etc. Co.*, 33 Fed. Rep. 146; *McLaughlin v. Del Re*, 71 Cal. 230, 16 Pac. Rep. 881; *Castle Rock etc. Co. v. Jurisch*, 67 Neb. 377, 93 N. W. Rep. 690.

Where complainants constructed a ditch and flume across defendant's mining claims without objection, and without condemning the right of way, the defendants being only entitled to damages for the construction of the ditch, complainants were entitled to an injunction from continuing to destroy the same *pendente lite*. *Miocene D. Co. v. Jacobson*, 146 Fed. Rep. 680, 77 C. C. A. 106.

entitled to an injunction to restrain the defendants from going upon and constructing an irrigation ditch over and across plaintiff's land.³

So, the right to have an original community ditch run through or near the lands of one of the owners thereof, upon its ancient course, being a property right, secured by the mutual understanding by which the ditch was constructed upon such course, an injunction will be granted against any change in the location of such ditch.⁴

Again, an injunction will be granted against the discharging of water into a ditch to the injury of the owners thereof.⁵ But it was held that an injunction would not be granted to abate dams so constructed on the lands of the owner as to turn into a ditch surface water where the owner of the ditch had so constructed aprons to run such surface water over the ditch on the cultivated land of the land owner.⁶ Again, an injunction will be granted to prevent the unlawful interference with the water flowing in a ditch by the owners of the land through which the ditch passes, such owners having no right to the water flowing in such ditch.⁷ But where the right of way was granted for a ditch for the purpose of drainage it was held that such right was an easement only, and that the owner of the land had the right to use such water for irrigation and that an injunction would be granted to such owner against the interference with such right.⁸

An action will lie to abate a ditch so constructed along a stream as to draw the water therefrom by seepage as against the rights to the use of the water by others.⁹ So, also, where a new ditch is con-

³ *Sterritt v. Young*, 14 Wyo. 146, 82 Pac. Rep. 946, 4 L. R. A., N. S., 169, 116 Am. St. Rep. 994.

⁴ *Candelaria v. Vallejos*, 13 N. M. 140, 81 Pac. Rep. 589.

⁵ *North Point etc. Co. v. Utah etc. Co.*, 16 Utah 246, 52 Pac. Rep. 168, 40 L. R. A., 851, 67 Am. St. Rep. 607.

⁶ *North Fork W. Co. v. Edwards*, 121 Cal. 662, 54 Pac. Rep. 69.

See, also, *Menthoe Cattle Co. v.*

Williams, 64 Wash. 457, 117 Pac. Rep. 239.

⁷ *Shaw v. Proffitt*, 57 Ore. 192, 109 Pac. Rep. 584, 110 Pac. Rep. 1092; *Silva v. Hawn*, 10 Cal. App. 544, 102 Pac. Rep. 952.

See, also, *Bowman v. Bowman*, 35 Ore. 279, 57 Pac. Rep. 546.

⁸ *Hayward v. Mason*, 54 Wash. 649, 104 Pac. Rep. 139; *Id.*, 54 Wash. 653, 104 Pac. Rep. 141.

⁹ *Platte Valley etc. Co. v. Buckers*, 25 Colo. 77, 53 Pac. Rep. 334.

structed in such a way as to cut into and draw the water appropriated and flowing in an old ditch.¹⁰

But in order for the owner to be entitled to equitable relief by way of an injunction for the interference with a ditch or canal the complainant must make out a plain case containing all the essentials for injunctive relief otherwise the injunction will be refused and he will be left to the remedy of an action at law for damages.¹¹

So, also, where the defendant has acquired a prescriptive right to impede the flow of a ditch by a flume.¹² So, also, where by changes in the ditch it was an additional burden upon the land than originally covered by the right of way as granted.¹³ But, upon the contrary, an injunction will be granted the land owner against the making of such change.¹⁴ Again, an injunction will not be granted where the plaintiff made a contract with the defendant granting it the prior right to the use of a certain amount of water from its ditch, and where the water in the ditch could not be taken out except by the means of dams in the ditch, even if by so doing it raised the water in the ditch so as to destroy the water power of the plaintiff.¹⁵ Where a decree was granted in favor of an irrigation district, restraining the defendants from interfering with the irrigation ditch of such district, such decree was held not to survive a dissolution of the district.¹⁶

10 Walker v. Emerson, 89 Cal. 456, 26 Pac. Rep. 968; Arnett v. Linhart, 21 Colo. 188, 40 Pac. Rep. 355; Jenkinson v. Kirk, 98 U. S. 453, 25 L. Ed. 240, 4 Morr. Min. Rep. 504.

11 An injury to a ditch which will not destroy its efficiency and can be easily repaired will not support an action for an injunction. Clark v. Willett, 35 Cal. 534, 4 Morr. Min. Rep. 628; Lorenz v. Waldron, 96 Cal. 243, 31 Pac. Rep. 54.

12 Centerville etc. Co. v. Sanger Lumber Co., 140 Cal. 385, 73 Pac. Rep. 1079.

13 Campbell v. Flannery, 32 Mont. 119, 79 Pac. Rep. 702, 80 Pac. Rep. 240; *Id.*, 29 Mont. 246, 74 Pac. Rep. 450; Arthur Irr. Co. v. Strayer, 50 Colo. 371, 115 Pac. Rep. 724.

14 See Sec. 860; Vestal v. Young,

147 Cal. 715, 82 Pac. Rep. 381; Joseph v. Ager, 108 Cal. 517, 41 Pac. Rep. 422.

An injunction will be granted to prevent the widening of a ditch through plaintiff's land, and the erection of a dam which would destroy the plaintiff's ford, the defendant having no legal right to do either. Mendenhall v. Harrisburgh etc. Co., 27 Ore. 38, 39 Pac. Rep. 399.

See, also, for changes in ditch which may be made, Sec. 860.

15 Consolidated Canal Co. v. Mesa Canal Co., 177 U. S. 296, 44 L. Ed. 777, 20 Sup. Ct. Rep. 628; affirming *Id.*, 6 Ariz. 135, 53 Pac. Rep. 575.

See, also, Bowman v. Ayers, 2 Idaho 465, 21 Pac. Rep. 405.

16 Thompson v. McFarland, 29 Utah 455, 82 Pac. Rep. 478.

§ 1620. **Injunctions relating to reservoir rights.**—As is the case with the interference with ditches and canals, so, also, will a court of equity enjoin the interference with reservoir rights in all proper cases where the essentials for granting equitable relief are shown. So, where there was at all times water enough in the stream for both parties it was held that it would not justify the defendants in going upon the plaintiff's premises and withdrawing water stored in his reservoir, especially where plaintiff's rights in the stream were superior, and that an injunction would lie against such continued acts.¹ Upon the other hand, an action for an injunction will not lie in favor of one having junior water rights, to prevent the storage of water in a reservoir, it not being clearly shown that but for it more water would reach him when needed.²

So, as between the riparian owners on a stream, where the upper owners construct dams in the stream for the purpose of storing the flood and storm waters for beneficial use, it is held that an injunction will not lie to abate such dams on behalf of the lower riparian owners not actually damaged thereby, although such dams diminish at certain times the natural flow of the stream.³ But where a reservoir leaks and thereby injures the land of those near by, an injunction will be granted against the filling of such reservoir while it is in such condition. But after it has been repaired an application may be sustained to have the injunctive order modified or dissolved.⁴

§ 1621. **The abatement of nuisances by means of injunctions.**—As far as this work is concerned, nuisances may be defined as that class of wrongs that arise from the unreasonable or unlawful use by a person of his own property which affects the health, comfort, or the profitable enjoyment of the property of another or of the public, producing such material annoyance, discomfort, or in-

¹ Koch v. Story, 47 Colo. 335, 107 Pac. Rep. 1093; Emerson v. Bergin, 71 Cal. 335, 12 Pac. Rep. 242.

That damages may also be recovered, see Green Bay etc. Co. v. Kaukauna etc. Co., 112 Wis. 323, 87 N. W. Rep. 864, 62 L. R. A. 579, and note.

See, also, for damages, Secs. 1660 *et seq*

² Larimer & Weld Res. Co. v. Cache

La Poudre Irr. Co., 8 Colo. App. 237, 45 Pac. Rep. 525; affirmed, 24 Colo. 144, 53 Pac. Rep. 318.

³ San Joaquin etc. Co. v. Fresno etc. Co., 158 Cal. 626, 112 Pac. Rep. 182, 35 L. R. A., N. S., 832.

See, also, Williams v. Altnow, 51 Ore. 275, 95 Pac. Rep. 200, 97 Pac. Rep. 539.

⁴ Sylvester v. Jerome, 19 Colo. 128, 34 Pac. Rep. 760.

jury that the law will presume a consequent damage. A public or common nuisance is such an injury that affects the whole community in general and produces no special injury to one more than another of the people. A private nuisance produces damage to but one or few persons and does not affect the public generally. A mixed nuisance is one which, while producing injury to the public at large, does some special damage to some individual or class of individuals. In order to determine the proper mode of procedure and the proper parties to bring an action to abate a nuisance, it is first necessary to determine whether it is a public or private nuisance.

In general, it may be said that either a public or private nuisance may be abated by a court of equity by way of either preventive or mandatory injunction in a proper action and brought by the proper parties affected by such a nuisance.¹

A suit for the abatement of a nuisance by an injunction, either prohibitive or mandatory, is within the equitable jurisdiction of the superior court, under the direct provisions of the constitution.²

The general rule as to the proper parties plaintiff for the abatement of a public nuisance is that the action must be brought by some public officer authorized by law.³ In the case of a private nuisance the proper party plaintiff is the party injuriously affected thereby.⁴ But in the case of a public nuisance, the one suffering some special injury, different from and greater than the injury suffered by the community at large, may bring an action for its abatement.⁵ A

¹ See, also, for the abatement of the pollution of streams, Secs. 1142-1144.

For the abatement of nuisances in mining debris cases, see Sec. 1136.

² *McCarthy v. Gaston etc. Co.*, 144 Cal. 542, 78 Pac. Rep. 7.

³ *Griffith v. Holman*, 23 Wash. 347, 63 Pac. Rep. 239, 54 L. R. A. 178; *Morris v. Graham*, 16 Wash. 343, 47 Pac. Rep. 752, 58 Am. St. Rep. 33.

⁴ *Crane v. Winsor*, 2 Utah 248; *White v. Billings etc. Co.*, 39 Mont. 1, 101 Pac. Rep. 168.

⁵ A private person may maintain an action to abate a public nuisance, if it is especially injurious to himself or to his property. *The Mining De-*
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bris Case, 9 Sawyer 441, 18 Fed. Rep. 753; *Blanc v. Klumpke*, 29 Cal. 156; *Grigsby v. Clear Lake W. Co.*, 40 Cal. 396; *Griffith v. Holman*, 23 Wash. 347, 63 Pac. Rep. 239, 54 L. R. A. 178; *Morris v. Graham*, 16 Wash. 343, 47 Pac. Rep. 752, 58 Am. St. Rep. 33; *Hudson v. Dailey*, 156 Cal. 617, 105 Pac. Rep. 748; *Small v. Harrington*, 10 Idaho 499, 79 Pac. Rep. 461.

A public nuisance is, as to a county suing to protect its property against the maintenance thereof, a private nuisance. *Yuba County v. Kate Hayes Min. Co.*, 141 Cal. 360, 74 Pac. Rep. 1049.

party who continues a nuisance, but is not the original creator of it, is entitled to notice that it is a nuisance, and a request must be made that it be abated before an action will lie for that purpose, unless it appears that he had knowledge of its hurtful character. But where the extent of the nuisance is increased by such party, the rule is otherwise.⁶

We will now discuss some of the specific nuisances which a court of equity will abate. The owners of a water right are entitled to have the waters of the natural stream, at least as to the quantity of water to which they are entitled, flow down to their point of diversion, and its pollution⁷ or unlawful diversion is a private nuisance and equity will abate the continuance of the same;⁸ so, the maintenance of a dam constructed in such a way as to back up the water and flood the lands of the owners above;⁹ so, also, the maintenance of a dam dangerous to life and property.¹⁰ Also,

⁶ Grigsby v. Clear Lake W. Co., 40 Cal. 369.

See, also, Hudson v. Doyle, 6 Cal. 101; Bear River etc. Co. v. Boles, 24 Cal. 354; Courtwright v. Bear River Co., 30 Cal. 573; Blood v. Light, 31 Cal. 115; Platte Valley Irr. Co. v. Buckers etc. Co., 25 Colo. 77, 53 Pac. Rep. 334.

⁷ For pollution, see Secs. 1129-1147.

⁸ Crane v. Winsor, 2 Utah 248; Parke v. Kilham, 8 Cal. 77, 68 Am. Dec. 310, 4 Morr. Min. Rep. 522; Tuolumne W. Co. v. Chapman, 8 Cal. 392, 11 Morr. Min. Rep. 34.

The diversion of water, or the unreasonable obstruction of its course, is a private nuisance which equity will enjoin to prevent a multiplicity of suits or irreparable damage. Ulbright v. Eufaula W. Co., 86 Ala. 587, 6 So. Rep. 78, 4 L. R. A. 572, 11 Am. St. Rep. 72.

But the maintenance of dams for the purpose of diverting water for irrigation, and the diversion thereof for such purpose, so as to materially diminish the amount, or even consume

the entire quantity, flowing in the stream, is not of itself a nuisance, where such diversion has been continued for a great number of years under a claim of right. Bliss v. Grayson, 24 Nev. 422, 56 Pac. Rep. 231.

See, also, for the defense of prescription in actions to abate private nuisances, Sec. 1146.

⁹ Wilhite v. Billings etc. Co., 39 Mont. 1, 101 Pac. Rep. 168, holding that the decree in such a case should not require the rebuilding, repair, or removal of the dam, but should command the abatement of the nuisance, employing the necessary and requisite means therefor whatever they may be.

See, also, Byers v. Colonial Irr. Co., 134 Cal. 553, 66 Pac. Rep. 732; Strumbo v. Seely, 23 Neb. 212, 36 N. W. Rep. 487; Booker v. McBride, 16 Tex. Civ. App. 348, 40 S. W. Rep. 1031; Humphreys v. Moulton, 1 Cal. App. 257, 81 Pac. Rep. 1085.

¹⁰ Hollenback v. Dingwell, 16 Mont. 335, 40 Pac. Rep. 863, 50 Am. St. Rep. 502.

where the stream is navigable and used for that purpose including the floating of timber and logs an action may be maintained by a private citizen for the abatement of a nuisance consisting of a dam or other works which prevent the use of the stream for that purpose.¹¹ Also, a person entitled to fish in a certain place in a navigable stream who is specially damaged by the placing of an obstruction in such stream which interferes with the carrying on of his business may maintain an action to abate such obstruction.¹² But in non-navigable streams, as the right of fishery is in the riparian owner, a fence constructed by such riparian owner across the stream will not be abated at the suit of one not entitled on such land.¹³ Also, the negligent maintenance of an irrigation ditch or canal in such a manner that leakage or seepage is caused to the injury of adjoining lands.¹⁴ So, the wrongful leaving uncapped artesian wells tapping a subterranean water course or water bearing stratum to the injury of the lands of the parties entitled to such waters.¹⁵

So, also, the pollution of streams and water courses;¹⁶ and also the permitting of mining debris to be discharged into a stream to the injury of the ditches, canals, and lands of those below.¹⁷

The construction of an irrigation ditch or canal in a highway or

¹¹ *Small v. Harrington*, 10 Idaho 499, 79 Pac. Rep. 461; *Dawson v. McMillan*, 34 Wash. 269, 75 Pac. Rep. 807, holding that where a private party is specially damaged by the obstruction of navigable waters, he may maintain an action to abate the nuisance.

See, also, *Lownsdale v. Gray's Harbor Boom Co.*, 36 Wash. 198, 78 Pac. Rep. 904.

But a mere threatened nuisance will not be enjoined. *Winsor v. Hanson*, 40 Wash. 423, 82 Pac. Rep. 710.

¹² *Morris v. Graham*, 16 Wash. 343, 47 Pac. Rep. 752, 58 Am. St. Rep. 33.

But the erection of a dam across a navigable stream, though a nuisance, will not be enjoined on the application of one sustaining no special in-

jury thereby. *Esson v. Wattier*, 25 Ore. 7, 34 Pac. Rep. 756.

¹³ *Griffith v. Holman*, 23 Wash. 347, 63 Pac. Rep. 239, 54 L. R. A. 178.

¹⁴ *Lisonbee v. Monroe Irr. Co.*, 18 Utah 343, 54 Pac. Rep. 1008; *North Point Consol. Irr. Co., v. Utah etc. Co.*, 16 Utah 246, 52 Pac. Rep. 168, 40 L. R. A. 851, 67 Am. St. Rep. 607; *Andrews v. Village of Steele City*, 2 Neb. 676, 89 N. W. Rep. 739.

¹⁵ *Hudson v. Dailey*, 156 Cal. 617, 105 Pac. Rep. 748, but holding that this particular action was barred by the statute of limitations.

¹⁶ *McCarthy v. Gaston etc. Co.*, 144 Cal. 542, 78 Pac. Rep. 7.

For the abatement of nuisances by pollution, see Secs. 1142-1146.

¹⁷ See Sec. 1136.

the streets of a municipal corporation is not a nuisance *per se*.¹⁸ But such ditch or canal may be maintained in such a manner that it may become a nuisance, upon which it will be ordered that such nuisance be abated.¹⁹

Where a party sued for the abatement of a nuisance has abated the same before the decree, the court will refuse an injunction.²⁰

§ 1622. **Injunctions for trespass on land.**—In cases involving trespass, especially the trespass on land, the foundation of the jurisdiction of a court of equity to grant an injunction against such acts is the probability of irreparable injury, the inadequacy of pecuniary compensation, or the prevention of the multiplicity of suits. Where the party committing the trespass does so under a claim of right and threatens to commit and claims the right to repeat numerous trespasses which the exercise of such right necessarily involves, an injunction will be granted to prevent irreparable injury and to avoid a multiplicity of suits.¹ But, as said by the Utah Court: "Few if any cases can be found where a court of equity has interfered by injunction to restrain a naked trespass, as such, without showing that the property itself had some peculiar value and could not admit of due recompense or would be destroyed or irreparably injured by repeated or continued acts of trespass."²

18 "The use which the abutting owner may make of the highway includes the right to maintain ditches or drains for the benefit of his lands, provided he maintains no nuisance in so doing, nor interferes with the use as a highway." *Holm v. Montgomery*, 62 Wash. 398, 113 Pac. Rep. 1115, 34 L. R. A., N. S., 506; *City of Fresno v. Fresno etc. Co.*, 98 Cal. 179, 32 Pac. Rep. 943; *MacCammelly v. Pioneer Irr. Dist.*, 17 Idaho 415, 105 Pac. Rep. 1076; *Walley v. Platte & Denver D. Co.*, 15 Colo. 579, 26 Pac. Rep. 129; *People v. Stephens*, 62 Cal. 209; *Drew v. Hicks*, 101 Cal. 17, 35 Pac. Rep. 563.

19 *City of Denver v. Mullin*, 7 Colo. 345, 3 Pac. Rep. 693; *Platte etc. Co.*

v. Anderson, 8 Colo. 131, 6 Pac. Rep. 515.

20 *McCarthy v. Gaston etc. Co.*, 144 Cal. 542, 78 Pac. Rep. 7.

1 *McGregor v. Silver King Min. Co.*, 14 Utah 47, 45 Pac. Rep. 1091, 60 Am. St. Rep. 883; *Hains v. Hall*, 17 Ore. 165, 20 Pac. Rep. 831, 3 L. R. A. 609; *Crescent Min. Co. v. Silver King Min. Co.*, 14 Utah 57, 45 Pac. Rep. 1093; *Id.*, 17 Utah 444, 54 Pac. Rep. 244, 70 Am. St. Rep. 810.

2 *Crescent Min. Co. v. Silver King Min. Co.*, 17 Utah 444, 54 Pac. Rep. 244, 70 Am. St. Rep. 810.

See, also, *Smith v. Gardner*, 12 Ore. 221, 6 Pac. Rep. 771, 53 Am. Rep. 342.

Therefore, in order to maintain an action for an injunction for trespass on land, the plaintiff must affirmatively show how and why it should be so, otherwise the extraordinary remedy by injunction ought not to be allowed. As a general rule an injunction will not be granted to restrain a trespass on land unless the trespasser is insolvent³ or the injury and destruction to the plaintiff's estate goes to its very nature and substance and such as call for immediate relief. There must be something particular or special for which a court of law can not afford adequate relief, before such an action will lie for trespass.⁴ However, where that is the case the injunction will be granted.⁵ An injunction will be granted to prohibit the continuance of acts which obstruct a land owner in the free use and enjoyment of his land, irrespective of other damages, where such acts if continued will ripen into an easement.⁶ So, where one cut down trees on the land of another, to prevent the obstruction to the flow of a stream and threatened to continue to do so an injunction will lie to restrain such injury.⁷ So, also, it was held by the Colorado court that the cutting of the banks of the plaintiff's reservoir by defendant as manager of a corporation and the placing a pipe therein to withdraw the water was a continuing trespass so as to authorize the enjoining of the defendant from continuing such acts; and, also, that the defendant's insolvency is not essential against injury to realty where the money damages are inadequate or the extent of the injuries can not be ascertained or where the trespass will destroy the property, though it is an additional ground for relief.⁸ A land owner is also entitled to an injunction against a stranger, who, under a claim of right, is taking water from his canal by means of a ditch across his land, where no easement for the same has been granted, even though the amount of water taken is

³ But see *Koch v. Story*, 47 Colo. 335, 107 Pac. Rep. 1093.

⁴ *Waldron v. Marsh*, 5 Cal. 1120; *Wells Fargo & Co. v. Dayton*, 11 Nev. 161; *Ritter v. Patch*, 12 Cal. 298; *Branch Turnpike Co. v. Supervisors of Yuba Co.*, 13 Cal. 190.

⁵ *Schneider v. Brown*, 85 Cal. 205, 24 Pac. Rep. 715; *Mendenhall v. Harrisburgh etc. Co.*, 27 Ore. 38, 39 Pac. Rep. 399; *Chicago etc. Co. v. Porter*, 72 Iowa 426, 34 N. W. Rep. 286;

Vestal v. Young, 147 Cal. 715, 82 Pac. Rep. 381.

⁶ *Vestal v. Young*, 147 Cal. 715, 82 Pac. Rep. 381; *Walker v. Emerson*, 89 Cal. 456, 26 Pac. Rep. 968; *Burris v. People's Ditch Co.*, 104 Cal. 248, 37 Pac. Rep. 922.

⁷ *Hatton v. Gregg*, 4 Cal. App. 537, 88 Pac. Rep. 592.

⁸ *Koch v. Story*, 47 Colo. 335, 107 Pac. Rep. 1093.

inappreciable, since its continued use would ripen into an easement in the land.⁹ But where the remedy at law was adequate for a trespass across lands, it was held that an injunction would not be granted; and, further, that no easement could be acquired in plaintiff's land without his acquiescence in such trespass.¹⁰ Where the owner of an easement attempts to impose an extra burden upon the land over which his easement runs an action for an injunction will lie to prevent such acts.¹¹

In general, an injunction will lie against the United States Reclamation Service officers for trespass on land. It was held by the Idaho Court that an injunction would be granted against the interference by such officers with a right of way of a railroad subject to the Act of Congress of August 30, 1890.¹²

§ 1623. Injunctions against the flooding of lands from ditches or other works.—Where ditches, dams, or other works for the

⁹ Walker v. Emerson, 89 Cal. 456, 26 Pac. Rep. 968.

But where the consent was given by the owner of the land to construct a ditch, an injunction will be refused. Hoyer v. Sweetman, 19 Nev. 376, 12 Pac. Rep. 504.

A landlord may sue for a trespass which affects his reversion, though a tenant is in possession, both parties having the right of action where there is injury to both estates. Custer Consol. Mines Co. v. City of Helena, — Mont. —, 122 Pac. Rep. 567.

¹⁰ Crescent Min. Co. v. Silver King Min. Co., 17 Utah 444, 54 Pac. Rep. 244, 70 Am. St. Rep. 810.

An injunction will be granted against a land owner from destroying a ditch constructed over his lands without objection, and without condemning a right of way. Miocene D. Co. v. Jacobson, 146 Fed. Rep. 680, 77 C. C. A. 106.

¹¹ Where the defendants had acquired an easement over plaintiff's land for an irrigation ditch, and commenced the construction of an-

other ditch some distance from the original one, it was immaterial to plaintiff's right to enjoin such acts that the land taken had no appreciable value. Vestal v. Young, 147 Cal. 715, 82 Pac. Rep. 381.

See, also, Burris v. People's D. Co., 104 Cal. 248, 37 Pac. Rep. 922; Wood v. Etiwanda W. Co., 122 Cal. 152, 54 Pac. Rep. 726; *Id.*, 147 Cal. 233, 81 Pac. Rep. 512; North Fork W. Co. v. Edwards, 121 Cal. 662, 54 Pac. Rep. 69; Josephs v. Ager, 108 Cal. 517, 41 Pac. Rep. 422, Kern Island etc. Co. v. Bakersfield, 151 Cal. 403, 90 Pac. Rep. 1052; Colegrove v. Hollywood, 151 Cal. 425, 90 Pac. Rep. 1053, 13 L. R. A., N. S., 904.

But see City of Portland v. Metzger, 58 Ore. 276, 114 Pac. Rep. 106, holding that the operation of a telephone line was not an additional burden to a right of way given to operate a pipe line.

¹² 26 Stat. L. 391; 2 U. S. Comp. Stat., 1901, p. 1570; Minidoka etc. Co. v. Weymouth, 19 Idaho 234, 113 Pac. Rep. 455.

diversion, storage, or the carrying of water are so constructed or managed that they continually flood the lands of others in the neighborhood to their irreparable injury, an injunction either mandatory or preventive will be granted by a court of equity in a proper action against such acts, as the circumstances of any particular case may warrant, and the land owner whose property is so injured will be entitled to recover in an action at law for the actual damages sustained.¹ So, where the defendant by the negligent construction of the works by which it diverted water from the Colorado River into its irrigation canal caused an overflow through a breach in the bank, creating a lake in the Salton Basin, which covered and practically destroyed the value of complainant's property situated in the basin, in a suit by the complainant it was awarded damages for the injury, and also an injunction restraining the defendant from diverting water from the river in excess of the substantial needs of the people dependent on its canal, and from permitting any waste water to flow on or over complainant's land, or into the lake in such an amount as would "substantially increase the amount of water therein," or prevent the decrease thereof by natural causes.²

An injunction will also lie to restrain the land owners on one side of a stream from maintaining a levee upon the bank thereof whereby the flood waters of the stream are made to overflow unnaturally the land of others on the other side of the stream.³ So, also, an injunction will be granted against the filling of a reservoir

¹ For damages for flooding lands, see Secs. 1674-1677; *Wilhite v. Billings* etc. Co., 39 Mont. 1, 101 Pac. Rep. 168; *Wallace v. Farmers' D. Co.*, 130 Cal. 578, 62 Pac. Rep. 1078; *Fischer v. Davis*, 19 Idaho 493, 116 Pac. Rep. 412; *Ryan v. Weiser Valley* etc. Co., 20 Idaho 288, 118 Pac. Rep. 769.

An irrigation district can not collect the waters and pour them out through one spillway in one volume onto the lands of another, so as to increase the damage done to his lands; but, on the contrary, if it desires to collect waters and turn them through spillways, it must do so as to allow them to flow over the lands of the owner in as nearly the same manner

and proportion as they would in their natural state, and in such manner as to do no greater damage than they would inflict in their usual and ordinary flow. *Teeter v. Nampa* etc. Irr. Dist., 19 Idaho 355, 114 Pac. Rep. 8, holding that for any increased flow an injunction would be granted.

² *The Salton Sea Cases—New Liverpool Salt Co. v. California Development Co.*, 172 Fed. Rep. 820, 97 C. C. A. 242.

³ *Town of Jefferson v. Hicks*, 23 Okla. 684, 102 Pac. Rep. 79, 24 L. R. A., N. S., 214; *Ladd v. Redle*, 12 Wyo. 362, 75 Pac. Rep. 691.

while it is in a leaky condition.⁴ In the construction and maintenance of such works, causing the property to be injured, the party so maintaining them is presumed to have intended the natural consequences of his acts and therefore is chargeable with notice of whatever conditions resulted from such acts. He can not complain, therefore, that the plaintiff failed to give notice that he had been injured and demand redress therefor before bringing his action.⁵

But an injunction in such cases will not lie where the trouble has been corrected, or where it does not appear that the injuries complained of are liable to be repeated.⁶ Nor will one be granted where it does not plainly appear that the maintenance of the works of the defendant caused the injuries.⁷ Nor, again, where it appears that the defendant has acquired a right to such overflow or flowage by grant or prescription will an injunction be granted;⁸ nor where the right has been acquired by prescription to discharge waste water upon the lands of others.⁹

In Idaho it is held that a riparian owner upon any of the streams of that State, whether navigable or non-navigable, may maintain an action for an obstruction in such stream which diverts the stream or portion thereof from its natural course to his damage.¹⁰

§ 1624. Injunctions against the turning of surface water upon the lands of others.—It is not the intention of the author of this work to discuss herein to any great extent the questions involved in the disposal of surface waters. That question is more appropriate for a work upon the subject of drainage.

⁴ *Sylvester v. Jerome*, 19 Colo. 128, 34 Pac. Rep. 760.

⁵ *Wilhite v. Billings etc. Co.*, 39 Mont. 1, 101 Pac. Rep. 168.

⁶ *Bryant v. Frank H. Lamb Timber Co.*, 37 Wash. 168, 79 Pac. Rep. 622.

⁷ *Esson v. Wattier*, 25 Ore. 7, 34 Pac. Rep. 756.

⁸ Where a dam across a stream has been maintained for 15 years, the period of limitations for actions to determine an interest in real property, the right to its continued maintenance can not be ordinarily enjoined by the owners of the land flooded thereby.

Whitehair v. Brown, 80 Kan. 297, 102 Pac. Rep. 783.

See, also, *Farnham, Waters and Water Rights*, Secs. 558-561; *Grigsby v. Clear Lake Waterworks Co.*, 40 Cal. 396; *Sweetland v. Grants Pass etc. Co.*, 46 Ore. 85, 79 Pac. Rep. 337.

⁹ *Abbott v. Pond*, 142 Cal. 393, 76 Pac. Rep. 60; *Durning v. Walz*, 42 Ore. 109, 71 Pac. Rep. 662.

See, also, for the defense of actions by the statute of limitations, Secs. 1634, 1635.

¹⁰ *Fischer v. Davis*, — Idaho —, 116 Pac. Rep. 412.

In general, however, it may be said that an owner of upper lands may have the surface waters from his land flow in their natural course down to the lands below without incurring any liability therefor. But, upon the other hand, he is not permitted, by the construction of dams, ditches, or other works, to turn the surface waters which flow or have accumulated on his land down on the lands of his neighbors. And where such works are constructed and such water is thereby caused to flow on the land of another, which would not naturally flow thereon, there is an invasion to his neighbor's right of property and a nuisance *per se*, and against the continuance of which an action for an injunction will lie.¹

Of course, as in many other cases involving rights in waters, a prescriptive right may be acquired by an upper owner to divert surface water and discharge it upon the land of another.² But where the defense in an action for an injunction is that of a prescriptive right to so discharge such waters and to overflow the land of another, it must be shown that there has been an uninterrupted enjoyment under a claim of right for at least the period of time which is a bar for the maintaining an action for the possession of real property in the jurisdiction where the action is brought and that there was an actual occupation by the flow of the water to the knowledge of the owner of the land and such as to occasion damage and give him a right of action, and there must have been such a use

¹ Galbreath v. Hopkins, 159 Cal. 297, 113 Pac. Rep. 174.

A land owner may fill in and raise the level of his ground, and erect embankments to protect his premises from overflow water, but he has no right to cast the water on the land of another to his injury. Ladd v. Redle, 12 Wyo. 362, 75 Pac. Rep. 691.

See, also, Cushing v. Pires, 124 Cal. 663, 57 Pac. Rep. 572; Ogburn v. Connor, 46 Cal. 346, 13 Am. Rep. 213; Gray v. McWilliams, 98 Cal. 157, 32 Pac. Rep. 976, 21 L. R. A. 593, 35 Am. St. Rep. 163; Learned v. Castle, 78 Cal. 454, 18 Pac. Rep. 872; Wood v. Moulton, 146 Cal. 317, 80 Pac. Rep.

92; Drew v. Hicks, 101 Cal. 17, 35 Pac. Rep. 563; Rudel v. Los Angeles County, 118 Cal. 281, 50 Pac. Rep. 400; Sullivan v. Johnson, 30 Wash. 72, 70 Pac. Rep. 246; Noyes v. Cosselman, 29 Wash. 635, 70 Pac. Rep. 61, 92 Am. St. Rep. 937; Humphreys v. Moulton, 1 Cal. App. 257, 81 Pac. Rep. 1085; Peck v. Peterson, 15 Cal. App. 543, 115 Pac. Rep. 327; State *ex rel.* Knittle v. Zerbe, — Kan. —, 124 Pac. Rep. 160.

But see Bryant v. Merritt, 71 Kan. 272, 80 Pac. Rep. 600.

² For rights by prescription, see Secs. 1033-1058.

of the land and such damage as will raise a presumption that he would not have submitted to it unless the right existed.³

§ 1625. Injunctions protecting the navigable capacity of waters.

—An action for an injunction will lie to protect the navigable capacity of waters both of the United States and of a State;¹ and that, too, regardless of the fact as to whether such capacity is being impaired by the direct means of obstructions placed in the navigable portion of the rivers and streams or whether it be by the diversion of water from the stream itself or from its tributaries to such an extent as to lower the flow and thus to impair its navigable capacity below.² Of course, before such an action can be maintained the stream must be in its natural condition; in fact, navigable.³ But, where such is the fact, in cases where the general public only are injured, the proper party to bring such actions where they are navigable waters of the United States is the Government and where they are navigable waters of a State, is the State or some public official authorized by law.⁴ But where a private citizen is specially

³ *Galbreath v. Hopkins*, 159 Cal. 297, 113 Pac. Rep. 174; *Carson v. Hayes*, 39 Ore. 97, 65 Pac. Rep. 814; *Woodruff v. North Bloomfield etc. Co.*, 8 Sawy. 628, 16 Fed. Rep. 25, 9 Sawy. 441, 18 Fed. Rep. 753.

¹ For the navigable waters of the United States, see Sec. 348.

For the navigable waters of a State, see Sec. 348.

² The prohibition by the Act of Congress of September 19, 1890, against the creation of any obstruction to the navigable capacity of any waters, includes not only an obstruction in the navigable portion of the stream, but also anything, wherever or however done, to destroy the navigable capacity of one of the navigable waters of the United States. *United States v. Rio Grande etc. Co.*, 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770; reversing *Id.*, 9 N. M. 303, 51

Pac. Rep. 674; *Id.*, 184 U. S. 416, 46 L. Ed. 619, 22 Sup. Ct. Rep. 428; reversing *Id.*, 10 N. M. 677, 65 Pac. Rep. 276; *Id.*, 13 N. M. 386, 85 Pac. Rep. 393; *Kansas v. Colorado*, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655; *Miller & Lux v. Enterprise etc. Co.*, 142 Cal. 208, 75 Pac. Rep. 770, 100 Am. St. Rep. 115; *Heilbron v. Fowler etc. Co.*, 75 Cal. 426, 17 Pac. Rep. 535, 7 Am. St. Rep. 183.

See, also, for injunctions against negligent logging, Sec. 1617.

³ For navigable waters, see Secs. 344-346; *Hains v. Hall*, 17 Ore. 165, 20 Pac. Rep. 831, 3 L. R. A. 609.

⁴ *Esson v. Wattier*, 25 Ore. 7, 34 Pac. Rep. 756; *Luhrs v. Sturtevant*, 10 Ore. 170; *Jones v. St. Paul etc. R. Co.*, 16 Wash. 25, 47 Pac. Rep. 226; *Griffith v. Holman*, 23 Wash. 347, 63 Pac. Rep. 239, 54 L. R. A. 178.

damaged by the obstruction of a navigable stream he may maintain the action.⁵

The question as to whether the acts complained of actually impair the navigable capacity of the stream is one of fact to be determined by the facts and circumstances surrounding each particular case.⁶

§ 1626. **Injunctions as between ditch companies and their stockholders or consumers.**—Injunctions are oftentimes granted to protect the rights of the respective parties and to regulate the dealings between ditch and canal companies and their stockholders or consumers.¹ The shareholders in a mutual ditch company may maintain an action to enjoin the company from disposing of any of the water appropriated and diverted to persons other than the *bona fide* shareholders where the effect of this action upon the part of the company would be to deprive such shareholders of some of the water to which they were entitled.²

So, also, the consumers furnished with water by a corporation organized for profit may maintain an action to enjoin the company from selling to other consumers applying later water beyond the capacity of the company to furnish, to the injury of the rights of the prior consumers.³ So, also, where such a company previously

⁵ Dawson v. McMillan, 34 Wash. 269; 75 Pac. Rep. 807; Small v. Harrington, 10 Idaho 499, 79 Pac. Rep. 461; Morris v. Graham, 16 Wash. 343, 47 Pac. Rep. 752, 58 Am. St. Rep. 33.

⁶ United States v. Rio Grande etc. Co., *supra*.

¹ For the control by private water companies, see Part XII, Chaps. 72-77.

² McDermont v. Anaheim etc. Co., 124 Cal. 112, 56 Pac. Rep. 779.

For mutual water companies, see Secs. 1453-1463, 1479-1489.

³ Wyatt v. Larimer & Weld Irr. Co., 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; Farmers' etc. Co. v. Southworth, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767; Brown v. Farmers' etc. Co., 26 Colo.

66, 56 Pac. Rep. 183; Lanning v. Osborne, 76 Fed. Rep. 319; affirmed, 178 U. S. 22, 20 Sup. Ct. Rep. 860, 44 L. Ed. 961.

See, also, Blakely v. Ft. Lyon etc. Co., 31 Colo. 224, 73 Pac. Rep. 249; La Junta etc. Co. v. Hess, 6 Colo. App. 497, 42 Pac. Rep. 50; New La Junta etc. Co. v. Kreybill, 17 Colo. App. 26, 67 Pac. Rep. 1026.

See, also, for duty to furnish water, Secs. 1497-1500.

A consumer whose right to demand a supply of water from a company has once vested is protected from injury from having his supply cut off. He may prevent, by injunction, if need be, the distributor from disposing of it to others beyond the capacity of the system. Lanning v. Os-

furnished water to a *bona fide* consumer, and might still continue to do so, but refused to comply with a demand accompanied with a tender of the established rates to further furnish it, and threatened to cut off the supply, an action for an injunction will lie against the company by the consumer to prevent the company from depriving him of his water.⁴ But a perpetual mandatory injunction requiring a company to supply water to a consumer will not be granted where such consumer had no right to the water other than that which existed by virtue of a contract for a single season.⁵ However, the usual remedy in actions of this nature is an action in mandamus, and not by injunction.⁶ An action will lie for an injunction to restrain a corporation from compelling early consumers to prorate the water in time of scarcity with later comers, in the absence of contract.⁷

An action for an injunction will lie by minority owners of the waters of a stream to prevent a corporation representing the majority owners from regulating and controlling all of the waters of the stream.⁸ An injunction will also lie against the enforcement of an invalid assessment levied by the company upon behalf of a stockholder.⁹ So, also, such an action will lie against the enforcement of illegal assessments or sales by irrigation districts.¹⁰

borne, 76 Fed. Rep. 319; affirmed, 178 U. S. 22, 20 Sup. Ct. Rep. 860, 44 L. Ed. 961.

⁴ *Fellows v. Los Angeles*, 151 Cal. 52, 90 Pac. Rep. 137; *Downing v. Agricultural D. Co.*, 20 Colo. 546, 39 Pac. Rep. 336.

⁵ *Fulton v. Twombly etc. Co.*, 6 Colo. App. 554, 42 Pac. Rep. 253.

⁶ *Oreutt v. Pasadena etc. Co.*, 152 Cal. 599, 93 Pac. Rep. 497.

For the compulsory service of water, see Secs. 1506, 1507.

For actions in mandamus, see Secs. 1506, 1649.

⁷ *Farmers' etc. Co. v. White*, 32 Colo. 114, 75 Pac. Rep. 416; *Brown v. Farmers' etc. Co.*, 26 Colo. 66, 56 Pac. Rep. 183.

⁸ *Bartholomew v. Fayette Irr. Co.*, 31 Utah 1, 86 Pac. Rep. 481, 120 Am. St. Rep. 912.

⁹ But where a person failed to pay assessments levied on his stock, and the same was sold, and the corporation brought it in, and where the sale was void because not held in conformity to law, and where subsequent assessments were levied on the stock outstanding, but he received no notice thereof, it was held that he was not entitled to a decree enjoining the corporation from withholding the water from his land without paying the assessments levied; it being inequitable to permit him to use the water without paying his share of the expenses. *Curtin v. Arroyo etc. Co.*, 147 Cal. 337, 81 Pac. Rep. 982.

¹⁰ For the enforcement of assessments by irrigation districts, see Secs. 1422, 1423.

See, also, *Hughson v. Crane*, 115 Cal. 404, 47 Pac. Rep. 120; *Baxter v.*

§ 1627. **Injunctions against the violation of contracts.**—In certain cases an action for an injunction will lie to enjoin the violation of contracts. So, where a corporation is under contract obligation to furnish water, an injunction will be granted to prevent the company from shutting off the water.¹ So, where a city gave a contract to a water company for 30 years to have full control of its water-works plant, with power to enlarge it and extend its mains, and at the end of the time the city was given the right to take possession on the payment of the value of the improvements, it was held that the city would be enjoined from taking possession of the plant under the contract without first paying or tendering the value thereof.² Again, a consumer having a contract with a water company whereby the company engages to furnish the consumer with a continual supply of water may by injunction prevent the corporation from contracting with other later parties which would impair the company's ability to supply the amount of water called for under the first consumer's contract.³

But it was held that where a corporation was under contract to furnish a city with a certain amount of water, an action for an injunction to prevent the company from shutting off the water from the city schools would not lie, for the reason that the board of education of the city was a distinct corporation and not a mere function or part of the municipal government of the city.⁴ So, also, where the plaintiff in his pleading based his right upon appropriation and the evidence disclosed the fact that he held under contract, it was held that there was a fatal variance and that an injunction

Dickinson, 136 Cal. 185, 68 Pac. Rep. 601; Quint v. Hoffman, 103 Cal. 506, 37 Pac. Rep. 514.

¹ Hunt v. Jones, 149 Cal. 297, 86 Pac. Rep. 686, holding that the company will either be compelled in equity to specifically execute the contract, or will be restrained from violating it.

See, also, contracts, Secs. 917-926.

Contracts with companies, Secs. 1509-1529; Bowman v. Ayers, 2 Idaho 465, 21 Pac. Rep. 405; City and County of Denver v. Walker, 45 Colo. 387, 101 Pac. Rep. 348.

² Los Angeles v. Los Angeles City

W. Co., 124 Cal. 368, 57 Pac. Rep. 210.

³ Wyatt v. Larimer etc. Co., 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280; Eaton v. Larimer etc. Co., 35 Colo. 16, 83 Pac. Rep. 627; Merrill v. South Side Irr. Co., 112 Cal. 433, 44 Pac. Rep. 720.

But see Hackett v. Larimer etc. Co., 48 Colo. 178, 109 Pac. Rep. 965, holding that a consumer can not complain if his rights are not interfered with.

⁴ Water Supply Co. v. City of Albuquerque, 9 N. M. 441, 54 Pac. Rep. 968.

would not be granted.⁵ Again, an injunction will not lie to relieve one from his own contract, although the effect of the contract was not anticipated when made.⁶

§ 1628. **Injunctions to protect decreed rights.**—Although the rights of the respective parties to the use of waters from the same source of supply may be adjudicated and as so adjudicated may be protected by injunction granted in the same action,¹ this is not always done. Where, however, the rights have been adjudicated in a previous action, and the decree is in full force and effect, an injunction in a subsequent action will always be granted in a proper case to prevent the interference with the rights decreed by the parties to the previous action. Such an action is to protect priorities already established and not to determine them.² Such an action may be defended upon the ground that the decreed rights have been abandoned. But the burden of proof is upon the party setting up such a defense to establish the fact that there has been an actual abandonment since the award was made in the previous suit.³

⁵ *City and County of Denver v. Walker*, 45 Colo. 387, 101 Pac. Rep. 348.

⁶ *Consolidated Canal Co. v. Mesa Canal Co.*, 6 Ariz. 135, 53 Pac. Rep. 575; affirmed, 177 U. S. 296, 44 L. Ed. 777, 20 Sup. Ct. Rep. 628.

¹ For the adjudication of water rights and injunction in same action, see Secs. 1536, 1598.

² *Medano D. Co. v. Adams*, 29 Colo. 317, 68 Pac. Rep. 431.

“No adjudication of water rights is sought in this action; no modification of the decree is asked. Plaintiff is simply seeking to protect the rights which were awarded in the adjudication proceedings. For this purpose the Court had jurisdiction, without regard to the Court where the statutory proceedings were had.” *Buckers etc. Co. v. Farmers' etc. Co.*, 31 Pac. Rep. 62, 72 Pac. Rep. 49; *Alamosa etc. Co. v. Nelson*, 42 Colo. 140, 93 Pac. Rep. 1112; *Barnes v. Gerberg*,

27 Wash. 126, 67 Pac. Rep. 568; *Montrose Canal Co. v. Loutsenhizer D. Co.*, 23 Colo. 233, 48 Pac. Rep. 532; *Consolidated etc. Co. v. New Loveland etc. Co.*, 27 Colo. 521, 62 Pac. Rep. 364; *McLean v. Farmers' etc. Co.*, 44 Colo. 184, 98 Pac. Rep. 16; *Buckers etc. Co. v. Platte Valley Irr. Co.*, 28 Colo. 187, 63 Pac. Rep. 305; *Diez v. Hartbauer*, 46 Colo. 599, 105 Pac. Rep. 868; *Hoyt v. Hart*, 149 Cal. 722, 87 Pac. Rep. 569; *Lower Latham D. Co. v. Loudon C. Co.*, 27 Colo. 267, 60 Pac. Rep. 629, 83 Am. St. Rep. 80; *Platte Valley Irr. Co. v. Central Trust Co.*, 32 Colo. 102, 75 Pac. Rep. 391.

³ *Platte Valley Irr. Co. v. Central Trust Co.*, 32 Colo. 102, 75 Pac. Rep. 391; *Conley v. Dyer*, 43 Colo. 22, 95 Pac. Rep. 304; *Lower Latham D. Co. v. Loudon C. Co.*, 27 Colo. 267, 60 Pac. Rep. 629, 83 Am. St. Rep. 80. For abandonment, see, also, Secs. 1100-1117.

§ 1629. **Injunctions — Jurisdiction of courts — Venue.** — The county in which an action must be brought to enjoin an invasion of any of the rights under discussion depends upon the constitutions and statutes of the respective States. As we have seen in previous sections, actions to adjudicate rights must be commenced in the county where the right is situated, for the reason that it is in the nature of an action to quiet title to real property.¹ Therefore, it must follow that where an action for an injunction is combined with an action to adjudicate a right, it must be also commenced in the county where the property is situated. But, where the action is simply for an injunction against the invasion of a right, or an action for an injunction combined with an action for past damages for such invasion, the basis of the action is one for tort; and under the California rule it is not required that the action be commenced in the county where the property is situated, but may be brought in any county and the court of that county acquires jurisdiction to try the case, unless the defendant applies for its transfer for trial to the county where the property is situated, upon which application it must be transferred to the county where the property is situated.²

In Colorado it is held that the statute providing that the court, having properly acquired jurisdiction of a proceeding to adjudicate water rights, shall thereafter retain exclusive jurisdiction for that purpose, does not apply to an action in which it is merely sought to protect rights awarded in the jurisdiction proceedings, but that the action may be brought in another county and that, too, without regard to the court in which the statutory proceedings were had.³

In Utah it is held that water wrongfully diverted in one county to the injury of plaintiff's rights in another county constitutes one cause of action, and the plaintiff may elect in which county he will bring the action.⁴ In Wyoming it is held that where owners of

¹ For jurisdiction of courts in actions to quiet title, venue, see Sec. 1533.

For the nature of such actions, see Sec. 1534.

² *Miller & Lux v. Madera etc. Co.*, 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391; *Miller & Lux v. Kern County etc. Co.*, 140 Cal. 132, 73 Pac. Rep. 836; *Grocers' etc. Union*

v. Kern County etc. Co., 150 Cal. 466, 89 Pac. Rep. 120.

See, also, *Elliot v. Whitmore*, 10 Utah 246, 37 Pac. Rep. 461.

³ *Buckers etc. Co. v. Farmers' etc. Co.*, 31 Colo. 62, 72 Pac. Rep. 49; *Medano D. Co. v. Adams*, 29 Colo. 317, 68 Pac. Rep. 431.

⁴ *Deseret Irr. Co. v. McIntyre*, 16 Utah 398, 52 Pac. Rep. 628; *Lower*

land in Montana have acquired prior right by appropriation to the use of water to irrigate their lands by means of a ditch and headgate located in Wyoming, the District Court of Wyoming has jurisdiction to enjoin others from diverting the water by means of ditches located in Wyoming or in Montana for the irrigation of lands in Wyoming.⁵ The question as to the jurisdiction can not be raised for the first time on appeal.⁶

Where there is an actual diversity of citizenship, such actions may be originally brought in the Federal court, or, after it has been brought in a State court, upon the proper motion to remove, it will be transferred to the Federal court; provided, of course, that the requisite amount is involved, which must exceed \$2,000 exclusive of interest and cost, as to each complainant.⁷ But the diversity of citizenship must be *bona fide* in order for the Federal court to acquire jurisdiction, otherwise the action will be dismissed. It is, therefore, held that the incorporation in one State by direction of a corporation of another State for the sole purpose of having the matter in dispute between such corporation and another corporation of the latter State determined in the Federal rather than in the State court must be regarded as an attempt collusively to make a party plaintiff simply for the purpose of creating a case cognizable by the Federal court, and such an action will be dismissed for want of jurisdiction of the Federal court.⁸

Where a water company has constructed a dam across a stream

Kings etc. Co. v. Kings River etc. Co., 60 Cal. 408; Last Chance etc. Co. v. Emigrant etc. Co., 129 Cal. 277, 61 Pac. Rep. 960.

⁵ Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939.

See, also, Lower Kings etc. Co. v. Kings River etc. Co., 60 Cal. 408; Morris v. Bean, 123 Fed. Rep. 618, 146 Fed. Rep. 423; Hoge v. Eaton, 135 Fed. Rep. 411, 141 Fed. Rep. 64, 72 C. C. A. 74.

See, also, for interstate waters, Secs. 664, 1221-1234.

⁶ Elliot v. Whitmore, 10 Utah 246, 37 Pac. Rep. 461.

⁷ Morris v. Bean, 123 Fed. Rep. 618; *Id.*, 146 Fed. Rep. 423; Howell v. Johnson, 89 Fed. Rep. 556; Hoge v. Eaton, 141 Fed. Rep. 64, 72 C. C. A. 74; *Id.*, 135 Fed. Rep. 411; Mohl v. Lamar Canal Co., 128 Fed. Rep. 776; Shepard v. Tulare Irr. Dist., 94 Fed. Rep. 1; San Joaquin etc. Co. v. Stanislaus County, 90 Fed. Rep. 516; Anderson v. Bassman, 140 Fed. Rep. 14.

⁸ Miller v. East Side etc. Co., 211 U. S. 293, 53 L. Ed. 189, 29 Sup. Ct. Rep. 111.

for the purpose of impounding water, and the dam results in the flooding of the lands of another, and an action for condemnation of such land is prosecuted in the Federal court and a judgment is entered in favor of the land owner for the value of the land taken, and the plaintiff then appeals to the United States Circuit Court of Appeals, it is held in Idaho that the State court has the jurisdiction to issue an injunction to restrain such company from flooding the land sought to be condemned until such time as the value thereof has been paid to the land owner, for the reason that no title can pass to the condemner in condemnation proceedings until after the payment of the value of the property which has been determined and assessed in the manner prescribed by law.⁹

Where the controversy is between two States, the only court having original jurisdiction is the Supreme Court of the United States.¹⁰

An allegation in a bill that the complainant is a corporation organized under an Act of Congress makes the case one arising under the laws of the United States and confers jurisdiction upon the Federal Court.¹¹ And the fact that a plaintiff is given a different remedy in the State courts can not affect the jurisdiction of a Federal Court to entertain his action, where, by reason of his citizenship, and the amount involved, he has the right to sue in that Court.¹² Any invasion of the prior right of the United States to the waters of a stream is a trespass, and the Government may maintain a suit in equity to protect its right against any one or all of such trespassers.¹³ The place of trial in an action to

⁹ *Ryan v. Weiser Valley etc. Co.*, Ed. 497, 21 Sup. Ct. Rep. 331; *Id.*, 20 Idaho 288, 118 Pac. Rep. 769. 200 U. S. 496, 50 L. Ed. 572, 26 Sup. Ct. Rep. 268.

¹⁰ See for original jurisdiction of the Supreme Court of the United States, Sec. 1533.

See, also, *Kansas v. Colorado*, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552; *Id.*, 206 U. S. 46, 51 L. Ed. 956; 27 Sup. Ct. Rep. 655; *Misouri v. Illinois*, 180 U. S. 208, 45 L.

¹¹ *United States v. Gallegos*, 89 Fed. Rep. 769, 32 C. C. A. 470, 61 U. S. App. 13.

¹² *Herring v. Modesto Irr. Dist.*, 95 Fed. Rep. 705.

¹³ *United States v. Conrad Inv. Co.*, 156 Fed. Rep. 123.

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abate a nuisance lies where the injury is done, and not where the defendant resides.¹⁴

§ 1630. **Injunctions—Jurisdiction of courts—Person and subject matter.**—As the remedy by injunction to prevent the continuance of the invasion of a right operates *in personam*,¹ so, where the defendant has been served with process in accordance with the law of the jurisdiction where the action is brought, or submits to the jurisdiction of the Court without objection thereto by answering to the merits, the Court has jurisdiction of the person.²

Upon the question of the jurisdiction of the subject matter of the suit, it is necessary in order to confer jurisdiction upon a court of equity to grant injunctive relief, for the plaintiff to allege in his petition or complaint essentials necessary for the granting of such relief,³ and to show that there is no plain, adequate, and complete remedy at law.⁴ And, further, where the facts necessary to confer jurisdiction on a court of equity have been alleged and denied, the question of jurisdiction is not waived, but is to be determined on the hearing; and it is the duty of the Court to dismiss the suit whenever, during the trial, want of jurisdiction appears.⁵ But, as is the case in actions where the main object is for the purpose of adjudicating water rights, and the injunctive feature is but incidental for the protection of the decreed rights, a court of equity having acquired jurisdiction for one purpose has jurisdiction for all.⁶ It has been decided a number of times by the Supreme Court of the United States that the

¹⁴ *City of Marysville v. North Bloomfield etc. Co.*, 66 Cal. 343, 5 Pac. Rep. 507; *Drinkhouse v. Spring Valley W. W.*, 80 Cal. 308, 22 Pac. Rep. 252; *Last Chance etc. Co. v. Emigrant etc. Co.*, 129 Cal. 227, 61 Pac. Rep. 960.

¹ See Sec. 1600.

² *Willey v. Decker*, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939; *Consolidated etc. Co. v. New Loveland etc. Co.*, 27 Colo. 521, 62 Pac. Rep. 364.

See *Salem etc. Co. v. Lord*, 42 Ore.

82, 69 Pac. Rep. 1033, 70 Pac. Rep. 832.

³ For the essentials necessary for such relief, see Secs. 1601-1605.

For complaints in suits for an injunction, see Sec. 1633.

⁴ See Sec. 1604; *Union etc. Co. v. Lichty*, 42 Ore. 563, 71 Pac. Rep. 1044; *Beach v. Spokane etc. Co.*, 25 Mont. 367, 65 Pac. Rep. 106.

⁵ *Union etc. Co. v. Lichty*, 42 Ore. 563, 71 Pac. Rep. 1044.

⁶ See Secs. 1629, 1630; *Feeney v. Chester*, 7 Idaho 324, 63 Pac. Rep. 192.

question of settling and adjudicating water rights and protecting the same, involved no Federal question, but that the same was left, as far as this aspect was concerned, to the State Courts.⁷

§ 1631. **Injunctions—Parties plaintiff.**—Upon the subject of parties plaintiff in actions for an injunction, in general, it may be said that any one who has an actual right in, or legal or equitable claim to, any of the rights under discussion¹ may maintain an action in equity to prevent the continuous interference with the same by another, and that, too, regardless of the fact as to how such party acquired such rights. We have discussed in previous sections of this chapter some of the most important rights which may be protected by an action for an injunction.² Where the action is for an injunction simply, and the element of damages is not included, several owners who are in a similar situation may join together as parties plaintiff and maintain an injunction against the invasion of their rights. It is held that such parties have such a common interest as will “justify them in uniting as joint plaintiffs in a suit to enjoin a continuation and repetition

⁷ Findings of fact of questions of local law upon which depends a party's right, under U. S. Rev. Stat., Sec. 2339 (U. S. Comp. Stat., 1901, p. 1437), to the protection of vested water rights, are not reviewable in the Supreme Court of the United States on a writ of error to a State court, for the reason that the same involves no Federal question. *Telluride etc. Co. v. Rio Grande etc. Co.*, 187 U. S. 579, 47 L. Ed. 307, 23 Sup. Ct. Rep. 178; see same case below, 23 Utah 22, 63 Pac. Rep. 995; see, also, *Id.*, 175 U. S. 639, 44 L. Ed. 305, 20 Sup. Ct. Rep. 245; for same case below, see 16 Utah 125, 51 Pac. Rep. 146; *Hooker v. Los Angeles*, 188 U. S. 314, 47 L. Ed. 487, 23 Sup. Ct. Rep. 395, 63 L. R. A. 471; *Los Angeles v. Los Angeles etc. Co.*, 152 Cal. 645, 93 Pac. Rep. 869, 1135; affirmed, 217 U. S.

217, 54 L. Ed. 736, 30 Sup. Ct. Rep. 452.

See, also, Sec. 593.

¹ That there must be the existence of a right, see Sec. 1601.

For the protection of equitable estates, see *Watts v. Spencer*, 51 Ore. 262, 94 Pac. Rep. 39.

The Government may protect its right to the waters by injunction. *United States v. Conrad Inv. Co.*, 156 Fed. Rep. 123; *Custer Consol. Mines Co. v. City of Helena*, — Mont. —, 122 Pac. Rep. 567, where it is held that all actions must be brought in the name of the real party in interest, and an action for the interference with an interest in a water right must be brought in the name of the person whose right is invaded.

See, also, for parties plaintiff in actions to adjudicate rights, Sec. 1544.

² See Secs. 1610-1628.

of such unlawful acts."³ But the rule is to the contrary, where the action is at law for damages,⁴ and where an action for an injunction, which is common to all the plaintiffs, is joined with an action for damages, which is not joint to all the plaintiffs, but is several.⁵ But, as held by the Supreme Court of Oregon, in an action for an injunction against the invasion of rights, the fact that some of the parties plaintiff were not shown to be injured by the acts of the defendants, and some of the parties defendant had not interfered with the plaintiffs' rights, did not affect the right to maintain the action, since it was necessary, in order to determine the rights of the parties, which involved the entire water of the stream, that all the parties having rights therein should be made parties, and it was immaterial whether they were made plaintiffs or defendants.⁶ Tenants in common may join together as parties plaintiff to protect their common rights.⁷

³ *Frost v. Alturas W. Co.*, 11 Idaho 294, 81 Pac. Rep. 996, citing *Kinney on Irr.*, 1st Ed., Sec. 327; *Brown v. Farmers' etc. Co.*, 26 Colo. 66, 56 Pac. Rep. 183; *Churchill v. Lauer*, 84 Cal. 233, 24 Pac. Rep. 107; *Ronnow v. Delmue*, 23 Nev. 29, 41 Pac. Rep. 1074; *Foreman v. Boyle*, 88 Cal. 290, 26 Pac. Rep. 94; *Blaisdell v. Stephens*, 14 Nev. 17, 33 Am. Rep. 523; *Beach v. Spokane etc. Co.*, 25 Mont. 367, 65 Pac. Rep. 106; *Deseret etc. Co. v. McIntyre*, 16 Utah 398, 52 Pac. Rep. 628; *Barham v. Hostetter*, 67 Cal. 272, 7 Pac. Rep. 689; *Miller v. Highland D. Co.*, 87 Cal. 430, 25 Pac. Rep. 550, 22 Am. St. Rep. 254; *Schultz v. Winter*, 7 Nev. 130; *Montecito Valley W. Co. v. Santa Barbara*, 144 Cal. 578, 77 Pac. Rep. 1113; *Rickey v. Wood*, 152 Fed. Rep. 22, 81 C. C. A. 218; *Farmers' etc. Co. v. White*, 32 Colo. 114, 75 Pac. Rep. 415.

The owners in severalty of different tracts of land may join in an action to restrain the diversion of the waters of a stream along whose banks their lands are located, and in which they have riparian rights, and rights ac-

quired by appropriation. *Churchill v. Lauer*, 84 Cal. 233, 24 Pac. Rep. 107.

But see *Rincon etc. Co. v. Anaheim etc. Co.*, 115 Fed. Rep. 543, holding that the other riparian owners are not necessary parties to such an action.

"Those who are united in interest must be joined as plaintiffs or defendants." *Kaukauna etc. Co. v. Green Bay etc. Co.*, 75 Wis. 385, 44 N. W. Rep. 638.

See, also, *Grand Rapids etc. Co. v. Bensley*, 75 Wis. 399, 44 N. W. Rep. 640; *Rodgers v. Pitt*, 89 Fed. Rep. 420, 129 Fed. Rep. 932; *Miller & Lux v. Rickey*, 127 Fed. Rep. 573.

⁴ For parties plaintiff, in actions at law for damages, see Sec. 1684.

⁵ *Barham v. Hostetter*, 67 Cal. 272, 7 Pac. Rep. 689.

⁶ *Williams v. Altnow*, 51 Ore. 275, 95 Pac. Rep. 200, 97 Pac. Rep. 539.

⁷ *Smith v. Stearns Rancho Co.*, 129 Cal. 58, 61 Pac. Rep. 662; *Wood v. Etiwanda W. Co.*, 122 Cal. 152, 54 Pac. Rep. 726.

See, also, for tenants in common, Secs. 1454-1458.

Again, the rule is well settled that one tenant in common may sue alone to protect the common rights of all without joining with him his cotenants as parties plaintiff.⁸ Again, one tenant in common in a water right or in a ditch, canal, or other works, may sue another tenant in common for the unlawful interference therewith.⁹

A ditch or canal company may itself maintain an action for an injunction to protect the rights of its stockholders and consumers against the invasion by another company, without making its stockholders or consumers parties plaintiff.¹⁰ Again, the stockholders and consumers of water furnished by a ditch and canal company may maintain such an action against the company for any invasion of their rights.¹¹ A pledgee of corporate stock may maintain an action against the corporation to have certain assessments declared void, and to enjoin the enforcement of the same.¹² A mortgagee is also held to have such a right of action against a canal company for the failure to furnish water.¹³ Again, a person need not be the owner of the water rights or the works used in connection therewith to maintain such an action. A tenant of the owner of such rights may maintain such an action in his own name, without joining his landlord as party plaintiff, where he

⁸ *Spanish Fork v. Hopper*, 7 Utah 235, 26 Pac. Rep. 293; *Lytle Creek W. Co. v. Perdew*, 65 Cal. 447, 4 Pac. Rep. 426; *Rodgers v. Pitt*, 89 Fed. Rep. 420; *Id.*, 129 Fed. Rep. 932; *Hildreth v. Montecito Creek W. Co.*, 139 Cal. 22, 70 Pac. Rep. 672, 72 Pac. Rep. 395; *Union M. & M. Co. v. Dangberg*, 81 Fed. Rep. 73; *Crowder v. McDonald*, 21 Mont. 367, 54 Pac. Rep. 43, citing *Kinney on Irr.*, 1st Ed., Sec. 301.

⁹ *Carnes v. Dalton*, 56 Ore. 596, 110 Pac. Rep. 170; *Moss v. Rose*, 27 Ore. 595, 41 Pac. Rep. 666, 50 Am. St. Rep. 743; *Lorenz v. Jacob*, 63 Cal. 73; *Jacob v. Lorenz*, 98 Cal. 332, 33 Pac. Rep. 119.

¹⁰ *Farmers' Ind. D. Co. v. Agricultural D. Co.*, 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149; re-

versing *Id.*, 3 Colo. App. 255, 32 Pac. Rep. 722; *Montrose C. Co. v. Loutsenhizer D. Co.*, 23 Colo. 233, 48 Pac. Rep. 532.

See, also, *Springville v. Fulmer*, 7 Utah 450, 27 Pac. Rep. 577.

¹¹ *Farmers' etc. Co. v. White*, 32 Colo. 114, 75 Pac. Rep. 415; *McLean v. Farmers' etc. Co.*, 44 Colo. 184, 98 Pac. Rep. 16; *Wadsworth etc. Co. v. Brown*, 39 Colo. 57, 88 Pac. Rep. 1060; *Clifford v. Larrien*, 2 Ariz. 202, 11 Pac. Rep. 397.

¹² *Farmers' etc. Co. v. Henderson*, 46 Colo. 37, 102 Pac. Rep. 1063.

See, also, for ditch and canal companies, Secs. 1449-1529.

¹³ *Equitable etc. Co. v. Montrose etc. Co.*, 20 Colo. App. 465, 79 Pac. Rep. 747.

has the right of possession.¹⁴ Upon the other hand, a landlord may sue a stranger to prevent the unlawful interference with the right without joining with him the tenant in possession.¹⁵ The owner of the water right, but not of the ditch, may also maintain such an action.¹⁶ So, also, the holder of the equitable title;¹⁷ again, the holder of the legal title as trustee;¹⁸ so, also, a person in possession of land under the land laws of the United States.¹⁹ It is also held that an assignee may maintain the action, although the assignment was made with the express purpose of enabling him to bring the action.²⁰ But under the rule that in order to maintain such an action the plaintiff must have some ownership or interest in the rights sought to be protected, it is held that a city having the first right of appropriation, has the *prima facie* right to divert the waters from the watershed of the creek in sufficient quantity to supply the needs of itself and its inhabitants, and that a taxpayer who is not a subsequent appropriator can not maintain an action for an injunction to prevent the diversion of water by the city on the ground that it will injuriously affect the rights of subsequent appropriators.²¹ A defect of parties plaintiff must be raised by demurrer or answer, and if objection is not so taken, it is waived.²²

¹⁴ Heilbron v. Fowler Switch etc. Co., 75 Cal. 426, 17 Pac. Rep. 535, 7 Am. St. Rep. 183; Los Robles W. Co. v. Stoneman, 146 Cal. 203, 79 Pac. Rep. 830; Clifford v. Larrien, 2 Ariz. 202, 11 Pac. Rep. 397; Heilbron v. Kings River etc. Co., 76 Cal. 11, 17 Pac. Rep. 933; Barkley v. Tieleke, 2 Mont. 59, 4 Morr. Min. Rep. 666; Crook v. Hewitt, 4 Wash. 749, 31 Pac. Rep. 28.

Under the rule that those having no interest in the subject matter are not proper parties, an irrigation company was not a necessary party to a suit by a reservoir owner to enjoin interference with its water, flowing in a canal of the irrigation company, where the issue was whether the plaintiffs or defendants owned the water. Hackett v. Larimer etc. Co., 48 Colo.

178, 109 Pac. Rep. 965, 1 Water and Min. Cas. Ann. 224; Beck v. Bono, 59 Wash. 479, 110 Pac. Rep. 13, 1 Water and Min. Cas. Ann. 222.

¹⁵ Heilbron v. Last Chance etc. Co., 75 Cal. 117, 17 Pac. Rep. 65.

¹⁶ Clifford v. Larien, 2 Ariz. 202, 11 Pac. Rep. 397; Carnes v. Dalton, 56 Ore. 596, 110 Pac. Rep. 170.

¹⁷ Watts v. Spencer, 51 Ore. 262, 94 Pac. Rep. 39.

¹⁸ Koch v. Story, 47 Colo. 335, 107 Pac. Rep. 1093.

¹⁹ Conkling v. Pacific Imp. Co., 87 Cal. 296, 25 Pac. Rep. 399.

²⁰ Smith v. Logan, 18 Nev. 149, 1 Pac. Rep. 678.

²¹ Carlson v. City of Helena, 43 Mont. 1, 114 Pac. Rep. 110.

²² Medano D. Co. v. Adams, 29 Colo. 317, 68 Pac. Rep. 431.

§ 1632. **Injunctions—Parties defendant.**—Upon the question of parties defendant, in general, it may be said that all persons, corporations, or companies, whenever the result of their acts, either joint or several, deprives the plaintiff of his rights or substantially interferes with the same, may be made parties defendant in an action for an injunction. All parties against whom the relief must be obtained to accomplish the object of the suit are necessary parties.¹ And, that some of the parties defendant had not interfered with the plaintiff's rights, does not affect the right to maintain the action, although they were not necessary parties.² And, as a general rule, it may be said that all persons using water from the stream above the plaintiff's point of diversion should be made parties defendant to such an action for an injunction only, because the use of each contributes to the plaintiff's shortage,³ and that, too, regardless of the fact as to whether such persons are joint or several tort feorsors.⁴ In an action by one con-

¹ McLean v. Farmers' etc. Co., 44 Colo. 184, 98 Pac. Rep. 16; Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113; Saint v. Guerrero, 17 Colo. 448, 30 Pac. Rep. 335, 31 Am. St. Rep. 320; Woodruff v. North Bloomfield etc. Co., 8 Sawy. 628, 16 Fed. Rep. 25, 9 Sawy. 441, 18 Fed. Rep. 753; Bliss v. Grayson, 24 Nev. 422, 56 Pac. Rep. 231; Bowman v. Bowman, 35 Ore. 279, 57 Pac. Rep. 546; Squires v. Livesey, 36 Colo. 302, 85 Pac. Rep. 181; Union M. & M. Co. v. Dangberg, 81 Fed. Rep. 73; Brown v. Farmers' etc. Co., 26 Colo. 68, 56 Pac. Rep. 183; Carnes v. Dalton, 56 Ore. 596, 110 Pac. Rep. 170; Farmers' etc. Co. v. White, 32 Colo. 114, 75 Pac. Rep. 415; Hillman v. Newington, 57 Cal. 56.

See, also, Gay v. Hicks, — Okla., —, 124 Pac. Rep. 1077.

² Williams v. Altnow, 51 Ore. 275, 95 Pac. Rep. 200, 97 Pac. Rep. 539; Daly v. Ruddell, 137 Cal. 671, 70 Pac. Rep. 784.

³ West Point Irr. Co. v. Moroni etc. Co., 21 Utah 229, 61 Pac. Rep. 16.

But see Beck v. Bono, 59 Wash. 479, 110 Pac. Rep. 13.

⁴ For the contrary rule for several tort feorsors in actions for damages, see Secs. 1684, 1685.

In the case of a joint trespass it was held that if the defendant and a corporation for which he worked were both responsible for trespasses to plaintiff's reservoir, plaintiff could elect to sue one or both of them in an action for damages and injunction. Koch v. Story, 47 Colo. 335, 107 Pac. Rep. 1093.

See, also, Sloan v. Byers, 37 Mont. 503, 97 Pac. Rep. 855; Mau v. Stoner, 15 Wyo. 109, 87 Pac. Rep. 434, 89 Pac. Rep. 466, 14 Wyo. 183, 83 Pac. Rep. 218; Williams v. Harter, 121 Cal. 47, 53 Pac. Rep. 405; Miles v. Du Bey, 15 Mont. 340, 39 Pac. Rep. 313.

And, in the case of a several trespass, it is held that a single suit may be brought to enjoin several defendants from diverting waters from a stream, though the defendants are not acting in concert, and are not joint tort feorsors. Montecito etc. Co. v.

sumer against a ditch company and co-consumers all co-consumers should be joined as parties defendant.⁵ And where it appears that other persons not parties to the action diverted water from the same stream to such an extent that it can not be satisfactorily shown, but that for the acts of the persons not sued no injury would have resulted to the plaintiff, the Court may make an order requiring all such persons to be made parties defendant,⁶ or, if this is not done, the Court may refuse to grant the injunction.⁷ So, in a suit to enjoin a water commissioner from diverting water in a stream from the use of prior appropriators to the use of subsequent appropriators, the subsequent appropriators being the persons really interested, are necessary parties, and their absence is fatal to the validity of the decree.⁸

In Colorado it is held that in an action between two ditch companies for an injunction, the consumers and stockholders of the defendant company need not be made parties defendant.⁹ Persons using water for irrigation from a creek branch are not necessary parties defendant to a suit by a lower riparian owner on the main stream to enjoin the enlargement of the head of the

Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113.

See, also, *Hillman v. Newington*, 57 Cal. 56; *People v. Gold Run etc. Co.*, 66 Cal. 138, 4 Pac. Rep. 1152, 56 Am. Rep. 80; *Miller v. Highland D. Co.*, 87 Cal. 430, 25 Pac. Rep. 550, 22 Am. St. Rep. 254; *Blaisdell v. Stephens*, 14 Nev. 17, 33 Am. Rep. 523.

⁵ *Farmers' etc. Co. v. White*, 32 Colo. 114, 75 Pac. Rep. 415; *Brown v. Farmers' etc. Co.*, 26 Colo. 66, 56 Pac. Rep. 183.

⁶ *Hough v. Porter*, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; *McLean v. Farmers' etc. Co.*, 44 Colo. 184, 98 Pac. Rep. 16.

A motion made only two days before the day set for the hearing, and more than 20 months after the answer was filed, to make other persons parties defendant, was properly refused

as made too late. *Koch v. Story*, 47 Colo. 335, 107 Pac. Rep. 1093.

⁷ *West Point Irr. Co. v. Moroni etc. Co.*, 21 Utah 229, 61 Pac. Rep. 16.

⁸ *Squires v. Livesey*, 36 Colo. 302, 85 Pac. Rep. 181; *McLean v. Farmers' etc. Co.*, 44 Colo. 184, 98 Pac. Rep. 16; *Buckers etc. Co. v. Farmers' Ind. D. Co.*, 31 Colo. 62, 72 Pac. Rep. 49; *Willey v. Decker*, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939.

⁹ *Farmers' Ind. D. Co. v. Agricultural D. Co.*, 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149; reversing *Id.*, 3 Colo. App. 255, 32 Pac. Rep. 722; *Montrose C. Co. v. Loutsenhizer D. Co.*, 23 Colo. 233, 48 Pac. Rep. 532.

See, also, *Hackett v. Larimer etc. Co.*, 48 Colo. 178, 109 Pac. Rep. 965; *Oregon Const. Co. v. Allen D. Co.*, 41 Ore. 209, 69 Pac. Rep. 455, 93 Am. St. Rep. 701.

branch and consequent diversion of an undue amount of water.¹⁰ The defect of parties defendant must be raised by demurrer or by answer, and if objection is not so taken, it is waived.¹¹ But the misjoinder of two persons defendant can not be raised by joint demurrer.¹² But it is held in Colorado that the rule that a defect of parties is waived by the defendants in joining issue and going to trial does not apply where the Court can not proceed to judgment without the presence of others who have not been made parties.¹³

§ 1633. **Pleadings—Complaint, petition, or bill.**—In an action for an injunction the complaint, petition, or bill, whatever it may be called in the respective jurisdictions, must set forth the right of the plaintiff, and that the defendant is wrongfully invading that right, and other essential elements necessary to give a court of equity jurisdiction of the case.¹ In general, it may be said that the rights of the plaintiff in actions for an injunction must be set forth even with greater particularity than where the action is simply to quiet the title to a water right or the adjudication of rights.² Where the complainant bases his action upon an appropriation of the water, the complaint should contain every essential allegation necessary to show the facts of such appropriation and its priority.³ A complaint alleging the ownership and the right

¹⁰ *Sanders v. Wilson*, 34 Wash. 659, 76 Pac. Rep. 280.

¹¹ *Medano D. Co. v. Adams*, 29 Colo. 317, 68 Pac. Rep. 431.

¹² *Empire etc. Co. v. Board of Commissioners of Rio Grande Co.*, 21 Colo. 244, 40 Pac. Rep. 449.

¹³ *McLean v. Farmers' etc. Co.*, 44 Colo. 184, 98 Pac. Rep. 16.

¹ For the essential elements in an action for injunction, see Secs. 1601-1605.

See, also, for complaints in actions to quiet title, Sec. 1548.

² Unlike an action where plaintiff seeks to restrain a defendant from unlawfully interfering with his prior appropriation, it is not necessary in a complaint to quiet title to specifically

set forth the facts constituting a valid appropriation. *Kimball v. Northern Colo. Irr. Co.*, 42 Colo. 412, 94 Pac. Rep. 333.

³ *Carroll v. Vance*, 39 Colo. 216, 88 Pac. Rep. 1069, where it is held that a complaint in an action by a senior appropriator to enjoin an unlawful diversion of water merely alleged that plaintiff had a priority superior to that of the defendants with which defendants were interfering, was insufficient without showing plaintiff's appropriation and priority.

In a suit to prevent defendant from diverting water and from interfering with plaintiff's use for domestic and irrigation purposes of a certain number of cubic feet of water a second,

to use the waters of certain springs, and the defendant's interference therewith, states a cause of action.⁴ And it is held that a complaint which merely alleges a priority of appropriation, without alleging the facts constituting such priority of appropriation, and the application of the water to a beneficial use, states a conclusion of law only, and is, upon demurrer, fatally defective.⁵

the complaint must allege facts showing plaintiff's right to the water claimed, and that the right was prior and superior to the defendant's right. *White v. Nuckolls*, 49 Colo. 170, 112 Pac. Rep. 329.

A complaint in an action to restrain a wrongful diversion of water, alleging that plaintiffs are owners in severalty of certain tracts of land under defendant's ditch; that they appropriated for irrigation definite amounts of water at certain times from 1872 to 1885; that ever since such appropriation they have continued to use the water each year during the irrigating season, until the years 1894 and 1895, when defendant wrongfully refused to deliver the water in the quantities to which they were entitled; that the amounts of water appropriated were and are necessary to make their lands productive; and that at all times between the years 1885 and 1893 defendant recognized the priorities of the plaintiffs to the quantities claimed, states a cause of action. *Brown v. Farmers' etc. Co.*, 26 Colo. 66, 56 Pac. Rep. 183.

See, also, *Farmers' etc. Co. v. Agricultural D. Co.*, 22 Colo. 513, 45 Pac. Rep. 444, 55 Am. St. Rep. 149; *rev'g Id.*, 3 Colo. App. 255, 32 Pac. Rep. 722; *Salazar v. Smart*, 12 Mont. 395, 30 Pac. Rep. 675; *Anderson etc. Co. v. McConnell*, 133 Fed. Rep. 581; *Cline v. Stock*, 71 Neb. 70, 98 N. W. Rep. 454, 102 N. W. Rep. 265; *Jerrett v. Mahan*, 20 Nev. 89, 17 Pac. Rep. 12; *Smith v. Stearns Rancho*

Co., 129 Cal. 58, 61 Pac. Rep. 662; *Raymond v. Winsette*, 12 Mont. 551, 31 Pac. Rep. 537, 33 Am. St. Rep. 604; *Sternberger v. Seaton etc. Co.*, 45 Colo. 401, 102 Pac. Rep. 168; *Huffner v. Sawday*, 153 Cal. 86, 94 Pac. Rep. 424; *Shenandoah etc. Co. v. Morgan*, 106 Cal. 409, 39 Pac. Rep. 802; *United States etc. Co. v. Gallegos*, 89 Fed. Rep. 769, 32 C. C. A. 470; *Roeder v. Stein*, 23 Nev. 92, 42 Pac. Rep. 867; *Conley v. Dyer*, 43 Colo. 22, 95 Pac. Rep. 304; *Ball v. Kehl*, 87 Cal. 506, 25 Pac. Rep. 679; *Montpelier etc. Co. v. City of Montpelier*, 19 Idaho 212, 113 Pac. Rep. 741; *Hill v. Lenormand*, 2 Ariz. 354, 16 Pac. Rep. 266, where it is held that an injunction may be granted where the court finds the plaintiff's right to be less in amount than alleged.

A general prayer in a complaint in an action to quiet title is sufficient to support an injunction where the facts alleged warrant it. *Los Angeles v. Los Angeles etc. Co.*, 152 Cal. 645, 93 Pac. Rep. 869; *dis.*, 217 U. S. 217, 53 L. Ed. 736, 30 Sup. Ct. Rep. 452.

⁴ *Williams v. Harter*, 121 Cal. 47, 53 Pac. Rep. 405; *Shenandoah etc. Co. v. Morgan*, 106 Cal. 409, 39 Pac. Rep. 802.

⁵ *Farmers' etc. Co. v. Southworth*, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767; *McLean v. Farmers' etc. Co.*, 44 Colo. 184, 98 Pac. Rep. 16; *Hildreth v. Montecito etc. Co.*, 139 Cal. 22, 72 Pac. Rep. 395; *Downing v. Agricultural D. Co.*, 20 Colo. 546, 39 Pac. Rep. 336; *Campbell v. Flan-*

However, it is not necessary for the complainant to set out his deraignment of title in the complaint or bill,⁶ or the particular tract or tracts of land that have been irrigated by him or by his grantors,⁷ the character of the crops grown thereon,⁸ or the fact that the raising of crops by irrigation on the land was successful,⁹ or the particular point of diversion,¹⁰ or the means and methods of the diversion used,¹¹ or the local customs referred to in Section 2339 of the Revised Statutes of the United States.¹²

In Washington it is held that the Court will take judicial notice of the fact that at least that portion of the States east of the Cascade Mountains was within the territory where the customary law of miners was in force for the appropriation of waters.¹³ But in Texas it is necessary to plead that the stream is in the arid portion of the State where the water claimed is used for irrigation,

nery, 29 Mont. 246, 74 Pac. Rep. 450; Carroll v. Vance, 39 Colo. 216, 88 Pac. Rep. 1069; McDermont v. Anaheim etc. Co., 124 Cal. 112, 56 Pac. Rep. 779; Heintzen v. Binninger, 79 Cal. 5, 21 Pac. Rep. 377.

See, also, Van Horn v. Decrow, 136 Cal. 117, 68 Pac. Rep. 473.

But where, in a suit to enjoin the defendant from interfering with the flow of water in plaintiff's ditch, defendant by answer made no claim to any water, and plaintiff claimed no definite quantity of water, and did not prove the amount to which he was entitled, the court held that the only relief that the court could grant was to enjoin the defendant from interfering with the flow of the water. Simpson v. Harrah, 58 Ore. 448, 103 Pac. Rep. 58.

⁶ Miller & Lux v. Rickey, 127 Fed. Rep. 573; Wutchumna W. Co. v. Pogue, 151 Cal. 105, 90 Pac. Rep. 362; Beach v. Spokane etc. Co., 25 Mont. 367, 65 Pac. Rep. 106; Hague v. Nephi etc. Co., 16 Utah 421, 52 Pac. Rep. 765, 41 L. R. A. 311, 67 Am. St. Rep. 634.

⁷ Miller & Lux v. Rickey, 127 Fed.

Rep. 573; Rincon etc. Co. v. Anaheim etc. Co., 115 Fed. Rep. 543; Anderson etc. Co. v. McConnell, 133 Fed. Rep. 581.

⁸ Miller & Lux v. Rickey, 127 Fed. Rep. 573.

⁹ Miller & Lux v. Rickey, *supra*.

¹⁰ Miller & Lux v. Rickey, *supra*.

¹¹ Miller & Lux v. Rickey, *supra*.

¹² For which see Secs. 598, 600.

See, also, Basey v. Gallagher, 87 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683.

It is not necessary for plaintiff to plead and prove a custom of appropriation, as the courts will take judicial notice thereof. Parkersville Drainage Dist. v. Wattier, 48 Ore. 332, 86 Pac. Rep. 775; Brown v. Baker, 39 Ore. 66, 65 Pac. Rep. 799, 66 Pac. Rep. 193.

¹³ Isaacs v. Barber, 10 Wash. 124, 38 Pac. Rep. 871, 30 L. R. A. 665, 45 Am. St. Rep. 772.

See, also, Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; Drake v. Earhart, 2 Idaho 750, 23 Pac. Rep. 541; Morris v. Bean, 146 Fed. Rep. 423.

and that the rainfall is insufficient and irrigation is necessary, as the courts will not take judicial knowledge of the aridity of any particular portion of the State.¹⁴

In those jurisdictions which recognize riparian rights under the *strict construction* of the rule, it is not necessary for a riparian owner to allege the use of the water by himself, or damages for its unlawful diversion. The very nature of his ownership entitles him to the natural flow of the stream, subject to the reasonable use by the other riparian owners above him. It is therefore sufficient to plead the ownership of the land, that it borders upon the stream, and the obstruction of its flow or the unlawful diversion by the defendant, and the law will imply damage and grant injunctive relief against such an invasion of the owner's right. As was held in a California case, under this rule, the allegation of use by a riparian owner was mere surplusage.¹⁵ But under the more modern rule as to the rights of riparian owners, especially under the later California decisions, holding that the strict rule of the common law is unfitted to the changed conditions in that State, and that a lower riparian proprietor must show use and damage in order to enjoin an upper riparian owner from a beneficial use of the water,¹⁶ the allegations in a complaint in an

¹⁴ *McGhee etc. Co. v. Hudson*, 85 Tex. 587, 22 S. W. Rep. 398.

¹⁵ "We think that the complaint is sufficient. It states facts showing that plaintiff is a lower and defendant an upper riparian proprietor upon a stream that is sufficiently described; and the averments of plaintiff's use of the water for a mill, winery, domestic purposes, etc., are mere surplusage." *Chauvet v. Hill*, 93 Cal. 407, 28 Pac. Rep. 1066.

A complaint by a riparian owner does not state a cause of action without alleging facts showing that the appropriation and use of the water by the defendant is unlawful. *Cline v. Stock*, 71 Neb. 70, 98 N. W. Rep. 454, 102 N. W. Rep. 265.

See, also, *Rigney v. Tacoma etc. Co.*, 9 Wash. 576, 38 Pac. Rep. 147, 26 L. R. A. 425; *Silver Creek etc. Co. v.*

Hayes, 113 Cal. 142, 45 Pac. Rep. 191; *Shotwell v. Dodge*, 8 Wash. 337, 36 Pac. Rep. 254; *Rincon etc. Co. v. Anaheim etc. Co.*, 115 Fed. Rep. 543; *Swift v. Goodrich*, 70 Cal. 103, 11 Pac. Rep. 561; *United States etc. Co. v. Gallegos*, 89 Fed. Rep. 769, 32 C. C. A. 470, 61 U. S. App. 13; *Moore v. Clear Lake Waterworks*, 68 Cal. 147, 8 Pac. Rep. 816.

In an action for an injunction, the plaintiff must plead that the defendant's taking is excessive. *Perry v. Calkins*, 159 Cal. 175, 113 Pac. Rep. 136.

¹⁶ *San Joaquin etc. Co. v. Fresno etc. Co.*, 158 Cal. 626, 112 Pac. Rep. 182, 35 L. R. A., N. S., 832.

See, also, for the right of riparian owners to an injunction, Secs. 1611-1616.

action to enjoin the diversion of the water, where the same is put to actual use by the parties diverting it, should be substantially the same as to use and damage as is required in actions of the same nature by appropriators, discussed above, with the allegation of riparian ownership added. So, in an action to adjudicate water rights, where it is not necessary that the pleadings be so correctly drawn, as is the case in actions for an injunction, the California Court recently said: "Moreover, considering Pogue's claim as resting upon his riparian ownership, he nowhere properly pleads his riparian rights, nor the amount of his irrigable lands, nor the amount of water reasonably necessary for his use upon such lands."¹⁷ So, in either case, whether the plaintiff claims his right as an appropriator or as a riparian owner, he should show in his complaint in an action for an injunction to prevent the invasion of his rights that the defendant's acts were unlawful and unauthorized, not as a conclusion of law, but he must allege the facts constituting the illegality and that the acts of the defendant irreparably injure the plaintiff.¹⁸ The pleadings of a party must be consistent with themselves. So, where a complaint asserted a right to a certain quantity of water from a stream by prior appropriation, and the reply set up a claim to the entire flow by reason of riparian proprietorship, it was held that there was a departure, since the rights by prior appropriation and by riparian proprietorship are incompatible.¹⁹

In an action to restrain the interference with a ditch, canal, or other works, the complaint must show the right in the plaintiff

¹⁷ *Wutchumna W. Co. v. Pogue*, 151 Cal. 105, 90 Pac. Rep. 362, citing *Riverside W. Co. v. Gage*, 89 Cal. 410, 26 Pac. Rep. 889; *Wiggins v. Muscupiabe etc. Co.*, 113 Cal. 182, 45 Pac. Rep. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337; *San Luis W. Co. v. Estrada*, 117 Cal. 168, 48 Pac. Rep. 1075; *Davis v. Chamberlain*, 51 Ore. 304, 98 Pac. Rep. 154; *Strong v. Baldwin*, 154 Cal. 150, 97 Pac. Rep. 178, 129 Am. St. Rep. 141.

¹⁸ A complaint was not aided by an allegation that defendants' acts were unlawful and unauthorized, it being

merely a conclusion of law unsupported by the facts, and, where illegality of official action is relied on as a ground of injunction, the facts constituting the illegality must be alleged. *McLean v. Farmers' etc. Co.*, 44 Colo. 184, 98 Pac. Rep. 16.

See, also, *Bowman v. Virdin*, 40 Colo. 247, 90 Pac. Rep. 506; *Downing v. Agricultural D. Co.*, 20 Colo. 546, 39 Pac. Rep. 336.

¹⁹ *Brown v. Baker*, 39 Ore. 66, 65 Pac. Rep. 799, 66 Pac. Rep. 193, citing *Kinney on Irr.*, 1st Ed., Sec. 272.

and the facts constituting the invasion by the defendant and the other essentials necessary to be shown in injunction actions.²⁰ In actions where the rights have been previously adjudicated, such adjudication should be pleaded, unless the plaintiff relies on some additional right.²¹ Where there are several plaintiffs, as is the case in actions for the adjudication of rights merely, the rights of such plaintiffs as between each other to an injunction can not be determined, unless they have joined issues thereof by pleading their rights *inter se*. If they have so pleaded their rights, they may be determined, and an injunction be granted preventing the interference with such right as between each other.²²

§ 1634. Pleadings—Answer—Defenses.—The defendant in an action for an injunction may demur to the plaintiff's complaint,¹ he may answer the complaint by denying the allegations therein

²⁰ For essentials, see Secs. 1600-1605.

Wilson v. Eagleson, 10 Idaho 755, 81 Pac. Rep. 434; Candelaria v. Vallejos, 13 N. M. 140, 81 Pac. Rep. 589; Union etc. Co. v. Litchy, 42 Ore. 563, 71 Pac. Rep. 1044; Hayois v. Salt River etc. Co., 8 Ariz. 285, 71 Pac. Rep. 944; Koch v. Story, 47 Colo. 335, 107 Pac. Rep. 1093.

²¹ Medano D. Co. v. Adams, 29 Colo. 317, 68 Pac. Rep. 431; Lillis v. Emigrant D. Co., 95 Cal. 553, 30 Pac. Rep. 1108; Flannery v. Campbell, 30 Mont. 172, 75 Pac. Rep. 1109; Davis v. Chamberlain, 51 Ore. 304, 98 Pac. Rep. 154.

²² Bathgate v. Irvine, 126 Cal. 135, 58 Pac. Rep. 442, 77 Am. St. Rep. 158.

See, also, Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113.

See, also, for the adjudication of rights of the respective parties *inter se*, Sec. 1550.

¹ The general rule that the truth of material and relevant matters set forth with requisite precision is ad-

mitted by demurrer will not be applied in a controversy between States, which involves the question whether one State may wholly deprive the other State and its inhabitants of all the water of a river accustomed to flow through that State. Kansas v. Colorado, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552.

A complaint which merely alleges conclusions of law is, upon demurrer, fatally defective. Farmers' etc. Co. v. Southworth, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767.

See, also, Downing v. Agricultural D. Co., 20 Colo. 546, 39 Pac. Rep. 336.

Carroll v. Vance, 39 Colo. 216, 88 Pac. Rep. 1069, holding that the complaint, though demurrable, was cured by the defendant's answer raising an issue as to plaintiff's ownership.

See, also, White v. Nuckolls, 49 Colo. 170, 112 Pac. Rep. 329, holding that when the demurrer to the complaint is sustained a temporary injunction issued thereon may be continued pending the amendment to the complaint.

contained,² and, in addition thereto, he may set up in his answer as many affirmative defenses as he may have by properly pleading the same.³ In an action to enjoin the diversion of water it is always a good defense for the defendant to show that he has a right to the water, and, therefore, that the diversion is not unlawful.⁴ It is no defense, in an action to enjoin the unlawful diversion of water, that other persons are also unlawfully diverting it; and, therefore, it is not error to exclude evidence of such diversion by other persons.⁵ It is not a good defense to allege that some

² A general denial puts in issue all the material allegations of a verified complaint. *Mentone Irr. Co. v. Redlands etc. Co.*, 155 Cal. 323, 100 Pac. Rep. 1082, 22 L. R. A., N. S., 382, 17 Am. & Eng. Ann. Cas. 1222.

Portions of an answer consisting mainly of denials of the allegations to the complaint can not be treated as sham or irrelevant. *Fifield v. Spring Valley Water Works*, 130 Cal. 552, 62 Pac. Rep. 1054.

An answer which puts in issue some of the material averments of the complaint is not demurrable. *Wellington v. Beck*, 30 Colo. 409, 65 Pac. Rep. 626, 70 Pac. Rep. 687.

See, also, *Burris v. People's D. Co.*, 104 Cal. 248, 37 Pac. Rep. 922; *Ogilvy etc. Co. v. Insinger*, 19 Colo. App. 380, 75 Pac. Rep. 598; *Raymond v. Wimsette*, 12 Mont. 551, 31 Pac. Rep. 537, 33 Am. St. Rep. 604; *Churchill v. Bauman*, 95 Cal. 541, 30 Pac. Rep. 770; *Id.*, 104 Cal. 369, 36 Pac. Rep. 93, 38 Pac. Rep. 43.

³ In an action where the defendant made no claim to any water nor title to any land, it was held that an injunction must be granted the plaintiff. *Simpson v. Harrah*, 54 Ore. 448, 103 Pac. Rep. 58.

In an answer to enjoin the diversion of water of a stream used by both parties, defendants alleged that since a certain date, two years before plaintiff's appropriation, and every year

thereafter, they diverted the stream for the purpose of irrigating their lands, and that during part of the irrigating season the volume of water was no greater than required for that purpose, it was held that the answer showed such a prior appropriation as to constitute a defense. *Wellington v. Beck*, 30 Colo. 409, 65 Pac. Rep. 626, 70 Pac. Rep. 687.

But it is held that a claim of title to water by prescription is inconsistent with a defense by the claimant that his use results in no injury to the plaintiff seeking to enjoin such use. *Watts v. Spencer*, 51 Ore. 262, 94 Pac. Rep. 39.

See, also, *Shenandoah etc. Co. v. Morgan*, 106 Cal. 409, 39 Pac. Rep. 802.

⁴ *Posachane v. Standart*, 97 Cal. 476, 32 Pac. Rep. 532.

⁵ *Gould v. Stafford*, 77 Cal. 66, 18 Pac. Rep. 879; *Heilbron v. Kings River etc. Co.*, 76 Cal. 11, 17 Pac. Rep. 933; *Blakeley v. Ft. Lyon etc. Co.*, 31 Colo. 224, 73 Pac. Rep. 249; *Lakeside D. Co. v. Crane*, 80 Cal. 181, 22 Pac. Rep. 76.

Where one sued for diverting water from a mill defends on the ground that the water was diverted by others after it passed him, it is in the nature of a plea in abatement, and is demurrable. *North Powder M. Co. v. Coughanour*, 34 Ore. 9, 54 Pac. Rep. 223.

stranger to the suit has a better right than the plaintiff. The rights of such third persons can not be set up unless they are brought into court, and then only by themselves. "It can not be vicariously contested by another on behalf of the owner of the better right."⁶ Nor is it a defense that the defendant needs the water and is wholly dependent upon it.⁷ Again, it is no defense in an action to enjoin the interference with the water in a canal that there was a large volume of water in the stream and sufficient for both parties.⁸ Again, it is no defense by a defendant that he was working for a company and that the orders to trespass upon property were given by the company.⁹

Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. Rep. 755; *Humphreys etc. Co. v. Frank*, 46 Colo. 524, 105 Pac. Rep. 1093; *Carnes v. Dalton*, 56 Ore. 596, 110 Pac. Rep. 170; *Beck v. Bone*, 59 Wash. 479, 110 Pac. Rep. 13.

But see *West Point etc. Co. v. Moroni etc. Co.*, 21 Utah 229, 61 Pac. Rep. 16.

⁶ *Duckworth v. Watsonville etc. Co.*, 150 Cal. 520, 89 Pac. Rep. 338, 1 Water and Min. Cas. Ann. 140; *Id.*, 158 Cal. 206, 110 Pac. Rep. 927, 1 Water and Min. Cas. Ann. 128.

"Neither do we think that the trial court was called upon, at the instance of the defendants, entire strangers in every aspect to other appropriators, to inquire into and pass upon the question whether appropriators of the water below the mouth of the proposed canal of appellee would be injured by the construction of the canal." *Gutierrez v. Albuquerque etc. Co.*, 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338.

See, also, *McCall v. Porter*, 42 Ore. 49, 70 Pac. Rep. 820, 71 Pac. Rep. 976; *Browning v. Lewis*, 39 Ore. 11, 64 Pac. Rep. 304; *Hayden v. Long*, 8 Ore. 244; *Senior v. Anderson*, 138 Cal. 716, 72 Pac. Rep. 349; *People's etc. Co. v. Fresno etc. Co.*, 152 Cal. 87, 92 Pac. Rep. 77; *Lux v. Haggin*, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac.

Rep. 674; *Utt v. Frey*, 106 Cal. 392, 39 Pac. Rep. 807; *Silva v. Hawkins*, 152 Cal. 138, 92 Pac. Rep. 72; *Humphreys v. McCall*, 9 Cal. 59, 70 Am. Dec. 621; *Ellis v. Tone*, 58 Cal. 289; *Craig v. Crafton W. Co.*, 141 Cal. 178, 74 Pac. Rep. 762; *Burkhart v. Meinberg*, 37 Colo. 187, 86 Pac. Rep. 98, 6 L. R. A., N. S., 1104, 19 Am. St. Rep. 279; *Seven Lakes Res. Co. v. New Loveland etc. Co.*, 40 Colo. 382; 93 Pac. Rep. 485, 17 L. R. A., N. S., 329; *Crippen v. Glasgow*, 38 Colo. 104, 87 Pac. Rep. 1073; *Clark v. Ashley*, 34 Colo. 285, 82 Pac. Rep. 588; *Larimer etc. Co. v. Water Supply Co.*, 7 Colo. App. 225, 42 Pac. Rep. 1020; *Buckers etc. Co. v. Farmers' etc. Co.*, 31 Colo. 62, 72 Pac. Rep. 49; *Schneider v. Schneider*, 36 Colo. 518, 86 Pac. Rep. 347; *Lower Latham etc. Co. v. Bijou etc. Co.*, 41 Colo. 212, 93 Pac. Rep. 483; *Denver etc. Co. v. Denver etc. R. Co.*, 30 Colo. 204, 69 Pac. Rep. 568, 60 L. R. A. 383.

⁷ *Roberts v. Arthur*, 15 Colo. 456, 24 Pac. Rep. 922.

See *Barrows v. Fox*, 98 Cal. 63, 32 Pac. Rep. 811, 30 Pac. Rep. 768.

⁸ *Hackett v. Larimer etc. Co.*, 48 Colo. 178, 100 Pac. Rep. 965, 1 Water and Min. Cas. Ann. 224.

⁹ *Koch v. Story*, 47 Colo. 335, 107 Pac. Rep. 1093.

It is a well-settled rule of the law of pleading that, in order for the defendant in such an action to avail himself of any affirmative defense which he may have, he must specially plead the same. So, where the defendant relies on prescription as the basis of his right, he must properly plead prescription.¹⁰ This may be done in one of two methods: First, by alleging that the action is barred by a certain section of the statute, and properly referring to the same by number, as provided for by the respective codes;¹¹ or, second, by pleading the facts constituting the limitation or prescriptive right. In following the latter method, however, it is incumbent upon him to plead all the elements entering into a prescriptive right.¹² Again, an answer by a riparian owner, claiming the water as against a subsequent appropriator for use, was held to be fatally defective because it did not show that he was making any use of the water.¹³ Nor was it a good defense that

¹⁰ *State v. Quantic*, 37 Mont. 32, 94 Pac. Rep. 491; *American W. Co. v. Bradford*, 27 Cal. 360, 15 Morr. Min. Rep. 190; *Matthew v. Ferrea*, 45 Cal. 51; *Lux v. Haggin*, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; *Chauvet v. Hill*, 93 Cal. 407, 28 Pac. Rep. 1066; *Lillis v. Emigrant D. Co.*, 95 Cal. 553, 30 Pac. Rep. 1108.

See, also, for pleading prescription, Sec. 1055.

¹¹ *Churchill v. Louie*, 135 Cal. 608, 67 Pac. Rep. 1052; *Alhambra etc. Co. v. Richardson*, 72 Cal. 589, 14 Pac. Rep. 379; *Partridge v. Shepard*, 71 Cal. 470, 12 Pac. Rep. 480; *Centerville etc. Co. v. Sanger Lumber Co.*, 140 Cal. 385, 73 Pac. Rep. 1079.

See, also, for the acquisition of rights by prescription, secs. 1033-1058.

¹² For the essential elements necessary to acquire a right by prescription, see Sec. 1048.

Churchill v. Louie, 135 Cal. 608, 67 Pac. Rep. 1052, where the plea failed to allege that the use was adverse to plaintiff, or that plaintiff had notice of the occupancy, or facts sufficient to charge him with notice thereof,

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was insufficient as a plea of prescription.

See, also, *Middlekamp v. Bessemer etc. Co.*, 46 Colo. 102, 103 Pac. Rep. 280, 23 L. R. A., N. S., 795, holding that the question when a cause of action accrues is a judicial one, and to determine it in any particular case is to establish a general rule of law for a class of cases, which rule must be founded on reason and justice.

See, also, *Harrington v. Demaris*, 46 Ore. 111, 77 Pac. Rep. 603, 82 Pac. Rep. 14, 1 L. R. A., N. S., 756; *Shenandoah etc. Co. v. Morgan*, 106 Cal. 409, 39 Pac. Rep. 802; *Whitehair v. Brown*, 80 Pac. Rep. 297, 102 Pac. Rep. 783; *Wasatch Irr. Co. v. Fulton*, 25 Utah 466, 65 Pac. Rep. 205; *Bauers v. Bull*, 46 Ore. 60, 78 Pac. Rep. 757; *Watts v. Spencer*, 51 Ore. 262, 94 Pac. Rep. 39; *Hayes v. Silver Creek etc. Co.*, 136 Cal. 238, 68 Pac. Rep. 704; *Richard v. Eupp*, 104 Cal. 18, 37 Pac. Rep. 920.

¹³ *Northport Brewing Co. v. Perrot*, 22 Wash. 243, 60 Pac. Rep. 403; *Riverside W. Co. v. Gage*, 89 Cal. 410, 26 Pac. Rep. 889.

the plaintiff was obstructing a navigable stream by means of a dam in an action to enjoin the diversion of water.¹⁴ It is a good defense to an action to enjoin the diversion of water by one claiming the right thereto as a riparian owner for the defendant to show that the stream in question is an artificial and not a natural water course, since riparian rights do not attach to artificial streams.¹⁵ It is, of course, a good defense to an action for an injunction enjoining the obstruction of the flow of a stream to show that there is no such obstruction as alleged by the plaintiff,¹⁶ or that the obstruction has been abated before the action or decree, or that steps have been taken to prevent the injury.¹⁷ It is also a good defense to show that the unlawful diversion was made by some person other than the defendant in the action.¹⁸ And the plea of prescription is in effect an action to establish a new right in the defendant. Where the latter method is used it is better that such a claim be set up by way of a cross-complaint or cross-bill, discussed hereafter in next section.¹⁹ So, also, where it is claimed that the plaintiff has abandoned his rights or some

But see *Sanders v. Wilson*, 34 Wash. 659, 76 Pac. Rep. 280.

For the right of riparian owners to an injunction, see Secs. 1610-1615.

¹⁴ *Miller & Lux v. Enterprise C. Co.*, 145 Cal. 652, 79 Pac. Rep. 439.

¹⁵ *Green v. Carotta*, 72 Cal. 267, 13 Pac. Rep. 685; *Sampson v. Hoddinott*, 1 C. B. N. S. 611, 87 E. C. L. 590, 3 Jur. N. S. 243, 26 L. J. C. P. N. S. 148, 5 Week. Rep. 230.

¹⁶ *Sparlin v. Gotcher*, 23 Ore. 186, 31 Pac. Rep. 399.

¹⁷ *McCarthy v. Gaston etc. Co.*, 144 Cal. 542, 78 Pac. Rep. 7; *Atchison v. Peterson*, 1 Mont. 561; *Id.*, 87 U. S. 20 Wall. 507, 22 L. Ed. 414, 1 Morr. Min. Rep. 583.

¹⁸ *Gould v. Stafford*, 101 Cal. 32, 35 Pac. Rep. 429, where a landlord was held not liable for the unlawful diversion of his tenant.

See, also, *West Point Irr. Co. v. Moroni etc. Co.*, 21 Utah 229, 61 Pac. Rep. 16; *Simmons v. Winters*, 21 Ore.

35, 27 Pac. Rep. 7, 28 Am. St. Rep. 727.

¹⁹ So, again, where the defense is that of estoppel, it must be specially pleaded.

For the doctrine of estoppel, see Secs. 1121-1128.

In a suit to establish priority of appropriation of water, and to restrain interference therewith, the defense of estoppel constitutes new matter and is of no avail unless specially pleaded. *Hector Min. Co. v. Valley View Min. Co.*, 28 Colo. 315, 64 Pac. Rep. 205.

See, also, *United States etc. Co. v. Gallegos*, 89 Fed. Rep. 769, 32 C. C. A. 470, 61 U. S. App. 13; *Lower Latham D. Co. v. Loudon Irr. C. Co.*, 27 Colo. 267, 60 Pac. Rep. 629, 83 Am. St. Rep. 80; *Flannery v. Campbell*, 30 Mont. 172, 75 Pac. Rep. 1109; *Miller & Lux v. Madera etc. Co.*, 155 Cal. 59, 99 Pac. Rep. 502, 22 L. R. A., N. S., 391; *Hackett v. Larimer*

portion thereof.²⁰ Again, where the defense is that of laches or unreasonable delay in seeking to enforce a right, it must be specially pleaded in the answer.²¹ Again, where the flow of a stream is increased by the defendant turning other water into the same.²²

Where, also, the defendant relies upon the defense that the water if not diverted by him would be of no benefit to the plaintiff, for the reason that it would not reach him anyway, there is no question but that such a defense must be specially pleaded.²³ Under the more recent decisions governing subterranean waters, especially as to the underflow of surface streams, it is a serious question whether such a defense, even if properly pleaded, is good. The diversion of the waters of a stream above a certain point undoubtedly contributes to the diminished flow below, either surface or subterranean.²⁴ The Utah Court holds that such a defense is good.²⁵ But the Federal Court and a number of other courts

etc. Co., 48 Colo. 178, 109 Pac. Rep. 965, 1 Water and Min. Cas. Ann. 224; Verdugo etc. Co. v. Verdugo, 152 Cal. 655, 93 Pac. Rep. 1021; Koch v. Story, 47 Colo. 335, 107 Pac. Rep. 1093; Williams v. Harter, 121 Cal. 47, 53 Pac. Rep. 405; Smyth v. Neal, 31 Ore. 105, 49 Pac. Rep. 850; Durga v. Lincoln Creek Lum. Co., 47 Wash. 477, 92 Pac. Rep. 343.

²⁰ For the doctrine of abandonment, see Secs. 1099-1120; Hector Min. Co. v. Valley View Min. Co., 28 Colo. 315, 64 Pac. Rep. 205; White v. Nuckolls, 49 Colo. 170, 112 Pac. Rep. 329; Alamosa Creek C. Co. v. Nelson, 42 Colo. 140, 93 Pac. Rep. 1112; Conley v. Dyer, 43 Colo. 22, 95 Pac. Rep. 304; Platte Valley Irr. Co. v. Central Trust Co., 32 Colo. 102, 75 Pac. Rep. 391.

²¹ Laches is not ground for demurrer, but is to be raised in the answer. Ogilvy etc. Co. v. Insinger, 19 Colo. App. 380, 75 Pac. Rep. 598.

See, also, Hudson v. Dailey, 156 Cal. 617, 105 Pac. Rep. 748; Verdugo etc. Co. v. Verdugo, 152 Cal. 655, 93 Pac. Rep. 1021; Lux v. Haggin, 69

Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; Blakely v. Ft. Lyon C. Co., 31 Colo. 224, 73 Pac. Rep. 249; Miller v. Dondero, 139 Cal. 643, 73 Pac. Rep. 583; Krause v. Oregon etc. Co., 45 Ore. 378, 77 Pac. Rep. 833.

That there must be no laches in an action for injunction, see, also, Sec. 1605.

²² See, also, for developed waters, Secs. 1205, 1206.

Right to use channel of stream to convey water, Sec. 832; Hector Min. Co. v. Valley View Min. Co., 28 Colo. 315, 64 Pac. Rep. 205.

²³ Alamosa Creek C. Co. v. Nelson, 42 Colo. 140, 93 Pac. Rep. 1112; Watts v. Spencer, 51 Ore. 262, 94 Pac. Rep. 39; West Point Irr. Co. v. Moroni etc. Co., 21 Utah 229, 61 Pac. Rep. 16.

²⁴ For the underground flow of surface streams, see Secs. 1161-1163.

²⁵ Before an appropriator of water can be enjoined for diversion by an appropriator further down the stream, it must satisfactorily appear that, had the water been allowed to pass down

hold that such a defense is not good.²⁶ Such a defense should not be good if in any way the acts of the defendant materially contribute to the diminishing of the quantity of water to which the plaintiff is entitled; and that such acts do not so contribute and that the plaintiff will derive no benefit, even if the defendant is enjoined, must be established by the clearest and most satisfactory proof.²⁷ Where the defendant relies upon a former decree as the basis of his right, he should plead such former decree.²⁸ But it is no defense unless the plaintiff was a party to the former action.²⁹ Again, where the defendant relies upon a contract made with the plaintiff, or a license granted by him, such contract or license should be specially pleaded.³⁰

§ 1635. Pleadings—Defenses—Cross-complaint or cross-bill.—

In addition to the defenses which may be set up by the defendant

the stream, it would have reached plaintiff's ditch. *West Point Irr. Co. v. Moroni etc. Co.*, 21 Utah 229, 61 Pac. Rep. 16.

²⁶ *Morris v. Bean*, 146 Fed. Rep. 423, wherein it is said that such a defense is as old as irrigation and perhaps as old as trespass itself.

See, also, *Union M. & M. Co. v. Dangberg*, 81 Fed. Rep. 73; *Raymond v. Wimsette*, 12 Mont. 551, 31 Pac. Rep. 537, 33 Am. St. Rep. 604; *Gutierrez v. Wege*, 145 Cal. 730, 79 Pac. Rep. 449; *Watts v. Spencer*, 51 Ore. 262, 94 Pac. Rep. 39; *Paige v. Rocky Ford etc. Co.*, 83 Cal. 84, 21 Pac. Rep. 1102, 23 Pac. Rep. 875; *Huffner v. Sawday*, 153 Cal. 86, 94 Pac. Rep. 424; *Lower Latham D. Co. v. Loudon etc. Co.*, 27 Colo. 267, 60 Pac. Rep. 629, 83 Am. St. Rep. 80; *City of Telluride v. Blair*, 33 Colo. 353, 80 Pac. Rep. 1053.

²⁷ *Alamosa etc. Co. v. Nelson*, 42 Colo. 140, 93 Pac. Rep. 1112; *Moe v. Harger*, 10 Idaho 302, 77 Pac. Rep. 645; *Huffner v. Sawday*, 153 Cal. 86, 94 Pac. Rep. 424; *Booth v. Trager*, 44 Colo. 409, 99 Pac. Rep. 60.

²⁸ *Community Ditch or Acequia of Tularosa Townsite v. Tularosa Community Ditch*, — N. M. —, 114 Pac. Rep. 285; *Carroll v. Vance*, 39 Colo. 216, 88 Pac. Rep. 1069.

²⁹ *Hackett v. Larimer etc. Co.*, 48 Colo. 178, 109 Pac. Rep. 965, 1 Water and Min. Cas. Ann. 224.

³⁰ For contracts with companies, see Secs. 1500-1529.

For contracts in general, see Secs. 917-926.

For license, see Secs. 981-984.

But see *Churchill v. Bauman*, 104 Cal. 369, 36 Pac. Rep. 93, 38 Pac. Rep. 43, where it was held that, where it appeared that the plaintiff assisted in maintaining the dam and diverting the water, it was held that he could not recover in an action to enjoin such diversion, and that such participation in the diversion of the water need not be specially pleaded, but may be proved under a general denial. But, *De Haven, J.*, while concurring in the judgment, said: "I think such defense should have been specially set out in the answer."

in his answer in an action for an injunction against him for the invasion of any of the rights under discussion,¹ he may also set up, by way of cross-complaint or cross-bill any claim that he may have to those rights, and, in turn, ask for an injunction against the plaintiff enjoining him from invading the rights of the defendant.² Although an action to enjoin the unlawful diversion of water, or to enjoin the continuous invasion of any of the other rights under discussion, is an action found in tort, as said by the Supreme Court of California: "There are many cases of that kind where a cross-complaint might be proper and affirmative relief be granted."³ So, where the action is by a riparian owner, and the defendant claims the right to the use of the water as an appropriator, he may set up his claim by a cross-complaint or cross-bill to the plaintiff's complaint.⁴ And, also, upon the other hand, where the action is by an appropriator, the riparian owner may, by the proper allegations, set up his claim to the water by a cross-complaint and seek to enjoin the appropriator.⁵ So, also, where the action is brought by a corporation to enjoin one of its stockholders from diverting more water from the stream than it is alleged he is entitled to, the defendant may, by way of cross-complaint, set up his claim to the right to the use of the water by an independent appropriation or by prescription.⁶ So, again, where the action is brought by one appropriator against the alleged diversion of water, the defendant may, by cross-bill, set up his claim to a prior or superior right, and pray for an injunction against the plaintiff.⁷ Upon the question of the allegations necessary, in general, it may be said that the defendant's right to the use of the water in question, or his right to the use of an easement, or to a ditch, canal, or other

¹ See Sec. 1634.

² For cross-complaints in suits for the adjudication of water rights, see Sec. 1550.

³ *Van Bibber v. Hilton*, 84 Cal. 585, 24 Pac. Rep. 308, overruling *Heilbron v. Kings River etc. Co.*, 76 Cal. 11, 17 Pac. Rep. 933, holding to the contrary.

See, also, *Rickey v. Wood*, 152 Fed. Rep. 22, 81 C. C. A. 218; *Ames v. Big Indian etc. Co.*, 146 Fed. Rep.

166; *Reno v. Reno & Juchem*, — Colo. —, 119 Pac. Rep. 473.

⁴ *Van Bibber v. Hilton*, 84 Cal. 585, 24 Pac. Rep. 308.

⁵ *Silver Creek etc. Co. v. Hayes*, 113 Cal. 142, 45 Pac. Rep. 191.

⁶ *Center Creek etc. Co. v. Lindsay*, 21 Utah 192, 60 Pac. Rep. 559.

⁷ *Bessemer Irr. D. Co. v. Woolley*, 32 Colo. 437, 76 Pac. Rep. 1053, 105 Am. St. Rep. 91.

works, must be so set forth in his cross-complaint as to clearly and concisely state the facts constituting his cause of action, and with the same precision as is required of the plaintiff in the original complaint.⁸ Again, the allegations of the cross-complaint must be germane to the subject matter set up in the complaint of the plaintiff or it can not avail the defendant. So, in an action brought by the plaintiff for the purpose only of restraining the defendants from breaking its headgates and interfering with the management of its canal, a cross-complaint setting up prior appropriation and ownership of the water, and praying for an adjudication of their water rights, was held demurrable as not germane to the principal suit.⁹ In order to have determined the right to an injunction as between themselves, defendants must specially plead such rights and the issues must be joined *inter se*. However, where the issues are so joined, the respective right of the defendants to an injunction may be determined.¹⁰

§ 1636. Pleadings—The reply—Answer to cross-complaint.—

The plaintiff, in turn, may demur to the answer of the defendant,¹ and to his cross-complaint, if one is filed.² Also, in those jurisdic-

⁸ Center Creek etc. Co. v. Lindsay, 21 Utah 192, 60 Pac. Rep. 559; Bessemer Irr. D. Co. v. Woolley, 32 Colo. 437, 76 Pac. Rep. 1053, 105 Am. St. Rep. 91; Silver Creek etc. Co. v. Hayes, 113 Cal. 142, 45 Pac. Rep. 191.

See, also, for allegations of complaint, Sec. 1633.

⁹ Hayois v. Salt River Valley C. Co., 8 Ariz. 285, 71 Pac. Rep. 944.

¹⁰ Rickey v. Wood, 152 Fed. Rep. 22, 81 C. C. A. 218; Ames etc. Co. v. Big Indian etc. Co., 146 Fed. Rep. 166.

In an action to determine plaintiff's water right, and to restrain the defendants from interfering therewith, the rights of the defendants, as between themselves, are not subject to determination, except so far as, between themselves, they have tendered and joined hostile issues. Nevada D.

Co. v. Bennett, 30 Ore. 59, 45 Pac. Rep. 472, 60 Am. St. Rep. 777.

For the adjudication of water rights *inter se* as between the respective parties, see Secs. 1550, 1554.

For the right to injunction *inter se* as between plaintiffs, see Sec. 1633.

¹ Candelaria v. Vallejos, 13 N. M. 140, 81 Pac. Rep. 589; Wright v. Platte Valley Irr. Co., 27 Colo. 322, 61 Pac. Rep. 603; North Powder M. Co. v. Coughanour, 34 Ore. 9, 54 Pac. Rep. 223.

A defect in an answer is waived by the plaintiff pleading over. McCall v. Porter, 42 Ore. 49, 70 Pac. Rep. 820, 71 Pac. Rep. 976; San Luis W. Co. v. Estrada, 117 Cal. 168, 48 Pac. Rep. 1075.

² Hayois v. Salt River C. Co., 8 Ariz. 285, 71 Pac. Rep. 499; Silver Creek etc. Co. v. Hayes, 113 Cal. 142,

tions where the new matters set up in an answer are not deemed denied, a reply should also be filed to the affirmative defenses set up by the defendant.³ The plaintiff should also answer or reply to the allegations of the defendant as set up in his cross-complaint or cross-bill.⁴

§ 1637. **Pleadings—Intervention.**—Persons who are not made parties to the action, and have an interest in the subject matter in controversy, have the right, upon leave granted by the Court, to come into an action brought for an injunction and ask for injunctive relief upon their own behalf. "They may intervene for their own protection" in such an action, if they deem that the acts of either the plaintiffs or the defendants will be an invasion of their rights.¹ Upon the hearing of the case, if the facts and circumstances warrant it, the Court may grant the injunctive relief prayed for in favor of such intervenors and against both the original parties to the action. But persons not parties to the action are held not entitled to the enjoyment of personal privileges accorded by the decree therein to those who were impleaded.²

§ 1638. **Pleadings—Amendments to.**—The power to allow amendments to the pleadings in actions for an injunction, as in other cases, is necessarily intrusted in a large degree to the sound discretion of the trial court, and the courts, in furtherance of jus-

45 Pac. Rep. 191; Center Creek etc. Co. v. Lindsay, 21 Utah 192, 60 Pac. Rep. 559.

³ Watts v. Spencer, 51 Ore. 262, 94 Pac. Rep. 39; State v. Quantic, 37 Mont. 32, 94 Pac. Rep. 491; Harrington v. Demaris, 46 Ore. 111, 77 Pac. Rep. 605, 82 Pac. Rep. 14, 1 L. R. A., N. S., 756; Reno v. Reno & Juchem, — Colo. —, 119 Pac. Rep. 473.

Where defendant pleaded a former adjudication in bar to a suit for an injunction, and alleged that the plaintiff in the case was a party to the former action, it was held error to strike out a verified answer by plaintiff to the plea in bar, denying that the plaintiff in the case at bar was a

party to or in any way bound by the decree in the former action. Community Ditch v. Tularosa Community Ditch, — N. M. —, 114 Pac. Rep. 285.

⁴ State v. Quantic, 37 Mont. 32, 94 Pac. Rep. 491.

¹ Gutierrez v. Albuquerque etc. Co., 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338.

For intervention in actions to adjudicate water rights, see Sec. 1546.

See, also, West Point Irr. Co. v. Moroni etc. Co., 14 Utah 127, 46 Pac. Rep. 762; Cache La Poudre etc. Co. v. Hawley, 43 Colo. 32, 95 Pac. Rep. 317.

² Slattery v. Harley, 58 Neb. 575, 79 N. W. Rep. 151.

tice, are usually liberal in allowing such amendments. But when an application to amend is resisted, it should not be granted except upon good cause shown, and upon such terms as the justice of the particular case may require.¹ When a demurrer to a complaint is sustained the Court may grant time within which the complaint may be amended.² When a temporary injunction is granted upon the original complaint and a demurrer to the complaint is sustained, the Court may, in its discretion, continue the injunction pending an amendment to the complaint.³ A plaintiff in his amended complaint can not depart from his original cause of action and set up an entirely new one. But the ultimate question involved from the inception of the case was the priority to the use of the water of a certain stream; a mere change in the allegations as to the method of the appropriation does not change the cause of action, and is not a departure.⁴

The courts are particularly liberal in granting leave to amend the answer in these cases. The general rule is that a defendant may set up as many defenses to the plaintiff's complaint as he may have, so long as they are not so inconsistent that they nullify each other, in which case he is generally required to elect the one upon which he will stand. In a California case it was held that the defendant might be permitted to amend his answer by omitting the defense in his original answer, and setting up an entirely new defense in the amended answer.⁵ An answer may also be amended by reference to certain paragraphs of the original answer.⁶ Amend-

¹ *Saint v. Guerrero*, 17 Colo. 448, 30 Pac. Rep. 335, 31 Am. St. Rep. 320.

² *Vestal v. Young*, 147 Cal. 715, 82 Pac. Rep. 381.

³ *White v. Nuckolls*, 49 Colo. 170, 112 Pac. Rep. 329.

⁴ *White v. Nuckolls*, 49 Colo. 170, 112 Pac. Rep. 329; *Davidson v. Fraser*, 36 Colo. 1, 84 Pac. Rep. 695, 4 L. R. A., N. S., 1126.

Where a decree for plaintiff, in a suit to restrain the interference with plaintiff's right to change his point of diversion, was held erroneous, on reversal and remand the plaintiff was

allowed to maintain the action and amend his pleadings so as to conform with the statutory proceedings, for change of point of diversion. *New Cache La Poudre Irr. Co. v. Water Supply etc. Co.*, 29 Colo. 469, 68 Pac. Rep. 781.

⁵ *Gould v. Stafford*, 101 Cal. 32, 35 Pac. Rep. 429.

⁶ *Welsh v. Bardshar*, 137 Cal. 154, 69 Cal. 977.

It is not error, however, for the court to refuse to allow facts occurring subsequent to the commencement of the action to be pleaded as an amendment to the original answer, but

ments to the pleadings may also be allowed after the evidence is before the Court. It is held by the Supreme Court of the United States that no amendment to a bill filed by one State against another State, whose averments are sufficient to present the question whether the latter State has the power to wholly deprive the former State of the benefits of water from a river which rises in the former and flows through the latter State, will be compelled on demurrer, whatever imperfections a close analysis of the bill may disclose; but any decision as to the sufficiency of the bill to warrant the relief prayed for will be postponed until the facts are before the Court on evidence.⁷

§ 1639. **Practice in actions brought for injunction.**—In actions brought for an injunction against the invasion of water and kindred rights, as in other cases, the practice as prescribed by the codes of the respective States or by the Federal statutes and rules, if the action is brought in that Court must be strictly followed. As we have discussed in previous sections of this chapter, an action for an injunction against the future invasion of rights may be combined with an action for damages for past invasions of such rights.¹ So, also, in an action brought principally for the object of quieting title to a water right, and to adjudicate the same, may an injunction be granted in favor of the parties found entitled to the rights and against those found not entitled to such rights, or against the

to require them to be set out in a supplemental answer. *Sylvester v. Jerome*, 19 Colo. 128, 34 Pac. Rep. 760.

⁷ *Kansas v. Colorado*, 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552.

So it is held that where the evidence showed a prescriptive right in the defendant to maintain a private nuisance was admitted without objection that it was not within the issues made by the pleadings, it was held by the Supreme Court of California to be an abuse of discretion to refuse to allow the defendant to amend his answer so as to allege the right. *Drew v. Hicks*, 101 Cal. 17, 35 Pac. Rep. 563.

See, also, *Buckers etc. Co. v. Platte*

Valley Irr. Co., 28 Colo. 187, 63 Pac. Rep. 305; *Richard v. Hupp*, 104 Cal. 18, 37 Pac. Rep. 920, holding that a refusal to permit the complaint to be amended so as to conform with the evidence was within the discretion of the trial court.

See, also, *Small v. Harrington*, 10 Idaho 499, 79 Pac. Rep. 461.

One is not entitled to have his pleadings amended to conform to the proof, where objection was made to the introduction of evidence for which the amendment is desired. *Mendenhall v. Harrisburgh etc. Co.*, 27 Ore. 38, 39 Pac. Rep. 399.

¹ See Sec. 1599.

respective parties enjoining each respectively from interfering with each other's rights as adjudicated in the action, if both are entitled under the decree to certain rights as therein specified.² The equitable features in such actions are for the decision of the judge or Court alone, with, perhaps, a submission of the facts in the case to a jury, whose decision may be considered by the Court as advisory only.³ So, in an action for an injunction alone it is within the discretion of the Court to submit the issues of fact to a jury, but whose findings will not bind the judge trying the case. But he may adopt them in whole or in part, or he may reject them *in toto*, and adopt his own findings.⁴ The better practice, it seems to us, is for the judge alone to decide the equitable features of the case as to whether or not the injunction should be granted without submitting the facts to the jury. The submission of these cases to a jury seems too much like an attempt upon the part of the judge to shift the responsibilities and duties of his office.⁵ But an action for damages is one at law.⁶ Therefore, in mixed actions, where an injunction is prayed for and also damages for past injuries, upon the question of damages the general practice is that a jury is required unless the same should be waived. As said by the Supreme Court of the United States: "Upon the question of damages a jury would be required, but upon the propriety of an injunction the action of the Court alone could be invoked. The formal distinctions in the pleadings and modes of procedure are abolished, but the essential distinction between law and equity is not changed."⁷

² See Secs. 1536, 1598.

³ For the submission to a jury suits to quiet title to water rights, see Sec. 1553.

⁴ *Koch v. Story*, 47 Colo. 335, 107 Pac. Rep. 1093; *Berry v. Equitable Gold M. Co.*, 29 Nev. 451, 91 Pac. Rep. 537; *Richardson v. City of Eureka*, 110 Cal. 441, 42 Pac. Rep. 965; *Churchill v. Louie*, 135 Cal. 608, 67 Pac. Rep. 1052; *Churchill v. Bauman*, 104 Cal. 369, 36 Pac. Rep. 93, 38 Pac. Rep. 43; *Hoyt v. Hart*, 149 Cal. 722, 87 Pac. Rep. 569.

⁵ See, also, Sec. 1553.

⁶ For actions for damages, see Secs. 1660-1704.

⁷ *Basey v. Gallagher*, 87 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683.

"Both legal and equitable relief are prayed for. On the question of damages for the injuries sustained through the alleged wrongful acts of the defendant, either party was entitled to a trial by jury, and the court, in the course of deciding upon the question of equitable relief, might submit the facts to a jury in an advisory capacity." *Stoner v. Mau*, 11 Wyo. 366, 72 Pac. Rep. 193.

See, also, *Stocker v. Kirtley*, 6 Idaho 795, 59 Pac. Rep. 891, where the court held that the trial court should have

But it was held by the Supreme Court of California, in an action to abate a nuisance, where the recovery of damages constituted incidental relief only, that the defendant was not entitled to have such damages assessed by a jury as a matter of right.⁸ As courts of equity are vested with the discretionary powers to consolidate causes, and such discretion will not be reviewed on appeal, except for abuse, where two suits involving irrigation rights could have been joined in the same complaint, and were between the same parties and with reference to the same subject matter, the ditches in controversy only being different, it is held that they were properly consolidated.⁹

§ 1640. **Proof—Burden of proof.**—In an action to enjoin the defendant from diverting water, or to prevent him from a continuous invasion of any of the plaintiff's alleged rights, it devolves upon the plaintiff, in the first instance, to establish a *prima facie* case to his right to the use of the water or other right in question, as set forth in the allegations of his complaint, and also the essentials necessary, such as irreparable injury to his rights, before the Court will grant the injunction prayed for.¹ Where the complaint is framed upon the theory that there has been an abandonment of all or a portion of the water, or that there was an enlarged use of such water, or a change in the point of diversion by the defendant, the burden of proof is upon the plaintiff to establish these facts by a preponderance of all the evidence in the case that such is the fact.²

first tried the equitable part of the action, and thereafter, if a jury was demanded, have tried the issue of damages, and submitted that question to a jury.

See, also, *North Point etc. Co. v. Utah etc. Co.*, 16 Utah 246, 52 Pac. Rep. 168, 40 L. R. A. 851; *Id.*, 23 Utah 199, 63 Pac. Rep. 812; *Churchill v. Louie*, 135 Cal. 608, 67 Pac. Rep. 1052; *Churchill v. Bauman*, 104 Cal. 369, 36 Pac. Rep. 93, 38 Pac. Rep. 43; *Joseph v. Ager*, 108 Cal. 517, 41 Pac. Rep. 422; *Chessman v. Hale*, 31 Mont. 577, 79 Pac. Rep. 254, 68 L. R.

A. 410; *McCarthy v. Gaston Ridge etc. Co.*, 144 Cal. 542, 78 Pac. Rep. 7.

⁸ *McCarthy v. Gaston Ridge etc. Co.*, 144 Cal. 542, 78 Pac. Rep. 7.

⁹ *Hayward v. Mason*, 54 Wash. 653, 104 Pac. Rep. 141.

¹ For the elements necessary to give a court of equity jurisdiction, see Secs. 1600-1605.

Barnes v. Gerberg, 27 Wash. 126, 67 Pac. Rep. 568; *Yick Wai Co. v. Ah Soong*, 13 Hawn. 378.

See, also, for the proof in actions to adjudicate water rights, Sec. 1554.

² *Platte Valley Irr. Co. v. Central Trust Co.*, 32 Colo. 102, 75 Pac. Rep.

But, as a general rule, upon the plaintiff making out a *prima facie* case, the burden is then cast upon the defendant to show that he is entitled to the water claimed by him in accordance with the allegations of his answer. So, where the defendant claims the water diverted by him because it had been previously turned into the stream by him, the burden of proof is upon him to establish that fact, and also the fact that he is not taking out more water than he turned into the stream.³ So, where an appropriator sues to restrain the loaning of water on the ground that it would result in injury to his vested rights, the burden of showing that the loaning will not so operate is on the parties to the loan.⁴ Again, an appropriator must show that he uses the water which he claims economically, or he is not entitled to an injunction to prevent its use by another.⁵ So, where the defendant seeks to justify his acts in taking the water under the allegation that it will not reach the prior appropriator and plaintiff below, even if permitted to flow down the stream, and will, therefore, be of no use to him, not only is the burden of proof upon such defendant to show that fact, but the evidence must be most clear and convincing.⁶ Again, where the defendant sets up in his answer a prescriptive right to the use of the water, either as against a prior appropriator or a riparian owner, the burden is upon him to show by a preponderance of all the evidence all the essential elements that enter into the acquisition of water rights by prescription, and such evidence must be clear and conclusive.⁷ Again, where the defendant sets up that the

391; Hall v. Lincoln, 10 Colo. App. 360, 50 Pac. Rep. 1047.

See, also, for abandonment, Secs. 1100-1115.

For change in point of diversion, see Secs. 857-859.

³ Herriman Irr. Co. v. Butterfield etc. Co., 19 Utah 453, 57 Pac. Rep. 537, 51 L. R. A. 930; Steinberger v. Meyer, 130 Cal. 156, 62 Pac. Rep. 483.

See, also, for developed water, Secs. 1205, 1206.

For the use of stream for a canal, see Sec. 832.

⁴ Ft. Lyon Canal Co. v. Chew, 33 Colo. 392, 81 Pac. Rep. 37.

See, also, Slosser v. Salt River Val. C. Co., 7 Ariz. 376, 65 Pac. Rep. 332.

⁵ Court House etc. Co. v. Willard, 75 Neb. 408, 106 N. W. Rep. 463.

⁶ "The infringement of a prior by the owner of a junior right constitutes a legal injury, and, before the junior can justify his acts of the interference with the prior right upon the ground stated, a strong showing should be made." Alamosa etc. Co. v. Nelson, 42 Colo. 140, 93 Pac. Rep. 1112.

See, also, for defenses of no benefit, Secs. 1550, 1634.

⁷ For the acquisition of rights by prescription, see Secs. 1033-1058.

right was abandoned by the plaintiff, the burden is upon him to establish that fact.⁸ Where it was stipulated before the trial that no question should be raised as to the titles of the respective parties to the lands described in the pleadings, in connection with which the water claimed by each was used, it was held that evidence that the defendant's premises were located upon an Indian reservation, which they could not lawfully occupy, was held to be inadmissible.⁹ Where either party sets up a former adjudication of his rights, the decree in the former case should be offered and admitted in evidence.¹⁰ In any case the proof should conform to the pleadings of the party alleging them, and should tend to prove the theory upon which he places his right to the injunction; otherwise there is a fatal variance, and the injunction will not be granted.¹¹ But it is not necessary that all the theories upon which

See, also, *Bauers v. Bull*, 46 Ore. 60, 78 Pac. Rep. 757; *Morris v. Bean*, 140 Fed. Rep. 433; *McRae v. Small*, 48 Ore. 139, 85 Pac. Rep. 503; *Kleyenstuber v. Robinson*, 6 Ariz. 31, 52 Pac. Rep. 1117; *Wasatch Irr. Co. v. Fulton*, 23 Utah 466, 65 Pac. Rep. 205.

Parties who have appropriated water for irrigation purposes pursuant to law, and continued the use under such appropriation for more than seven years, can not be enjoined from the continued use of such right by a lower riparian owner. *Cline v. Stock*, 71 Neb. 70, 98 N. W. Rep. 454, 102 N. W. Rep. 265.

⁸ For the abandonment of water, see Secs. 1099-1115.

See, also, *Alamosa etc. Co. v. Nelson*, 42 Colo. 140, 93 Pac. Rep. 1112; *O'Brien v. King*, 41 Colo. 487, 92 Pac. Rep. 945; *Platte Val. Irr. Co. v. Central Trust Co.*, 32 Colo. 102, 75 Pac. Rep. 391; *Hall v. Lincoln*, 10 Colo. App. 360, 50 Pac. Rep. 1047; *Putnam v. Curtis*, 7 Colo. App. 437, 43 Pac. Rep. 1056; *Beaver etc. Co. v. St. Vrain etc. Co.*, 6 Colo. App. 130, 40 Pac. Rep. 1066.

⁹ *Phillips v. Coburn*, 28 Mont. 45, 72 Pac. Rep. 291.

¹⁰ *Barnes v. Gerberg*, 27 Wash. 126, 67 Pac. Rep. 568; *Salt Lake etc. Co. v. Salt Lake City*, 25 Utah 441, 71 Pac. Rep. 1069, 61 L. R. A. 648.

A judgment roll in a former suit is not admissible in bar of an action where there is no privity between defendants and either of the parties to the former action, although plaintiffs may have acquired their interests from parties to the former suit. *Silva v. Hawkins*, 152 Cal. 138, 92 Pac. Rep. 72.

¹¹ *City and County of Denver v. Walker*, 45 Colo. 387, 101 Pac. Rep. 348, where the complaint alleged appropriation, but the proof showed that the right of plaintiff was in contract; held, that there was a substantial and fatal variance.

So, where the plaintiff based his right on an appropriation, and the proof offered tended to show that the prior appropriator had relinquished his right to the water. *Wellington v. Beck*, 43 Colo. 70, 95 Pac. Rep. 297.

So, where plaintiff set up a decree

a party bases his right to an injunction should be proven, or all the allegations which he sets up relative thereto. It is sufficient if enough of the facts which are set forth in the pleadings are established by a preponderance of the evidence, without substantial conflict, to constitute a good cause of action, although other allegations are not proven.¹² In the support of the claims of either party, especially upon the question of the measurement of the water and the amount actually necessary for any use to which the water is applied, expert testimony may be introduced. But this kind of testimony should be considered by the Court with the usual caution which is applied in other cases.¹³

In those States where it is not necessary to plead the local customs referred to in Section 2339 of the Revised Statutes of the United States, it, of course, is not necessary to prove such customs. As a general rule the Court will take judicial notice of the fact that the customary rules and regulations of the miners are in force either in the whole State or in certain portions thereof.¹⁴ However, in Texas, in an action to restrain an irrigation company from proceeding with the construction of its works, the burden of proof is on

in a former action restraining defendant's predecessor in interest from diverting water above plaintiff's land based on the latter's riparian rights, it would not protect any rights based on a prior appropriation now claimed by him against defendant. *Davis v. Chamberlain*, 51 Ore. 304, 98 Pac. Rep. 154.

So, again, where the theory of the plaintiff was wholly based upon the right acquired by prescription, a finding and decree thereon that the use of the water and the ditch was by the consent of the owners can not be sustained. *Schirmer v. Drexler*, 135 Cal. 134, 66 Pac. Rep. 180.

¹² *Katz v. Walkinshaw*, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

¹³ *Twaddle v. Winters*, 29 Nev. 88, 85 Pac. Rep. 280, 89 Pac. Rep. 289;

Robertson v. Wilmoth, 40 Colo. 74, 90 Pac. Rep. 95.

See, also, for the economical use of water and the suppression of waste, Secs. 874-916.

¹⁴ For customs, see Secs. 598, 600.

See, also, *Parkersville Drainage Dist. v. Wattier*, 48 Ore. 332, 86 Pac. Rep. 775; *Brown v. Baker*, 39 Ore. 66, 65 Pac. Rep. 799, 66 Pac. Rep. 193; *Isaacs v. Barber*, 10 Wash. 124, 38 Pac. Rep. 871, 30 L. R. A. 665, 45 Am. St. Rep. 772; *Basey v. Gallagher*, 87 U. S. 20 Wall. 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683; *Crawford v. Hathaway*, 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; *Drake v. Earhart*, 2 Idaho 750, 23 Pac. Rep. 541; *Morris v. Bean*, 146 Fed. Rep. 423.

But see *McGhee etc. Co. v. Hudson*, 85 Tex. 587, 22 S. W. Rep. 398.

the plaintiff to show by his pleadings and proof that in that particular portion of the State irrigation is unnecessary.¹⁵

§ 1641. **Findings of fact and conclusions of law.**—As is the case in actions to adjudicate water rights and to quiet the title to the same, so in actions for an injunction, the Court must make findings of fact and conclusions of law.¹ The findings must conform to the pleadings and the evidence in the case,² and must support the decree and judgment rendered in the case.³ And for this purpose the findings should definitely and specifically state the rights of the respective parties.⁴ The findings in a case must be consistent

¹⁵ *McGhee etc. Co. v. Hudson*, 85 Tex. 587, 22 S. W. Rep. 398, 22 S. W. Rep. 967.

¹ For findings and conclusions in actions to quiet title, see Sec. 1556.

Findings of fact and conclusions of law should cover the issues in the case, and be made separate from the opinion of the judge. *Roeder v. Stein*, 23 Nev. 92, 42 Pac. Rep. 867.

It is the duty of the court to find on all material issues in the case, regardless of any request of the parties. *Davies v. Angelo*, 8 Cal. App. 305, 96 Pac. Rep. 909.

Where the defendant is entitled to the water saved and developed by it above the natural flow of the stream, the court must find with such exactness as is possible how much water is saved and developed. *Pomona etc. Co. v. San Antonio W. Co.*, 152 Cal. 618, 93 Pac. Rep. 881, and holding that the court must not shirk the duty of making its findings on account of the difficulties presented in the case.

See, also, *Butte C. Co. v. Vaughn*, 11 Cal. 143, 70 Am. Dec. 769, 4 Morr. Min. Rep. 552.

² *Schirmer v. Drexler*, 134 Cal. 134, 66 Pac. Rep. 180; *Simpson v. Harrah*, 54 Ore. 448, 103 Pac. Rep. 58; *Roeder v. Stein*, 23 Nev. 92, 42 Pac. Rep. 867;

Parker v. Gregg, 136 Cal. 413, 69 Pac. Rep. 22; *Goon v. Proctor*, 27 Mont. 526, 71 Pac. Rep. 1003; *Town of Suisun City v. De Freitas*, 142 Cal. 350, 75 Pac. Rep. 1092; *Platte Valley Irr. Co. v. Central Trust Co.*, 32 Colo. 102, 75 Pac. Rep. 391; *North American etc. Co. v. Adams*, 104 Fed. Rep. 404, 45 C. C. A. 185, 21 Morr. Min. Rep. 65; *Last Chance D. Co. v. Heilbron*, 86 Cal. 1, 26 Pac. Rep. 523; *Baldrige v. Leon Lake etc. Co.*, 20 Colo. App. 518, 80 Pac. Rep. 477; *Wilson v. Collin*, 45 Colo. 412, 102 Pac. Rep. 20.

³ For the decree and judgment, see Secs. 1642-1646.

Miller & Lux v. Enterprise etc. Co., 145 Cal. 652, 79 Pac. Rep. 439; *Hildreth v. Montecito etc. Co.*, 139 Cal. 22, 72 Pac. Rep. 395; *Welsh v. Bardshar*, 137 Cal. 154, 69 Pac. Rep. 977; *Churchill v. Rose*, 136 Cal. 576, 69 Pac. Rep. 416; *Wutchumna W. Co. v. Ragle*, 148 Cal. 759, 84 Pac. Rep. 162; *Wilson v. Collin*, 45 Colo. 412, 102 Pac. Rep. 20.

“A decree should be based upon definite findings, and the findings can be no more definite nor certain than the evidence justifies.” *Walsh v. Wallace*, 26 Nev. 299, 67 Pac. Rep. 914, 99 Am. St. Rep. 692.

⁴ *Walsh v. Wallace*, 26 Nev. 299, 67 Pac. Rep. 914, 99 Am. St. Rep. 692;

with each other, and one must not negative another upon any material issue.⁵ But in cases where the facts have been submitted to a jury, and where the Court adopts their findings as expressed in their verdict, there is no necessity of any further finding by the Court.⁶ Again, where the defendant sets up affirmative matter in his answer, which presents no material and substantial issue, and which in no way affects the rights of the plaintiff in the action, it is unnecessary for the Court to make findings thereon, and a failure to make such findings is not error.⁷

§ 1642. **The decree and judgment.**—Upon the final hearing of an action for an injunction, according to the allegations of the pleadings, and the facts and circumstances as evolved in each particular case, the trial court may render a decree and judgment granting an injunction in favor of either party and against the other party to the action, or it may make a temporary injunction permanent as originally issued or as modified by the Court; or, again, upon the other hand, it may refuse to grant the injunction or dissolve the temporary injunction already issued in the action. This does not mean that the granting or refusing to grant injunctive relief in these actions is discretionary with the trial court, but these actions being in equity, are subject to review, reversal, or modification by the Appellate Court to a much greater extent than

Montpelier Milling Co. v. City of Montpelier, 19 Idaho 212, 113 Pac. Rep. 741.

“In the absence of a finding of the actual diversion of some definite quantity of water, sufficiently supported by the evidence, the plea of prescription must necessarily fail.” Logan v. Guichard, 159 Cal. 562, 114 Pac. Rep. 989.

See, also, Hayes v. Silver Creek etc. Co., 136 Cal. 238, 68 Pac. Rep. 704.

⁵ Davies v. Angelo, 8 Cal. App. 305, 96 Pac. Rep. 909; Learned v. Castle, 78 Cal. 454, 18 Pac. Rep. 872, 21 Pac. Rep. 11; Beaverhead C. Co. v. Dillon etc. Co., 34 Mont. 135, 85 Pac. Rep. 880; Authers v. Bryant, 22 Nev. 245, 38 Pac. Rep. 439.

But a finding in conflict with an “opinion” of the court is not ground for reversal. Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113.

⁶ Hoyt v. Hart, 149 Cal. 722, 87 Pac. Rep. 569.

⁷ Montpelier M. Co. v. City of Montpelier, 19 Idaho 212, 113 Pac. Rep. 741.

See, also, Williams v. Harter, 121 Cal. 47, 53 Pac. Rep. 405.

A judgment in a court of equity will not be reversed because the court failed to make express findings, where it does not affirmatively appear that such findings were not waived. Richardson v. Eureka, 110 Cal. 441, 42 Pac. Rep. 965.

actions at law, where the judgment is based upon the verdict of a jury.¹

As we have discussed in a previous section, the decree and judgment in actions for the adjudication of water rights and to quiet the title thereto must be definite and certain as to the rights of the parties,² so, also, the decree and judgments in actions where the injunction is granted must also be definite and certain as to the rights of the respective parties, and must also go one step further and specifically state just what acts the party enjoined must refrain from doing to prevent a further invasion of the rights in question. So, in a well-reasoned case decided by the Supreme Court of Nevada, where all the parties had done all the things necessary for a valid appropriation of water, and it was not claimed that the plaintiffs had appropriated all the water, a decree without any definite finding of amount appropriated, but only that plaintiffs had appropriated enough to irrigate certain portions of their land, which enjoins defendants from diverting any of the water, and from interfering therewith so as to prevent the water from flowing onto plaintiffs' land in sufficient quantity to irrigate it, was held to be too indefinite to be sustained.³ The decree and judgment in an injunction case should specifically award the water to the respective

¹ For appeal in injunction cases, see Sec. 1647.

For appeal in damage cases, see Sec. 1704.

For appeal in actions to quiet title, see Sec. 1565.

² For decrees and judgments in actions to quiet title, see Secs. 1557-1563.

³ Walsh v. Wallace, 26 Nev. 299, 67 Pac. Rep. 914, 99 Am. St. Rep. 692.

See, also, White v. Nuckolls, 49 Colo. 170, 112 Pac. Rep. 329; Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. Rep. 755; Wilson v. Eagleson, 10 Idaho 755, 81 Pac. Rep. 434; *In re Huntley*, 85 Fed. Rep. 889, 29 C. C. A. 468; Barrows v. Fox, 98 Cal. 63, 32 Pac. Rep. 811; Riverside W. Co. v. Sargent, 112 Cal. 230, 44 Pac. Rep.

560; Wallace v. Farmers' D. Co., 130 Cal. 578, 62 Pac. Rep. 1078; Drake v. Earhart, 2 Idaho 750, 23 Pac. Rep. 541; Steinberger v. Meyer, 130 Cal. 156, 62 Pac. Rep. 483; Sanders v. Wilson, 34 Wash. 659, 76 Pac. Rep. 280; Medano D. Co. v. Adams, 29 Colo. 317, 68 Pac. Rep. 431; Rogers v. Overacker, 4 Cal. App. 333, 87 Pac. Rep. 1107; Brown v. Baker, 39 Ore. 66, 65 Pac. Rep. 799, 66 Pac. Rep. 193; Simpson v. Harrah, 54 Ore. 448, 103 Pac. Rep. 58; Wilhite v. Billings etc. Co., 39 Mont. 1, 101 Pac. Rep. 168; Twaddle v. Winters, 29 Nev. 88, 85 Pac. Rep. 280, 89 Pac. Rep. 289; Hildreth v. Montecito etc. Co., 139 Cal. 22, 72 Pac. Rep. 395; North Powder M. Co. v. Coughanour, 34 Ore. 9, 54 Pac. Rep. 223.

parties, notwithstanding their right might be implied by law.⁴ The quantity of water should be based upon beneficial use, and an injunction will be dissolved whenever the writ is ineffectual by reason of uncertainty.⁵ And, again, it may be dissolved when its object has been wholly accomplished and the cause of action abated.⁶ A decree enjoining the use of a ditch does not, unless specified, enjoin the use of the water formerly conducted through the ditch.⁷ Neither does a decree enjoining the use of water *per se* also enjoin the use of a ditch.⁸ These are separate property rights, and the decree must specify which one is intended.⁹ A mandatory decree ordering the abatement of a nuisance¹⁰ should simply order its abatement, regardless of the means to be taken by the defendant therefor.¹¹ A decree must be based upon definite findings and conform thereto;¹² and it must also conform to the pleadings¹³ and the evidence taken in the case.¹⁴ A conditional decree may be entered instead of a mandatory decree, the decree being worded to

⁴ Twaddle v. Winters, 29 Nev. 88, 85 Pac. Rep. 280, 89 Pac. Rep. 289; Gotelli v. Cardelli, 26 Nev. 382, 69 Pac. Rep. 8; Medano etc. Co. v. Adams, 29 Colo. 317, 68 Pac. Rep. 431.

See, also, for economic use and suppression of waste, Chap. 49, Secs. 874-916.

See, also, Ferrea v. Knipe, 28 Cal. 340, 87 Am. Dec. 128.

⁵ McKenzie v. Ballard, 14 Colo. 426, 24 Pac. Rep. 1.

⁶ Sylvester v. Jerome, 19 Colo. 128, 34 Pac. Rep. 760; Mace v. Mace, 40 Ore. 586, 67 Pac. Rep. 660, 68 Pac. Rep. 737.

⁷ Parke v. Boulware, 7 Idaho 490, 63 Pac. Rep. 1045.

⁸ Nevada etc. Co. v. Kidd, 37 Cal. 282.

⁹ See, also, Secs. 1618, 1619.

¹⁰ For injunctions as against nuisances, see Sec. 1621.

¹¹ Wilhite v. Billings etc. Co., 39 Mont. 1, 101 Pac. Rep. 168; Mace v. Mace, 40 Ore. 586, 67 Pac. Rep. 660, 68 Pac. Rep. 737.

The owner of a ditch is entitled to no greater relief than the restoration of the ditch to its former condition and damages for the injuries occasioned. Stufflebeem v. Adelsbach, 135 Cal. 221, 67 Pac. Rep. 140; Denver etc. Co. v. Dotson, 20 Colo. 304, 38 Pac. Rep. 322.

¹² Walsh v. Wallace, 26 Nev. 299, 67 Pac. Rep. 914, 99 Am. St. Rep. 692; City and County of Denver v. Walker, 45 Colo. 387, 101 Pac. Rep. 348; Wutchumna W. Co. v. Ragle, 148 Cal. 759, 84 Pac. Rep. 162.

¹³ Schirmer v. Drexler, 134 Cal. 134, 66 Pac. Rep. 180; Simpson v. Harrah, 54 Ore. 448, 103 Pac. Rep. 58; Wood v. Etiwanda W. Co., 122 Cal. 152, 54 Pac. Rep. 726; New Cache La Poudre Irr. Co. v. Water Supply etc. Co., 29 Colo. 469, 68 Pac. Rep. 781.

¹⁴ City and County of Denver v. Walker, 45 Colo. 387, 101 Pac. Rep. 348; Huffner v. Sawday, 153 Cal. 86, 94 Pac. Rep. 424.

restrain the operation of the parties until they had made suitable provision to prevent the injury.¹⁵ And where the evidence shows that there is no probability of a recurrence of the injury, the suit may be dismissed.¹⁶

In the matter of costs, the general rule is that the party who recovers in the injunction proceedings is entitled to his costs against the party losing. Where, however, mutual injunctions are granted, it is not error to divide the costs between the parties thereto.¹⁷ And, again, in the discretion of the Court costs may be denied all parties.¹⁸

§ 1643. Decree and judgment—The balance of convenience—Authorities against.—It has been frequently asserted that in rendering its final decree and judgment in actions brought for an injunction the Court should take into consideration the balance of convenience and losses of the respective parties; or, stating the proposition in the converse, the balance of inconvenience and losses to the one as compared with the gain of the others. In general, it may be said that there is a direct conflict of authorities upon this proposition which can not be reconciled. By one line of authority it is held that the absolute right of property should be protected in the owner until he is dispossessed of the same in accordance with law, against the continuous invasion of his rights, causing material and irreparable injury, and that, too, regardless of the fact of the expense or loss which may be incurred by the opposite party by the decree of injunction, and that any other rule would be in violation of the Federal and State constitutions forbidding the taking of property for private use.¹

¹⁵ *Brown v. Gold Coin etc. Co.*, 48 Ore. 277, 86 Pac. Rep. 361.

¹⁶ *Union etc. Co. v. Lichty*, 42 Ore. 563, 71 Pac. Rep. 1044.

¹⁷ *Hoyt v. Hart*, 149 Cal. 722, 87 Pac. Rep. 569; *McCarthy v. Gaston Ridge etc. Co.*, 144 Cal. 542, 78 Pac. Rep. 7.

¹⁸ *Hough v. Porter*, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

¹ Where an irreparable injury is being suffered, and will continue by the

maintenance of a lawful business, relief by injunction against such business will not be withheld merely because the financial interests sought to be protected are small in comparison with those sought to be restrained. *Arizona Copper Co. v. Gillespie*, 12 Ariz. 190, 100 Pac. Rep. 465.

“In a state of society the rights of the individual must to some extent be sacrificed to the rights of the social body; but this does not warrant the forcible taking of property from a

It is held that there is no principle of law or power in a court of equity to justify or authorize such an invasion of the property rights of one private party to serve the wishes, convenience, necessities or profits of another private party. "It is the duty of courts to protect a party in the enjoyment of his private property, not to license a trespass upon such property or to compel the owner to

man of small means to give it to the wealthy man, on the ground that the public will be indirectly advantaged by the greater activity of the capitalist. Public policy, I think, is more concerned in the protection of individual rights than in the profits to inure to individuals by the invasion of those rights." *Marshall, J., in McCleery, v. Highland Boy G. M. Co.*, 140 Fed. Rep. 951.

An injunction can not be refused because more injury will result from awarding than from refusing it, if the one asking for it is entitled to it as a matter of right. *Sullivan v. Jones etc. Co.*, 208 Pa. 540, 57 Atl. Rep. 1065, 66 L. R. A. 712.

"It is earnestly urged by counsel for respondents that if this court should hold that there is error in sustaining the demurrers to the complaints, or either of them, it would result in 'the depopulation of Shoshone County, the abandonment of all mining and milling therein, and the consequent bankruptcy of the inhabitants thereof.' Deplorable as this might be, if true, it furnishes no excuse for the court to shirk its responsibilities in disposing of the question before us on the merits. The law is no respecter of persons, corporations, or individuals, and in its creation and enforcement reaches out and protects the lone settler in his rights, let them be ever so meager, as well as the capitalist, the corporation, or individual with its or his millions. . . .

The law does not measure the rights of litigants by the amount involved, nor the manner in which it may affect others not parties to the litigation." *Hill v. Standard Min. Co.*, 12 Idaho 223, 85 Pac. Rep. 907.

The right to take subterranean water for use at a distance can not be determined by the relative area or value of the local lands and those to which it is to be taken. "Such an argument has no standing in a court of law, and is distinctly repudiated." *Newport v. Temescal W. Co.*, 149 Cal. 531, 87 Pac. Rep. 372, 6 L. R. A., N. S., 1098; *Verdugo W. Co. v. Verdugo*, 152 Cal. 655; 93 Pac. Rep. 1021.

See, also, *Wilhite v. Billings etc. Co.*, 39 Mont. 1, 101 Pac. Rep. 168; *Woodruff v. North Bloomfield etc. Co.*, 9 Sawy. 441, 18 Fed. Rep. 753; dissenting opinion by Hawley, J., in *Mountain Copper Co. v. United States*, 142 Fed. Rep. 625, 73 C. C. A. 621; *Suffolk etc. Co. v. San Miguel etc. Co.*, 9 Colo. App. 407, 48 Pac. Rep. 828; *Cole Silver M. Co. v. Virginia etc. Co.*, 1 Sawy. 470, Fed. Cas. No. 2989, 7 Morr. Min. Rep. 503; *Vansickle v. Haines*, 7 Nev. 249, 15 Morr. Min. Rep. 201; *Gregory v. Nelson*, 41 Cal. 278, 12 Morr. Min. Rep. 124; *Weiss v. Oregon Iron & Steel Co.*, 13 Ore. 496, 11 Pac. Rep. 255; *Teel v. Rio Bravo Oil Co.*, 47 Tex. Civ. App. 153, 104 S. W. Rep. 420, *Heilbron v. Fowler Switch etc. Co.*, 75 Cal. 426, 17 Pac. Rep. 535, 7 Am. St. Rep. 183; *Fabian v. Collins*, 1 Mont. 215.

exchange the same for other property to answer private purposes or necessities." ² "Every substantial, material right of person or property is entitled to protection against all the world." ³ Neither is there any reason upon principle why this rule should be relaxed where the injunction is sought in behalf of a private party as against an invasion by the public and for public uses. If the acquisition of these rights are necessary for a public use, there are methods provided by law whereby they may be acquired by condemnation proceedings, and not by the unlawful invasion of the vested rights of private parties. ⁴

In order for the Court to grant a permanent injunction it must be proven by the party seeking such relief that there is a continuous or threatened invasion of his substantial and material rights, which will cause irreparable injury; otherwise the party will be left to his action at law for damages. We will concede the proposition that where the injury is slight and inappreciable, and the plaintiff can be fully recompensed in an action at law for damages, no injunction should be granted which will overthrow great property interests. ⁵ Under the rule it is held, however, that the granting of preliminary injunctions or the refusal thereof being largely discretionary with the trial court, the Court may govern its action by considering the balance of present convenience between the parties.

² Gregory v. Nelson, 41 Cal. 278, 12 Morr. Min. Rep. 124.

³ Sawyer, J., in Woodruff v. North Bloomfield etc. Co., 9 Sawy. 441, 18 Fed. Rep. 753.

See, also, Hill v. Standard Min. Co., 12 Idaho 223, 85 Pac. Rep. 907.

⁴ Pomeroy's Equitable Remedies, Sec. 531.

⁵ "Of course, great interests should not be overthrown on trifling or frivolous grounds, as where the maxim *de minimis non curat lex* is applicable." Sawyer, J., in Woodruff v. North Bloomfield etc. Co., 9 Sawy. 441, 18 Fed. Rep. 753.

"No doubt there are cases in which the court will refuse to interfere by

injunction to prevent a trespass, where it can see that the injury will be slight, and the injunction will work great injury." Heilbron v. Fowler Switch etc. Co., 75 Cal. 426, 17 Pac. Rep. 535, 7 Am. St. Rep. 183.

See, also, Hoyer v. Sweetman, 19 Nev. 376, 12 Pac. Rep. 504; Thorn v. Sweeney, 12 Nev. 251; Crescent M. Co. v. Silver King M. Co., 17 Utah 444, 54 Pac. Rep. 244, 70 Am. St. Rep. 810; *Id.*, 14 Utah 57, 45 Pac. Rep. 1093; McGregor v. Silver King M. Co., 14 Utah 47, 45 Pac. Rep. 1091, 60 Am. St. Rep. 883; Mann v. Parker, 48 Ore. 321, 86 Pac. Rep. 598; Montecito etc. Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. Rep. 1113.

in the granting or refusing of the loan there is no doubt that the purpose should not be to the disadvantage of the borrower.

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which flows by his land, without actual use of the water other than is incidental or "for no purpose other than to afford him pleasure in its prospect," as against the diversion of the water by expensive works and the application of the water to useful purposes, whereupon the very life of the community depends. In such a case great interests should not be overthrown upon such "trifling and frivolous grounds." And, we will add, that such is the rule adopted in some of the Western States, where the doctrine of the common law of riparian rights is in force, and especially in the State of California, by the later and best-reasoned decisions of its Supreme Court.³ The leading case holding to this side of the contention is that of *Kansas v. Colorado*,⁴ decided by the Supreme Court of the United States. In that case Mr. Justice Brewer, in summing up the conclusions of the Court, said: "That the appropriation of the waters of the Arkansas by Colorado for purposes of irrigation has diminished the flow of water into the State of Kansas; that the result of that appropriation has been the reclamation of large areas in Colorado, transforming thousands of acres into fertile fields, and rendering possible their occupation and cultivation when otherwise they would have continued barren and unoccupied; that while the influence of such diminution has been of perceptible injury to portions of the Arkansas Valley in Kansas, particularly those portions closest to the Colorado line, yet to the great body of the valley it has worked little, if any, detriment, and regarding the interests of both States, and the right of each to receive benefit through irrigation and in any other manner from the waters of this stream, we

³ A riparian owner is not entitled to an injunction to restrain the diversion of water above him by a non-riparian owner, where the amount diverted would not be used by the former, nor cause any loss or injury to him or to his lands, present or prospective, and would greatly benefit the party diverting it. *Modoc etc. Co. v. Booth*, 102 Cal. 151, 36 Pac. Rep. 431.

"Even if at common law or under the civil law it is a part of the usufructuary right of a riparian owner to have the water flow by for no purpose other than to afford him pleasure

in its prospect, such is not the rule of decision in this State. The lower claimant must show damage to justify a court of equity in restraining an upper claimant from his beneficial use of the water." *San Joaquin etc. Co. v. Fresno etc. Co.*, 158 Cal. 626, 112 Pac. Rep. 182, 35 L. R. A., N. S., 832.

See, also, for right of riparian owner to an injunction, Secs. 1611-1615.

⁴ 185 U. S. 125, 46 L. Ed. 838, 22 Sup. Ct. Rep. 552; *Id.*, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655.

are not satisfied that Kansas has made out a case entitling it to a decree." In other words, the Court held that in granting the injunction the damage to the State of Colorado would be so great, as compared to the damage to the State of Kansas, were it not granted, that it should not be granted.⁵

Also, in another late case decided by the Circuit Court of Appeals, it was held that an injunction of such a positive and sweeping character that it would practically result in destroying all other interests in the Imperial Valley should not be granted.⁶ So, again, in cases where the rights of the respective parties can be reconciled so that both may have the use of the water without materially impairing the rights of either, as would be the case where the water could be returned to the stream before it reached the lower user,⁷ the injunction should not be granted. Again, a mandatory injunction should not be granted ordering the removal of a dam or other works constructed at great expense when the nuisance caused thereby may be abated without such destruction of property.⁸

Our conclusions upon this subject are that where the plaintiff's injuries are small as compared with the loss of the defendant in the case, and he can be fully recompensed in damages in an action for the same, a court of equity in determining whether or not a final injunction should be granted should take into consideration the balance of convenience as between the respective parties and the comparative losses that the respective parties should be put to in case the injunction was or was not granted.

§ 1645. Decree and judgment—Effect of.—A decree and judgment granting an injunction, being *in personam*, is binding only upon the parties mentioned therein, who must have been parties to the action.¹ It is a fundamental proposition of law that a person

⁵ See, also, *New York City v. Pine*, 185 U. S. 93, 46 L. Ed. 820, 22 Sup. Ct. Rep. 592.

⁶ *The Salton Sea Cases*, 172 Fed. Rep. 820, 97 C. C. A. 242.

⁷ *Montecito etc. Co. v. Santa Barbara*, 144 Cal. 578, 77 Pac. Rep. 1113.

⁸ *Wilhite v. Billings etc. Co.*, 39 Mont. 1, 101 Pac. Rep. 168; *Mace v. Mace*, 40 Ore. 586, 67 Pac. Rep. 660, 68 Pac. Rep. 737.

¹ All who are neither parties to a judgment, nor privies to such parties, are not bound by such a judgment. *Stocker v. Kirtley*, 6 Idaho 795, 59 Pac. Rep. 891.

"The rights of such persons will not, of course, be injuriously affected by the decree in this cause." *Gutierrez v. Albuquerque etc. Co.*, 188 U. S. 545, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338.

who is not made a party to an action, or who has not had "his day in court," is not bound by any decree or judgment granting an injunction in favor of one party and against another.² It therefore follows that many cases, especially those to enjoin the diversion of water, have been decided as between certain parties and the injunction granted where a third person not a party to the action has a better right to the use of the water than either of the parties to the action. This condition has oftentimes resulted in the bringing of another action by this third person against both of the parties to the former action to enjoin them from diverting the water to the injury of this third person. It was this condition of affairs that was one of the cases for the passage of the codes in the various States for the adjudication of all the water rights of any certain source of supply, and the granting of injunctive relief against all of the parties to the action against the interference with the rights of the others as decreed and adjudicated in the action.³ An injunction granted in such an action is only ancillary to and in aid of the decree establishing and quieting the title to the rights of the

"The rights of the parties to this suit must be determined, therefore, with reference to the priorities as between themselves, without regard to the rights of persons not parties to the suit, and who, of course, can not be affected in any way by the decree." *McCall v. Porter*, 42 Ore. 49, 70 Pac. Rep. 820, 71 Pac. Rep. 976.

See, also, *Browning v. Lewis*, 39 Ore. 11, 64 Pac. Rep. 304.

² Where by the final decree in an action the rights of all the parties to the use of the waters of a creek were determined, and all parties, their heirs, assigns, tenants, etc., were enjoined from interfering with the rights of the other parties, the court is without jurisdiction in a summary proceeding, on less than twenty-four hours' notice, to enjoin a person not a party to the action, whether he be a trespasser or claim an independent

right, from using the waters of the creek for any purpose whatever. *State ex rel. Pew v. District Court*, 34 Mont. 233, 85 Pac. Rep. 525, saying: "If the relator was a trespasser he could be enjoined only after a hearing in a regular action, brought in the usual way."

³ For the adjudication of rights in equity, see Secs. 1530-1566.

For the statutory adjudication of water rights, see Secs. 1567-1584.

In Oregon, where, in a suit as to the right to the use of water and for an injunction, it appeared that parties other than the parties to the action were entitled to a prior use of the water, it was held that the court properly refused to award defendants the use of all the water in excess of plaintiffs' allowance. *Brown v. Baker*, 39 Ore. 66, 65 Pac. Rep. 799, 66 Pac. Rep. 193.

respective parties to the action, and it merely commands and enforces obedience to the decree and judgment.⁴

§ 1646. Decree and judgment—Enforcement of—Violation of.—Where the Court has jurisdiction of the subject matter and acquires jurisdiction of the defendant by service of process, it is thereby vested with full power and authority to make such orders and to issue such writs and process as may be necessary and essential to carry the decree into effect and render it binding and operative.¹ The proper proceeding for the violation of an injunction decree is by contempt proceedings, and not by a bill to enforce the decree.² The violation of the decree and judgment rendered upon the final hearing of the case, and the violation of the temporary or interlocutory order of injunction by the party against whom such judgment or order is issued, may be punished in the same manner as in other cases for contempt of Court; and the same general rules of procedure relating to contempts govern in these cases.³ Upon the subject of a violation of a temporary injunction, it is held in a recent case in Colorado that where the case made by the complaint authorized injunctive relief if the facts alleged were sufficient, so that a decree based on the complaint would not be actually void, a violation of an injunction issued thereon constituted contempt of Court, though the complaint was insufficient.⁴ The procedure in these actions, being in its nature criminal procedure,

⁴ "The injunction would only be ancillary to and in aid of a decree establishing and quieting plaintiff's title. It would merely command and enforce obedience to the decree. That would be a remedy *in personam*, and would act only upon the person of the parties enjoined." Taylor v. Hulett, 15 Idaho 265, 97 Pac. Rep. 37, 19 L. R. A., N. S., 535.

See, also, Elliot v. Whitmore, 10 Utah 246, 37 Pac. Rep. 461.

¹ Taylor v. Hulett, 15 Idaho 265, 97 Pac. Rep. 37, 19 L. R. A., N. S., 535.

See, also, for the enforcement of decrees in actions to adjudicate rights, Sec. 1566.

² Raft River etc. Co. v. Langford, 5 Idaho 62, 46 Pac. Rep. 1024.

³ *In re* North Bloomfield etc. Co., 27 Fed. Rep. 795, 11 Sawy. 590.

⁴ White v. Nuckolls, 49 Colo. 170, 112 Pac. Rep. 329.

See, also, Johnson v. Superior Court, 65 Cal. 567, 4 Pac. Rep. 575.

One who is a party to a decree enjoining him from diverting certain water is guilty of contempt if his tenant, by his direction, actually diverts the water. *State ex rel. Thompson v. Lavery*, 31 Ore. 77, 49 Pac. Rep. 852.

But a decree requiring defendants to allow a sufficient quantity of water to flow in a stream, so that after a person named, who is not a party,

the Court may, upon a proper showing, issue an attachment for the party charged with violating the decree or order, and cite him to show cause why he should not be punished for contempt. And upon the hearing, if the Court adjudges him guilty, it may punish him by a fine, by imprisonment in jail, or by a fine and commit him to jail until the fine is paid.⁵

Before one can be punished for the violation of an injunction both the subject matter for which the injunction was issued to protect and the party in whose favor it was issued or its lawful successors in interest, must be in existence, and must have suffered some actual or special damages. So it is held in Utah that where the defendants, who were land owners under the canals of a quasi-public irrigation district and members thereof, were restrained from interfering in any manner with the ditches of the district, such decree became *functus officio* upon the dissolution of the district, and they could not thereafter be punished for contempt for such interference; and even if such proceedings were maintainable by a corporation entitled to a portion of the water, they were not maintainable in the absence of proof of actual or special damages.⁶ Again, a reasonable construction must be placed upon the decree of injunction, and there must be a direct violation of its terms before one can be adjudged in contempt. In the recent Salton Sea cases, where the defendant, by the negligent construction of its works, by which it diverted the water from the Colorado River, caused an overflow through a breach in the bank, creating a lake in the Salton Basin which covered and practically destroyed the value of complainant's property situated in the basin, in a suit by complainant an injunction was granted restraining the defendant from

shall have diverted all of the water to which he is entitled, there shall be enough to carry 150 inches statutory measurement, to the complainant's premises, is void for uncertainty, so that no contempt can be based on its alleged violation. *In re Huntley*, 85 Fed. Rep. 889, 29 C. C. A. 468.

⁵ *Shore v. People*, 28 Colo. 516, 59 Pac. Rep. 49.

A court has power to imprison a person for breach of an injunction un-

til he complies therewith, when it is within his power to do so, and he refuses to do so. *Elliot v. Whitmore*, 10 Utah 246, 37 Pac. Rep. 461.

In re Whitmore, 9 Utah 441, 35 Pac. Rep. 524; *State ex rel. Stevens v. Catlin*, 21 Wash. 423, 58 Pac. Rep. 206; *Johnson v. Superior Court*, 65 Cal. 567, 4 Pac. Rep. 575.

⁶ *Thompson v. McFarland*, 29 Utah 455, 82 Pac. Rep. 478.

diverting water from the river in excess of the substantial needs of the people dependent on its canal, and from permitting any waste water to flow on or over complainant's land, or into the lake in such amount as would "substantially increase the amount of water therein," or prevent the decrease thereof by natural causes. Defendant's canal was the only source of supply for an arid valley containing 20,000 people who were wholly dependent thereon for water for domestic purposes and the raising of crops. It appeared that in order to supply their needs, and especially to meet emergencies, as in the case of hot winds, to which the valley was subject, it was necessary to run through the canal, which was 61 miles long, a quantity of water somewhat in excess of the average consumption, and that excess, when unused, was discharged through waste gates into the lake at a point some 40 miles from the complainant's land, but not in such quantity as to materially affect its volume. It was held that, giving the decree a proper and reasonable construction, such waste of water into the lake did not work substantial injury to the complainant, and was not a violation of the injunction.⁷

A decree adjudicating water rights merely being *in rem* and not *in personam*, it is held that one interfering with the water commissioner who seeks to enforce the decree is not contempt of court.⁸

In a recent case in Idaho, the question arose as to the enforcement of a decree of injunction, restraining the interference with the waters of an interstate stream, where the defendant against whom the writ was granted goes beyond the jurisdiction of the State where the same was rendered, and into the other State, and there commits the acts in violation of the decree and injunction. It was held that the party in favor of whom the decree was rendered could go into the court of the other State with his decree and there obtain a like injunction from that court, where personal service could be had, and the defendant would be held amenable to the orders and process of that court. "The decree and injunction from the Idaho Court would undoubtedly be accorded full faith and credit by the Wyoming Court."⁹

⁷ New Liverpool Salt Co. v. California Dev. Co., 172 Fed. Rep. 820, 97 U. C. A. 242.

⁸ For the enforcement of decrees adjudicating rights, see Secs. 1566, 1584.

⁹ Taylor v. Hulett, 15 Idaho 265, 97

Pac. Rep. 37, 19 L. R. A., N. S., 535

See, also, Willey v. Decker, 11 Wyo. 496, 73 Pac. Rep. 210, 100 Am. St. Rep. 939.

See, also, for rights in interstate waters, Secs. 664, 1221-1234.

§ 1647. **Appeals in injunction cases.**—As with other cases, any party feeling aggrieved by the decree in an injunction case may appeal from the final judgment therein rendered by the trial court to the appellate court having the proper jurisdiction.¹ And, in these appeals the same rules of procedure are in force as are in force in other cases. The statutes and rules of the Appellate Court are mandatory in this respect and must be strictly followed. Upon the question of a final judgment from which an appeal will lie, in an action for an injunction and for damages, a judgment for defendant, after a hearing on the injunction is a final judgment, because it has disposed of the entire case as to the plaintiff, his claim for damages resting on the tort he is seeking to enjoin.² So, also, a judgment against the plaintiff, on demurrer being sustained to the complaint, and he declining to plead further, is held to be not an order denying a temporary injunction, which is unappealable, but a final and appealable judgment.³

Pending the appeal a stay of the injunctive order may be granted by the trial court, upon the filing of a supersedeas bond fixed and approved by the trial court, and it was held to be error for the trial court to refuse to fix and allow a supersedeas bond to stay the injunction pending the appeal.⁴ As is the rule in other cases, the findings of fact by the trial court will not be disturbed by the Appellate Court, where they are based upon substantial evidence,⁵ or where there is a conflict of evidence.⁶ The Appellate Court will not review any questions except such as have been raised in the trial court.⁷ The theory of appellant's case can not be changed upon appeal.⁸

By the decision of the Appellate Court the injunction decree and judgment may be affirmed, modified, reversed, and sent back for

¹ For appeals in actions to adjudicate rights, see Sec. 1565.

See, also, *Egan v. Estrada*, 6 Ariz. 248, 56 Pac. Rep. 721; *Bliss v. Grayson*, 24 Nev. 442, 56 Pac. Rep. 231.

² *North Point etc. Co. v. Utah etc. Co.*, 23 Utah 199, 63 Pac. Rep. 812.

³ *Peters v. Lewis*, 28 Wash. 366, 68 Pac. Rep. 869.

⁴ *Elliot v. Whitmore*, 10 Utah 246, 37 Pac. Rep. 461.

⁵ *Hagerman Irr. Co. v. McMurry*,

— N. M. —, 113 Pac. Rep. 823; *Hayes v. Fine*, 91 Cal. 391, 27 Pac. Rep. 772.

⁶ See, for appeals in actions to adjudicate rights, Sec. 1565. *Herriman v. Keel*, 25 Utah 96, 69 Pac. Rep. 719.

⁷ *Tew v. Powar*, 37 Colo. 292, 86 Pac. Rep. 342.

⁸ *Sternberger v. Seaton Mountain etc. Co.*, 45 Colo. 401, 102 Pac. Rep. 168.

See, also, Sec. 1565.

a new trial, or, by a mandatory order, it may be modified.⁹ The effect of a decision of an Appellate Court constitutes the law of the case only as to such questions as were necessarily involved in such decision, and were presented to the Court and expressly or impliedly decided.¹⁰

⁹ Simpson v. Harrah, 54 Ore. 448, N. W. Rep. 435, 17 L. R. A., N. S., 103 Pac. Rep. 58; Hoyt v. Hart, 149 650.
Cal. 722, 87 Pac. Rep. 569; Erickson v. ¹⁰ Herriman v. Keel, 25 Utah 96, 69
Crookston etc. Co., 105 Minn. 182, 117 Pac. Rep. 719.

CHAPTER 82.

PROTECTION BY MISCELLANEOUS ACTIONS.

- § 1648. Scope of chapter.
- § 1649. Actions for mandamus.
- § 1650. Actions on contracts to protect rights—Specific performance.
- § 1651. Actions for writ of prohibition.
- § 1652. Actions for certiorari of review.
- § 1653. Actions in quo warranto.
- § 1654. Actions in ejectment.
- § 1655. Actions for receivers.
- § 1656. Actions for an accounting.
- § 1657. The enforcement of the criminal statutes.
- § 1658. Protection of rights by physical force.
- § 1659. Protection by various actions previously discussed.

§ 1648. **Scope of chapter.**—Having discussed in the preceding chapter the protection of rights by the means of equitable relief by injunction, we will discuss in this chapter the miscellaneous remedies and actions for the protection of rights both in equity and at law, other than by injunction.¹

§ 1649. **Actions for mandamus.**—Where there is a duty imposed either by law or by contract on a person or company to do or perform a certain act, and the right exists in a party to demand the performance of such act, a common method to enforce such performance is for the party in whom the right exists to bring an action for mandamus. Actions for mandamus are not peculiar for the protection of water and other kindred rights, but lie in relation to many other subjects. In a previous portion of this work we have shown that whenever the law imposes upon a water company or a public officer a duty to do and perform certain acts in relation to the distribution of water, at the instance of any person having the right to demand it, and upon such demand having been made, accompanied by a tender of the legal rate, a court of equity, in an action for mandamus, will compel such company or officer to furnish

¹ For the protection of rights by injunction, see Secs. 1596-1647.
(3023)

him the water.¹ The duty to furnish the water may be imposed by statute,² or, in certain instances, it may be imposed by contract.³ However, in some jurisdictions, it is held that mandamus will not lie to compel the performance of a contract,⁴ but that the remedy must be by an action for specific performance.⁵

Before a writ of mandamus will be granted by the Court, and the defendant ordered to furnish the plaintiff the water demanded, there must have been found to exist the following essentials: First, that the duty is imposed upon the defendant to furnish the water;⁶ second, that the plaintiff has the right to demand the performance of that duty and to be furnished with the water;⁷ third, that a legal demand has been made, accompanied with a payment or a tender of the established rates;⁸ fourth, that the defendant has the water under its control which it can furnish the plaintiff, without

¹ See corporations for profit—Duty to furnish water, Secs. 1497-1502.

Duty to furnish water—Compulsory service, Sec. 1506.

² See Sec. 1497.

³ See Sec. 1510.

See, also, *People v. Farmers' High-line etc. Co.*, 25 Colo. 202, 54 Pac. Rep. 626; *rev'g Id.*, 8 Colo. App. 246, 45 Pac. Rep. 543; *Combs v. Agricultural D. Co.*, 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; *Bardsly v. Boise etc. Co.*, 8 Idaho 155, 67 Pac. Rep. 428; *Bonslett v. Butte County Canal Co.*, — Cal. App. —, 122 Pac. Rep. 821; *Cozzens v. North Fork etc. Co.*, 2 Cal. App. 404, 84 Pac. Rep. 342; *Bay City Irr. Co. v. Sweeney*, 81 S. W. Rep. 545; *New Iberia etc. Co. v. Romero*, 105 La. 439, 29 So. Rep. 876; *Golden Canal Co. v. Bright*, 8 Colo. 144, 6 Pac. Rep. 142; *Wilterding v. Green*, 4 Idaho 773, 45 Pac. Rep. 134; *Bright v. Farmers' etc. Co.*, 3 Colo. 170, 32 Pac. Rep. 433.

⁴ *Perrine v. San Jacinto etc. Co.*, 4 Cal. App. 376, 88 Pac. Rep. 293; *State ex rel. Krutz v. Washington etc. Co.*, 41 Wash. 283, 83 Pac. Rep. 308, 111 Am. St. Rep. 1019; *Lanham v. We-*

natchee Canal Co., 48 Wash. 337, 93 Pac. Rep. 522; *Northern Colo. Irr. Co. v. Poupprit*, 47 Colo. 490, 108 Pac. Rep. 23; *Bright v. Farmers' etc. Co.*, 3 Colo. App. 170, 32 Pac. Rep. 433; *State ex rel. Shaw v. Noyes*, 25 Nev. 31, 56 Pac. Rep. 946.

⁵ For actions for specific performance, see Secs. 1520, 1650.

⁶ For the duty of companies to furnish water, see Secs. 1497-1502.

⁷ It is held in Colorado that a writ of mandamus will not be granted to compel the State engineer or division superintendent to close certain ditches unless the rights of the petitioner have been ascertained and adjudicated. *Farmers' Ind. D. Co. v. Maxwell*, 4 Colo. App. 477, 36 Pac. Rep. 556.

⁸ *Golden Canal Co. v. Bright*, 8 Colo. 144, 6 Pac. Rep. 142; *Price v. Riverside etc. Co.*, 56 Cal. 431, 433.

"Where the person aggrieved has a private interest in or claims the immediate benefit of the act sought to be covered, he must make a demand upon the officer to lay the foundation for relief by mandamus." *Farmers' Ind. D. Co. v. Maxwell*, 4 Colo. App. 477, 36 Pac. Rep. 556.

impairing the rights of others previously entitled to the same;⁹ and, fifth, that the plaintiff has no plain, speedy, or adequate remedy at law.¹⁰

An action to compel a company to furnish water is not usually brought until there is need for the water. Therefore, proceedings of this nature must, to be effective, be somewhat summary in character. And it is held that the trial courts should be liberal in the matters of pleading and practice, as well stated by the Colorado Court, "lest the crops of the farmer burn while counsel contend over legal technicalities."¹¹ Where the action is brought to compel a company to furnish water for irrigation, the petition should show: That the water is sought to irrigate land which lies within the flow of the ditches and canals of the company; that such company owns or has under its control the water in quantity to supply the one demanding and all others previously entitled to its use; that a legal demand has been made for the quantity of water required; and that a payment of the water rates has either been made,

⁹ *Cozzens v. North Fork D. Co.*, 2 Cal. App. 404, 84 Pac. Rep. 342; *Price v. Riverside etc. Co.*, 56 Cal. 431, 433.

There is a priority among consumers from a canal analogous to that which exists among appropriators from a natural stream, and the rights of later applicants for water are subordinate to those of prior consumers. *Gerber v. Nampa etc. Dist.*, 19 Idaho 765, 116 Pac. Rep. 104.

¹⁰ An action for damages held not to be a speedy or adequate remedy. *Golden Canal Co. v. Bright*, 8 Colo. 144, 6 Pac. Rep. 142.

"This is the general rule, and the courts hold that mandamus is a remedy to compel the performance of a duty required by law where the party seeking the relief has no other adequate remedy, and where the duty sought to be enforced is clear and indisputable." *State ex rel. Krutz v. Washington Irr. Co.*, 41 Wash. 283,

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83 Pac. Rep. 308, 111 Am. St. Rep. 1019.

¹¹ *Townsend v. Fulton etc. Co.*, 17 Colo. 142, 29 Pac. Rep. 453.

The above principle is well illustrated in a Colorado case, where an action for mandamus was instituted for the purpose of compelling a company to furnish water to the plaintiff for the season of 1886, and owing to delays in the trial and appeal the case was not finally decided until January 4, 1888. The court then held that it would not order an impossible act, and that to permit the amendment of the writ so as to cover the approaching irrigation season would be to allow the substitution in the proceeding of a wholly new and different cause of action, and to violate an established rule of pleading. *Wheeler v. Northern Colo. Irr. Co.*, 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603.

or that there has been a legal tender thereof, and an allegation of willingness to pay when due.¹²

The defendant may plead such defenses that it may have in answer to the petition for a writ of mandate. It may plead that it is a mutual company organized for the purpose only of furnishing water to its shareholders and that it has no more water than is necessary for their use.¹³ And, if the company is organized for profit, or hire, it may defend upon the ground that it has no water under its control, other than is necessary for those who have previously acquired rights to its use.¹⁴ But an allegation, in an answer of such

¹² Cozzens v. North Fork D. Co., 2 Cal. App. 404, 84 Pac. Rep. 342; Price v. Riverside etc. Co., 56 Cal. 431, 433; Helphery v. Perrault, 12 Idaho 451, 86 Pac. Rep. 417; Merrill v. Southside Irr. Co., 112 Cal. 433, 44 Pac. Rep. 720; Mahoney v. American etc. Co., 2 Cal. App. 186, 83 Pac. Rep. 267; Hewitt v. San Jacinto etc. Co., 124 Cal. 186, 56 Pac. Rep. 893; Hildreth v. Montecito etc. Co., 70 Pac. Rep. 672; Bright v. Farmers' etc. Co., 3 Colo. App. 170, 32 Pac. Rep. 433; Bardsly v. Boise etc. Co., 8 Idaho 155, 67 Pac. Rep. 428; Shelby v. Farmers' etc. Co., 10 Idaho 723, 80 Pac. Rep. 222; Orcutt v. Pasadena etc. Co., 152 Cal. 599, 93 Pac. Rep. 497; State *ex rel.* Milsted v. Butte City W. Co., 18 Mont. 199, 44 Pac. Rep. 966, 56 Am. St. Rep. 575, 32 L. R. A. 697.

Allegations that relators made a contract with the defendant because induced to believe they had no legal means to compel defendant to repair its canal, and that they were so induced to believe at the connivance of the defendant, and as they believed at the defendant's instance, will be disregarded as a plea of fraud or mistake, as they are mere legal conclusions. State *ex rel.* Crawford v. Minnesota etc. Co., 20 Mont. 198, 50 Pac. Rep. 420.

Where, on an application for a writ of mandate to compel the delivery of water, the evidence establishes a right inferior to that of prior consumers, a judgment awarding the plaintiff the same right as prior consumers is erroneous, and should be modified so as to make such right subordinate to that of prior consumers. Gerber v. Nampa & Meridan Irr. Dist., 19 Idaho 765, 116 Pac. Rep. 104.

"Appellant's application shows that she is not dependent upon the remedy which is provided for the enforcement of a mere public duty. It shows that she holds a private contract whereby respondent has obligated itself to furnish water. She can resort to the ordinary remedies upon that contract, as in the case of any private contract." State *ex rel.* Krug v. Washington Irr. Co., 41 Wash. 283, 83 Pac. Rep. 308, 111 Am. St. Rep. 1019.

¹³ Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; Farmers' etc. Co. v. Southworth, 13 Colo. 111, 21 Pac. Rep. 1028, 4 L. R. A. 767; McFadden v. Board, 74 Cal. 571, 16 Pac. Rep. 397.

¹⁴ Combs v. Agricultural D. Co., 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; Gerber v. Nampa etc. Co., 16 Idaho 1, 100 Pac. Rep. 80.

a company, that it has not sufficient water to supply the plaintiff, and all lands lying under its ditch that need water, states no defense, in the absence of an averment that others have demanded or have purchased it.¹⁵ Neither can the defendant set up a contract with plaintiff for a higher rate than the late legally fixed.¹⁶ Again, the defendant may set up that the demand of the plaintiff is excessive for his needs.¹⁷ The defects in plaintiff's petition may be supplied by the defendant's answer.¹⁸

Upon the subject of parties, it is held that in an action to procure a peremptory writ of mandate against a water master, commanding him to distribute waters from a different stream than that named in a previous decree under which he was making the distribution, all parties to be affected thereby should be made parties to the action.¹⁹ Where there is a community of interest between a number of consumers, they may join as parties plaintiff in an action for a writ of mandate to compel the defendant to deliver the water.²⁰ But, upon the other hand, where there is no such community of interest and especially where the rights of the parties are based upon separate and individual contracts, they can not be joined as parties plaintiff, but must bring their separate actions.²¹ In this respect the law is different from actions to adjudicate and determine rights,²² and from actions for an injunction.²³ But, where it appears that other persons are interested in the water sought, they should be made parties defendant.²⁴

¹⁵ *Merrill v. Southside Irr. Co.*, 112 Cal. 433, 44 Pac. Rep. 720.

¹⁶ *Northern Colo. Irr. Co. v. Poup-
pritt*, 47 Colo. 490, 108 Pac. Rep. 23.

¹⁷ *Bright v. Farmers' etc. Co.*, 3 Colo. App. 170, 32 Pac. Rep. 433.

¹⁸ *Mahoney v. American etc. Co.*, 2 Cal. App. 186, 83 Pac. Rep. 267.

¹⁹ *Stetham v. Skinner*, 11 Idaho 374, 82 Pac. Rep. 451.

²⁰ Where several land owners contract and agree among themselves to unite in interest and construct their own ditch or lateral, and make a joint application to a ditch company for sufficient water for all their land as one applicant, they may join as plaintiffs in an action to compel the water

company to deliver the quantity of water applied for at their headgate. *Helphrey v. Perrault*, 12 Idaho 451, 86 Pac. Rep. 417.

²¹ *Creer v. Bancroft etc. Co.*, 13 Idaho 407, 90 Pac. Rep. 228.

²² For parties plaintiff in actions to adjudicate rights, see Secs. 1530-1584. See, also, *Frost v. Alturas W. Co.*, 11 Idaho 294, 81 Pac. Rep. 996.

²³ See Sec. 1631.

²⁴ Mandamus will not lie where the right to invoke the writ rests only on the allegations of the complaint, and it is apparent that the rights of many persons not before the court will be affected. *Farmers' Ind. D. Co. v. Maxwell*, 4 Colo. App. 447, 36 Pac.

So, it is held that in a proper case the Court may, by its decree, compel the delivery of water;²⁵ but it is held that perpetual right to the use of water is not the proper subject-matter of adjudication by mandamus. It, therefore, must necessarily follow that an action must be brought each season, or whenever occasion arises.²⁶ And a judgment awarding the writ rendered after the expiration of the irrigation season for the designated year is erroneous, under the rule that courts do not order performance of impossible acts.²⁷ Mandamus will lie to compel a public officer to do his duty.²⁸ Therefore, the State Engineer may be compelled to perform the ministerial duties of his office by a writ of mandate.²⁹ So, also, a water commissioner may be compelled by mandamus to distribute water according to the decree of the Court.³⁰ So, also, mandamus will lie to enforce the plain rights of stockholders of corporations to restore a member of a mutual corporation to his corporate rights.³¹ It will also lie to compel the performance of a public duty, for which the corporation was organized, and the delivery of stock to those entitled thereto.³²

In California it is held that an action for mandamus will lie to compel the Board of Supervisors of a county to create an irrigation district if the facts are such that no room for discretion is left.³³ Also, it will be issued to compel the trustees of an irrigation district to perform their duties under the law.³⁴ Also action

Rep. 556; *Bright v. Farmers' etc. Co.*, 3 Colo. App. 170, 32 Pac. Rep. 433.

²⁵ See cases cited above.

See, also, *Miller v. Imperial W. Co.* No. 8, 156 Cal. 27, 103 Pac. Rep. 227, 24 L. R. A., N. S., 372.

²⁶ *Northern Colo. Irr. Co. v. Poup-prit*, 47 Colo. 490, 108 Pac. Rep. 23; *Townsend v. Fulton Irr. D. Co.*, 17 Colo. 142, 29 Pac. Rep. 453; *Combs v. Agricultural D. Co.*, 17 Colo. 146, 28 Pac. Rep. 966, 31 Am. St. Rep. 275; *Agricultural D. Co. v. Rollins*, 42 Colo. 267, 93 Pac. Rep. 1125.

²⁷ *Agricultural D. Co. v. Rollins*, 42 Colo. 267, 93 Pac. Rep. 1125; *Wheeler v. Northern Colo. Irr. Co.*, 10 Colo. 582, 17 Pac. Rep. 487, 3 Am. St. Rep. 603.

²⁸ *Riemenschneider v. Wilson*, 6 Haw. 375.

²⁹ *Idaho etc. Co. v. Stephenson*, 16 Idaho 418, 101 Pac. Rep. 821.

³⁰ *Boulder etc. Co. v. Hoover*, 48 Colo. 843, 110 Pac. Rep. 75; *Northern Colo. Irr. Co. v. Poup-prit*, 47 Colo. 490, 108 Pac. Rep. 23.

³¹ *Miller v. Imperial Water Co.*, 156 Cal. 27, 103 Pac. Rep. 227, 24 L. R. A., N. S., 372.

³² *State v. Twin Falls Canal Co.*, — Idaho —, 121 Pac. Rep. 1039.

³³ *Inglis v. Hoppin*, 156 Cal. 483, 105 Pac. Rep. 582; *Chinn v. Superior Court of San Joaquin*, 156 Cal. 478, 105 Pac. Rep. 580.

³⁴ *Harris v. Tarbet*, 19 Utah 325, 57 Pac. Rep. 33.

will lie to compel the district to keep its ditches and canals and other works in repair.³⁵ It will also lie to compel an irrigation district having a supply of water undisposed of, to deliver such water to consumers.³⁶ An action in mandamus will lie to compel the defendant irrigation district to classify the lands to which water is delivered by said district in accordance with the revised codes, Section 3287, which provides for the division of the consumers into classes in accordance with their priorities. Again, when the directors of an irrigation district refuse to make the levy of assessments to pay the interest and principal of bonds issued, an action for a writ of mandamus will lie to enforce such levy.³⁷ An action will also lie to compel a county board to make an assessment to pay a judgment against an irrigation district.³⁸

A proceeding in mandamus may be maintained by a State to compel an irrigation company to construct bridges over highways which it obstructs by its ditches, and the duty to construct such bridges need not be imposed by statute, but is imposed by the common law independent of statute.³⁹ Mandamus will lie to compel a State Auditor to issue a warrant on the Treasurer for relator's salary as superintendent of a water division.⁴⁰ So, the writ will be issued to compel County Commissioners to establish a ditch fund and make special assessments to pay warrants issued for the construction of a ditch, under the Act of the legislature of the State of Washington of 1895.⁴¹ But an action for mandamus will not lie to compel a company to continue in business, but in such a case it can not continue to control the water.⁴² In Colorado it is held that the writ will not be issued by the Supreme Court to a District Judge

³⁵ *McPherson v. Alta Irrigation Dist.*, 14 Cal. App. 353, 112 Pac. Rep. 193.

³⁶ *Niday v. Barker*, 16 Idaho 703, 101 Pac. Rep. 254.

³⁷ *Nevada Bank v. Board of Supervisors*, 5 Cal. App. 638, 91 Pac. Rep. 122; *Hewel v. Hugin*, 3 Cal. App. 248, 84 Pac. Rep. 1002; *Miller v. Perris Irr. Dist.* 85 Fed. Rep. 693, 92 Fed. Rep. 263; *State ex rel. Witherop v. Brown*, 19 Wash. 383, 53 Pac. Rep. 548.

³⁸ *Board of Supervisors of River-*

side County v. Thompson, 122 Fed. Rep. 860, 59 C. C. A. 70.

³⁹ *State ex rel. Dffenbacher v. Lake Koen etc. Co.*, 63 Kan. 394, 65 Pac. Rep. 681.

⁴⁰ *State ex rel. Hamilton v. Grant*, 14 Wyo. 41, 81 Pac. Rep. 795, 1 L. R. A., N. S., 588, 116 Am. St. Rep. 982.

⁴¹ *Espy Estate Co. v. Board of Commissioners of Pacific County*, 40 Wash. 67, 82 Pac. Rep. 129.

⁴² *Fellows v. Los Angeles*, 151 Cal. 52, 90 Pac. Rep. 137.

directing him to order certain proceedings in the matter of taking testimony in an action brought for the purpose of adjudicating rights.⁴³ Again, in the same State, it is held that a void judgment against a county for costs can not be enforced by mandamus or otherwise.⁴⁴ In Nevada it was held that under the Act of March 5, 1887,⁴⁵ providing for the payment of bounties for the sinking of artesian wells of a given capacity, and wherein it was provided "no two wells shall receive a bounty if located in the same county," but that the bounty should be paid for the first well, and where the law was afterward amended in 1889,⁴⁶ but contains no words of repeal, it was held that where a well was sunk in a certain county and a bounty for it granted under the original Act, another bounty would not be granted under the amendatory Act for another well sunk in the same county, and the writ of mandamus for the payment of the bounty for such second well against the State Comptroller was denied.⁴⁷

§ 1650. Actions on contracts to protect rights—Specific performance.—Where the basis of a right rests in contract, equity, in a proper case, will protect the right of either party to the contract, by decreeing specific performance. And, upon this subject, there is nothing peculiar upon the enforcement of private contracts relating to water and other kindred rights, but the general law of contracts applies.¹ Before a court of equity will decree the enforcement of a private contract by specific performance protecting the rights claimed thereunder, it must be shown that the party seeking the relief has such a contract and that nothing remains to be performed thereunder upon his part; that there is a breach or a threatened breach by the adverse party; and that the contract is capable of being performed.² A contract to furnish the spe-

⁴³ *People ex rel. Sterling Irr. Co. v. Downer*, Judge, 19 Colo. 595, 36 Pac. Rep. 787.

See, also, *Union Colony v. Elliott*, 5 Colo. 371.

⁴⁴ *Downs v. Reno*, — Colo. —, 124 Pac. Rep. 582.

⁴⁵ Stat. 1887, p. 119.

⁴⁶ Stat. 1889, p. 84.

⁴⁷ *State ex rel. Blossom v. Horton*, 21 Nev. 300, 30 Pac. Rep. 876.

¹ For contracts, see Secs. 917-926.

For contracts with corporations, see Secs. 1500-1529.

For the enforcement of contracts, see Sec. 1520.

² One who has prepared his land and planted a crop, relying on a contract whereby another was required to furnish water, is entitled to an injunction compelling specific performance. *Bay City Irr. Co. v. Sweeney*, 81 S. W. Rep. 545.

See, also, *Bree v. Wheeler*, 4 Cal.

cific number of miner's inches of water for irrigation purposes, is held to be sufficiently certain to justify specific performance, where witnesses explain the meaning of the ambiguous "miner's inch."³ The Court will also grant specific performance of parol agreements, where there has been a part performance upon behalf of the party seeking the relief, so as to take the case out of the statute of frauds.⁴ Contracts by water companies with their consumers that, upon the happening of a certain contingency, such as the sale of a certain amount of water or water rights, that it will turn the ownership and management of its property rights to the consumers, will be specifically enforced.⁵

App. 109, 87 Pac. Rep. 255; *Gelwicks v. Todd*, 24 Colo. 494, 52 Pac. Rep. 788; *Clyne v. Benicia W. Co.*, 100 Cal. 310, 34 Pac. Rep. 714; *San Diego W. Co. v. San Diego Flume Co.*, 108 Cal. 549, 41 Pac. Rep. 495, 29 L. R. A. 839; *Bowen v. Webb*, 34 Mont. 61, 85 Pac. Rep. 739; *Id.*, 37 Mont. 479, 97 Pac. Rep. 839; *Giddings v. Seventy-Six Land etc. Co.*, 109 Cal. 116, 41 Pac. Rep. 788; *Perrine v. San Jacinto etc. Co.*, 4 Cal. App. 376, 88 Pac. Rep. 293; *Hunt v. Jones*, 149 Cal. 297, 86 Pac. Rep. 686; *Stanislaus Water Co. v. Bachman*, 152 Cal. 716, 93 Pac. Rep. 858, 15 L. R. A., N. S., 359.

³ *Ulrich v. Pateros Water Ditch Co.*, — Wash. —, 121 Pac. Rep. 818; *Russ etc. Co. v. Muscupiabe etc. Co.*, 120 Cal. 521, 52 Pac. Rep. 995, 65 Am. St. Rep. 186; *Hunt v. Jones*, 149 Cal. 297, 86 Pac. Rep. 686; *Perrine v. San Jacinto etc. Co.*, 4 Cal. App. 376, 88 Pac. Rep. 293; *Stanislaus W. Co. v. Bachman*, 152 Cal. 716, 93 Pac. Rep. 858, 15 L. R. A., N. S., 359; *Creer v. Bancroft etc. Co.*, 13 Idaho 407, 90 Pac. Rep. 228; *State ex rel. Krutz v. Washington etc. Co.*, 41 Wash. 283, 83 Pac. Rep. 308, 111 Am. St. Rep. 1019.

⁴ See Sec. 980.

See, also, *Flickinger v. Shaw*, 87 Cal. 126, 25 Pac. Rep. 286, 11 L. R.

A. 134, 22 Am. St. Rep. 234, where it is said: "To refuse specific performance under the circumstances would be to sanction fraud, and to allow a statute passed for the prevention of fraud to become the means of accomplishing a fraud."

See, also, *Churchill v. Russell*, 148 Cal. 1, 82 Pac. Rep. 440; *Dorris v. Sullivan*, 90 Cal. 279, 27 Pac. Rep. 216; *Blankenship v. Whaley*, 124 Cal. 300, 57 Pac. Rep. 79; *Schilling v. Romminger*, 4 Colo. 100; *Corfman v. Robbins*, 8 Ore. 279; *Combs v. Slayton*, 19 Ore. 99, 26 Pac. Rep. 661; *Bree v. Wheeler*, 4 Cal. App. 109, 87 Pac. Rep. 255; *Watts v. Spencer*, 51 Ore. 262, 94 Pac. Rep. 39; *Coventon v. Seufert*, 23 Ore. 548, 32 Pac. Rep. 508; *Lavery v. Arnold*, 36 Ore. 84, 57 Pac. Rep. 906, 58 Pac. Rep. 524; *Maple Orchard etc. Co. v. Marshall*, 27 Utah 215, 75 Pac. Rep. 369; *Bashore v. Mooney*, 4 Cal. App. 276, 87 Pac. Rep. 553; *Jensen v. Hunter*, 108 Cal. 17, 41 Pac. Rep. 14; *McPhee v. Kelsey*, 44 Ore. 193, 74 Pac. Rep. 401, 75 Pac. Rep. 713; *Hayes v. Fine*, 91 Cal. 391, 27 Pac. Rep. 772; *Griseza v. Terwilliger*, 144 Cal. 456, 77 Pac. Rep. 1034.

⁵ *La Junta etc. Co. v. Hess*, 6 Colo. App. 497, 42 Pac. Rep. 50, 31 Colo. 1, 71 Pac. Rep. 415; *Blakely v. Ft. Lyon*

But, where the party seeking the relief has not himself fully complied with its terms, an action for the specific performance of the contract will not lie.⁶ Again, a court of equity will not enforce a part specific performance. So, where it appears that the defendant is not able to perform all of its terms, the Court will not grant the decree for a part performance.⁷ Again, a court of equity will not decree a vain and useless thing, by granting the decree to specifically perform, where it is an impossibility for the party in default to perform, but will relegate the party seeking the relief to his action at law for damages for the breach.⁸ Again, where the defendant with a covenant of warranty sold land to the plaintiff, and also the right to a certain number of inches of water each season from a ditch company on making an annual payment therefor, and the ditch company refused to deliver the water on demand, it was held that an action for specific performance against the defendant would not lie; but that plaintiff's remedy was by action against the ditch company, or, failing in that, then against the defendant on the covenant for breach of warranty.⁹

Upon the questions of parties and pleadings in actions on contracts involving these rights, the law does not differ from actions on contracts involving water rights; and, therefore, an extended discussion upon these subjects would be useless. In a recent case decided by the Supreme Court of Idaho, where an action was brought by 14 persons owning distinct and separate tracts of land, upon 14 distinct and separate contracts, for a specific performance of said contracts, and the complaint was demurred to on the ground of a misjoinder of parties plaintiff and causes of action, it was held that the trial court erred in not sustaining such demurrer, the Court

Canal Co., 31 Colo. 224, 73 Pac. Rep. 249; *Patterson v. Ft. Lyon Canal Co.*, 36 Colo. 175, 84 Pac. Rep. 807; *Wyatt v. Larimer etc. Co.*, 18 Colo. 298, 33 Pac. Rep. 144, 36 Am. St. Rep. 280.

See, also, upon this subject, Secs. 1516-1518.

⁶ *Senior v. Anderson*, 155 Cal. 496, 47 Pac. Rep. 454.

⁷ *Dorris v. Sullivan*, 90 Cal. 279, 27 Pac. Rep. 216.

⁸ For actions for damages for breach of contract, see Sec. 1526.

⁹ *Starbird v. Jacobs*, 46 Colo. 507, 105 Pac. Rep. 872, the Court saying: "The authorities are not in substantial conflict on the question as to whether an action for specific performance will lie in cases like this, and we cite, as placing the question beyond dispute: *Brown v. Lapham*, 22 Colo. 264, 44 Pac. Rep. 504; *Kennedy v. Hazelton*, 128 U. S. 667, 9 Sup. Ct. Rep. 202, 32 L. Ed. 576; *Pomeroy on Specific Performance*, Secs. 465-475."

saying: "There is no community of interest whatever between the plaintiffs, and we know of no rule that would permit the plaintiffs to join in this action, no more than in an action on promissory notes held by each of 14 plaintiffs against one defendant." ¹⁰ But, where the contract is joint and there is a community of interest between the parties such parties may join as parties plaintiff, either to enforce specific performance, or for damages for the breach of the contract. ¹¹

The allegations of the complaint must, of course, set out the contract, and the rights claimed, all of which must be proven. ¹² A complaint asking for the specific performance of a contract and damages for its non-performance on the same facts sets up a single cause of action. ¹³

It is held in California that in an action for specific performance, the Court may award any legal damages suffered by delay in performance. In other words, as said by the Court: "He might have brought an action to recover such damages as were caused him by the breach; or, he might, as he did, bring his action for specific enforcement of the contract, and in such action obtain, not only the specific enforcement of his contract, but also such damages as he was lawfully entitled to; for it is thoroughly settled that a court of equity taking jurisdiction for the purpose of specifically enforcing a contract, takes full jurisdiction of all the rights of the parties, whether legal or equitable, and may award such legal damages as the vendee may have suffered by reason of the delay in performance." ¹⁴

§ 1651. Actions for writ of prohibition.—When a judge of a District Court, in a cause of which the Court has no jurisdiction,

¹⁰ Creer v. Bancroft etc. Co., 13 Idaho 407, 90 Pac. Rep. 228.

¹¹ Consolidated Canal Co. v. Peters, 5 Ariz. 80, 46 Pac. Rep. 74.

¹² If the allegations of the complaint were not sufficiently broad to cover the contract sued on, because not including certain water rights, but the defendant's answer stated and her proofs showed that the contract did include such water rights, an amendment should be allowed to make the

complaint correspond to the proof. Gelwicks v. Todd, 24 Colo. 494, 52 Pac. Rep. 788.

¹³ San Diego W. Co. v. San Diego Flume Co., 108 Cal. 549, 41 Pac. Rep. 495, 29 L. R. A. 839.

¹⁴ Abbott v. 76 Land & Water Co., — Cal. —, 118 Pac. Rep. 425.

See, also, Ulrich v. Pateros W. Ditch Co., — Wash. — 121 Pac. Rep. 818.

insists in its prosecution, or, in an action over which the Court has jurisdiction, the judge attempts to proceed with its prosecution by rules differing from those which ought to be observed in the action, an action for a writ of prohibition will lie commanding him to cease from the prosecution of the cause. The writ is issued by a superior court and directed to the judge of the inferior court and generally to the parties to the suit. So, in Idaho, it was held that the writ would be issued by the Supreme Court of that State to the judge of the District Court, where he attempted to proceed with the prosecution of an action in the adjudication of water rights, by the special proceedings provided in such cases by the Act of the legislature of the State of March 11, 1903,¹ and wherein it was provided that the action should be brought by a water commissioner, and that the summons against the defendants in such actions should be by publication only, and that the costs in such actions, including attorney's fees, should be paid by the county and afterward assessed against the lands of the real parties in interest, all against the constitution or laws of the State.² But, later, the same Court in an action involving the same subject-matter, with the above errors of procedure eliminated, but proceeding under the regular rules of practice of the State, refused to grant the writ.³ The Supreme Court will grant a writ of prohibition to prevent the District Court from proceeding further in an action, where it appears that the action is not within the jurisdiction of the District Court.⁴

The matter of fixing water rates is not judicial, and a writ of prohibition will not be granted against a board of commissioners to prohibit them from performing their duty.⁵ Neither will the writ be granted against town authorities having the jurisdiction of the abatement of a nuisance and who do not follow the law in that respect.⁶

¹ Laws, Idaho, 1903, p. 223.

² *Bear Lake County v. Budge*, 9 Idaho 703, 75 Pac. Rep. 614, 108 Am. St. Rep. 179.

³ *Boise etc. Co. v. Stewart*, 10 Idaho 38, 77 Pac. Rep. 25.

⁴ *People ex rel. Hinckley v. Dis-*

trict Court of Lake County, 29 Colo. 277, 68 Pac. Rep. 224, 93 Am. St. Rep. 61.

⁵ *Spring Valley Water Works v. Bartlett*, 63 Cal. 245.

⁶ *Montezuma v. Minor*, 70 Ga. 191.

• § 1652. **Actions for certiorari or review.**—A writ of *certiorari* or review will, in proper cases, be issued by a Supreme Court, or by a District Court, or a judge thereof, when an inferior court, board, or officer exercising judicial functions has exceeded its jurisdiction, by requiring the latter to transmit to it the records and proceedings in a cause or matter therein pending, or of some case or matter already terminated, where the procedure therein has not been according to the course provided by law, and where there is no appeal,¹ nor, in the judgment of the Court or judge, any plain, speedy, and adequate remedy. The judgment in such an action is either that the proceedings below be quashed or that they be affirmed. A writ of review lies only where the tribunal has exceeded its jurisdiction, or has exercised its judicial functions erroneously and contrary to the course of procedure applicable to the matter before it; and it does not go to a review of questions of fact, and has nothing to do with the evidence. So, where in a recent case in Oregon, the main contention of the plaintiffs was that by the terms of Sections 45 and 47 of the Act of the legislature of that State of 1909,² known as the "Water Code," the first person filing an application for a water right is entitled to the first right, and that the law is mandatory upon the State engineer to approve it, unless the proposed use is a menace to the safety and welfare of the public, in which case he must refer it to the board of control, and where in the case the State engineer, being of the opinion that the proposed use would be a menace to the safety and welfare of the public, referred such applications, by letter, to the board of control, with a statement of his opinion, and where the board, after a consideration of the

¹ State *ex rel.* Nelson v. Superior Court, 31 Wash. 32, 71 Pac. Rep. 601, where the writ was denied upon the ground that the petitioners had a plain and adequate remedy by appeal.

The Supreme Court, on *certiorari*, is not limited to the mere question whether the trial court has exceeded its jurisdiction, but may review errors at law affecting the substantial rights of the parties, and determine if there is competent evidence to warrant the judgment; but it is not authorized to set the judgment aside by reason of

a conflict of evidence, or errors not affecting substantial rights. Salt Lake City etc. Co. v. Salt Lake City, 24 Utah 249, 67 Pac. Rep. 672, 25 Utah 441, 71 Pac. Rep. 1069, 61 L. E. A. 648.

See, also, Imperial Water Co. v. Board of Supervisors of Imperial County, — Cal. —, 120 Pac. Rep. 780; Cookinham v. Lewis, 58 Ore. 484, 114 Pac. Rep. 88.

² Laws, 1909, pp. 332, 333; L. O. L., Secs. 6624, 6627.

same, directed the State engineer to refuse the applications, upon the grounds mentioned, and where the plaintiffs contended that there was no evidence in the case to disclose any such menace, and where the Circuit Court upon a hearing upon the return sustained the writ, the judgment of the lower court upon appeal was reversed by the Supreme Court and the cause remanded with directions to dismiss the writ, upon the ground that the Court in such an action could not consider the evidence.³ "It is a settled law that in *certiorari* the reviewing court will not consider the weight of conflicting evidence as to jurisdictional facts given before the tribunal whose action is sought to be reviewed."⁴

The writ will be granted to annul an order of a District Court enjoining a person from diverting water, where the Court had no jurisdiction, in a summary proceeding on notice of less than twenty-four hours to the person.⁵ It will also be granted where town authorities having jurisdiction of the abatement of a nuisance do not follow the law in administering it to the facts in the case.⁶ The writ will also be granted to annul condemnation proceedings in favor of a corporation organized for the furnishing of power, which has no franchise and is under no contractual relations to furnish power or electricity to any person for any purpose.⁷ Where the Court had jurisdiction, under certain limits, to entertain condemnation proceedings for the enlargement of an irrigation ditch, the writ will not lie to review its proceedings until after the final determination has been had.⁸ Neither will the writ lie to review a judgment

³ *Cookinham v. Lewis*, 58 Ore. 484, 114 Pac. Rep. 88; *State ex rel. Kettle Falls etc. Co. v. Superior Court*, 46 Wash. 500, 90 Pac. Rep. 650.

But see *Salt Lake City etc. Co. v. Salt Lake City*, 24 Utah 249, 67 Pac. Rep. 672, 25 Utah 441, 71 Pac. Rep. 1069, 61 L. R. A. 648.

⁴ *Imperial Water Co. v. Board of Supervisors of Imperial County*, — Cal. —, 120 Pac. Rep. 780.

⁵ *State ex rel. Pew v. District Court*, 34 Mont. 233, 85 Pac. Rep. 525.

⁶ *Montezuma v. Minor*, 70 Ga. 191; *People ex rel. New York etc. R. Co. v.*

Bd. of Health, 58 Hun 595, 12 N. Y. Supp. 561.

⁷ *State ex rel. Tacoma Industrial Co. v. White River Power Co.*, 39 Wash. 648, 82 Pac. Rep. 150, 2 L. R. A., N. S., 842, 4 Ann. Cas. 987.

⁸ *Sievers v. Garfield County Court*, 11 Colo. App. 147, 52 Pac. Rep. 634.

See, also, *State ex rel. Liberty Lake Irr. Co. v. Superior Court*, 47 Wash. 310, 91 Pac. Rep. 968; *State ex rel. Wilson v. Superior Court*, 47 Wash. 397, 92 Pac. Rep. 269; *State ex rel. Galbraith v. Superior Court*, 59 Wash. 621, 110 Pac. Rep. 429, 140 Am. St. Rep. 893.

in such a case, where notice in the hearing was waived, and the only question for review was the question of damages.⁹

In order to have the writ issued and a review of proceedings had there must be a legally constituted tribunal or board.¹⁰ The writ will not be granted to review the action of a municipal corporation in fixing water rates merely because the schedule did not originate with the executive board as required by the charter, where the rate was not inequitable, and had received the approval of the legislative department, whose approval would have been necessary had it originated in the manner pointed out by statute, and the irregularity may be cured by legislative means.¹¹

One of the most important cases to be decided upon *certiorari*, was the case of *Schodde v. Twin Falls Land & Water Co.*, decided by the Supreme Court of the United States on April 1, 1912,¹² in which the Court affirmed the judgment of the Circuit Court of Appeals.¹³

§ 1653. **Actions in quo warranto.**—Whenever it is claimed that an office is wrongfully held by a person, or a franchise is wrongfully held by a corporation or person, an action in *quo warranto* may be brought by the State. The writ is issued by the Court and commands the sheriff to summon the defendant to appear before the Court and to show cause by what authority he or it claims the office or franchise. The judgment is ouster, when it is against an officer or individuals, determined in the proceedings to be holding an office illegally; it is the forfeiture of the franchise, when it is against persons or a corporation determined to be wrongfully holding such franchise.

It is held to be the appropriate remedy to test the validity of reclamation districts, where there was no method provided by the

⁹ State *ex rel.* Kettle Falls etc. Co. v. Superior Court, 46 Wash. 500, 90 Pac. Rep. 650.

¹⁰ Such self-constituted board, having no legal existence, had no functions, judicial or otherwise, and could make no record which could be brought to the court on *certiorari*. State *ex rel.* Township of Dry Run

v. Board of Assessment, 1 S. D. 62, 45 N. W. Rep. 38.

¹¹ State *ex rel.* Hallauer v. Gosnell, 116 Wis. 606, 93 N. W. Rep. 542, 61 L. R. A. 33.

¹² 224 U. S. 107, 56 L. Ed. —, 32 Sup. Ct. Rep. 470.

¹³ 161 Fed. Rep. 43, 88 C. C. A. 207.

statute for the confirmation of the organization of such districts.¹ It is also the appropriate remedy to test the validity of irrigation district organizations, where special proceedings are not provided by statute for the confirmation of such organizations. But, where such special proceedings are provided, it is held that *quo warranto* will not lie to declare the organization invalid after the confirmatory decree has been rendered, upon the ground that it is a collateral attack upon the confirmatory decree.² *Quo warranto* is the proper proceeding to annul the franchises of a water company where it fails to comply with the law or with contracts. In Colorado it is provided that, when any corporation shall fail to deliver water upon demand and tender of the established rates, and having the ability to do so, it shall be the duty of the attorney-general to institute and prosecute to judgment and final determination proceedings in *quo warranto*, for the forfeiture of the corporate rights, privileges, and franchises, or by mandamus or other proper proceedings to compel it to do its duty in that behalf.³ *Quo warranto* is

¹ *People v. Reclamation Dist. No. 136*, 121 Cal. 522, 53 Pac. Rep. 1085, 50 Pac. Rep. 1068, where it is held that in *quo warranto* by a State against a pretended corporation, it is sufficient to allege the ultimate fact that it was usurping corporate functions without legal right, without stating the facts constituting such usurpation. *People ex rel. Thisby v. Reclamation Dist. No. 556*, 130 Cal. 607, 63 Pac. Rep. 27.

² *People v. Linda Vista Irr. Dist.*, 128 Cal. 477, 61 Pac. Rep. 86; *People v. Perris Irr. Dist.*, 132 Cal. 289, 64 Pac. Rep. 399; *Id.*, 142 Cal. 601, 76 Pac. Rep. 381; *People ex rel. Brady v. Browns Valley Irr. Dist.*, 119 Fed. Rep. 538, but it is held that *quo warranto* will not lie to declare the organization of the irrigation district invalid after the confirmatory decree has been rendered upon the ground that such an action would be a collateral attack upon the confirmatory decree.

People v. Selma Irr. Dist., 98 Cal. 206, 32 Pac. Rep. 1047; *People v. Linda Vista Irr. Dist.*, 128 Cal. 477, 61 Pac. Rep. 86.

In an action by the State, on the relation of an individual, against an irrigation district, formed under the statutes of the State, to have such district declared to have no legal existence, laches may be imputed to the plaintiff for failure to prosecute with due diligence, so as to authorize dismissal. *People ex rel. Stone v. Jeffers*, 126 Cal. 296, 58 Pac. Rep. 704.

See, also, for confirmatory proceedings for irrigation districts, Sec. 1421.

³ *Mills' Ann. Stat.*, Sec. 2307; 3 *Colo. Stats. Ann.*, Morr. Ed., 1911, Sec. 3274; *Rev. Stats.*, 1908, Sec. 3274.

See, also, *Larimer etc. Co. v. People*, 8 Colo. 614, 9 Pac. Rep. 794; *Palestine etc. Co. v. Palestine*, 41 S. W. Rep. 659; *aff'd* 91 Tex. 540, 44 S. W. Rep. 814, 40 L. R. A. 203; *St. Cloud v. Water etc. Co.*, 88 Minn. 329, 92 N. W. Rep. 1112; *Capital*

also a proper proceeding to compel the abatement of an obstruction of a stream which constitutes a nuisance.⁴

§ 1654. **Actions in ejectment.**—An action in ejectment will not lie for the recovery of the possession of a natural stream or water course as such.¹ The action will, of course, lie for the recovery of land covered with water, and the recovery will include all of the incidents of the land.² Again, a riparian owner may maintain an action for ejectment against one who unlawfully does acts which exclude him from the use of the stream.³ There are a number of property rights directly connected with the Western theory of water rights, for the recovery of the possession of which an action in ejectment will lie; but, of course, these rights must be in the nature of real property. A ditch or canal being land,⁴ it is held that an action in ejectment will lie on behalf of one entitled to the possession thereof.⁵ Such an action not being for an incorporeal here-

City W. Co. v. State, 105 Ala. 406, 18 So. Rep. 62, 29 L. R. A. 743; State *ex rel.* Macdonald v. Capital City W. Co., 102 Ala. 231, 14 So. Rep. 652.

⁴ Lake Shore etc. R. Co. v. State of Ohio *ex rel.* Humphrey, 165 U. S. 365, 41 L. Ed. 747, 17 Sup. Ct. Rep. 357; Dover v. Portsmouth Bridge, 17 N. H. 200; State *ex rel.* Blake v. Northeastern R. Co., 9 Rich. L. 247, 67 Am. Dec. 551.

¹ Swift v. Goodrich, 70 Cal. 103, 11 Pac. Rep. 561; Newell on Ejectment, 54; Gould on Waters, 3d Ed., Sec. 471.

Ejectment does not lie against one diverting or disturbing a water course, where the plaintiff does not have the title to the land under the water. Yelverton's Report, Eng. K. B. 143.

² Lawe v. Kaukauna, 70 Wis. 306, 35 N. W. Rep. 561; Beidelman v. Foulke, 5 Watts 308.

³ Cole v. Wells, 49 Mich. 450, 13 N. W. Rep. 813; Asher Lumber Co. v. Lumsford, 17 Ky. Law Rep. 245, 30 S. W. Rep. 968; Pitman v. Nun-

nely, 17 Ky. Law Rep. 793, 32 S. W. Rep. 606; Castle v. Elder, 57 Minn. 289, 59 N. W. Rep. 197; Glassell v. Hansen, 135 Cal. 547, 67 Pac. Rep. 964; Laddies' Seamen's Friend Soc. v. Halstead, 58 Conn. 144, 19 Atl. Rep. 658; Chapin v. Bourne, 8 Cal. 294; Nichols v. Lewis, 15 Conn. 143; Frisbie v. McClernin, 38 Cal. 568.

⁴ See Secs. 833, 834.

See, also, Bashore v. Mooney, 4 Cal. App. 276, 87 Pac. Rep. 553; Clark v. Willett, 35 Cal. 534, 4 Morr. Min. Rep. 628.

But see Mt. Carmel Fruit Co. v. Webster, 140 Cal. 183, 73 Pac. Rep. 826.

⁵ Dondero v. O'Hara, 3 Cal. App. 633, 86 Pac. Rep. 985; Reed v. Spicer, 27 Cal. 58, 4 Morr. Min. Rep. 330; Integral etc. Co. v. Altoona etc. Co., 75 Fed. Rep. 379, 21 C. C. A. 409, 44 U. S. App. 566; Nevada etc. Co. v. Kidd, 37 Cal. 282; Mitchell v. Amador etc. Co., 75 Cal. 464, 17 Pac. Rep. 246; Silver Peak Mines v. Valcaldia, 79 Fed. Rep. 886; Stockley v. Sissana,

ditament merely, but for the ditch itself, an action in ejectment will therefore lie.⁶ It is also held that an action in ejectment will lie to recover a certain ditch and the water rights used in connection therewith.⁷ However, under the more modern practice, the adjudication of water rights is unusual by actions at law in ejectment, the more common method of procedure being to try the rights to the same by actions in equity brought for the determination and adjudication of such rights,⁸ or by the statutory proceedings provided for by the statutes of various States.⁹

An action for ejectment will lie in behalf of a person entitled to the possession of land under the land laws of the United States, although no patent has been issued to him.¹⁰

A distinction must be made between a ditch or canal and the easement for the same. A mere easement for a ditch or canal, being simply a right in the owner of one tract of land to the use of the land of another for this special purpose not inconsistent with the general property rights of the owner, and being an incorporeal

119 Fed. Rep. 822, 56 C. C. A. 324; *Ada County Farmers Irr. Co. v. Farmers County*, 5 Idaho 793, 51 Pac. Rep. 990, 40 L. R. A. 485.

But see *Mt. Carmel Fruit Co. v. Webster*, 140 Cal. 183, 73 Pac. Rep. 826; *Swift v. Goodrich*, 70 Cal. 103, 11 Pac. Rep. 561.

⁶ *Integral etc. Co. v. Altoona etc. Co.*, 75 Fed. Rep. 379, 21 C. C. A. 409, 44 U. S. App. 566.

⁷ *Integral etc. Co. v. Altoona etc. Co.*, 75 Fed. Rep. 379, 21 C. C. A. 409, 44 U. S. App. 566; *Nevada etc. Co. v. Kidd*, 37 Cal. 282; *Mitchell v. Amador etc. Co.*, 75 Cal. 464, 17 Pac. Rep. 246.

⁸ For the adjudication of rights in equity, see Secs. 1530-1566.

⁹ For the statutory adjudication of water rights, see Secs. 1567-1584.

For the determination of rights by boards, see Secs. 1585-1595.

A vendor of a contract of sale which does not provide that time is the essence, nor stipulate for a for-

feiture on failure to pay the price, is not entitled to maintain ejectment against the purchaser, who has paid a part of the price and taken possession, because of his failure to pay the balance, without showing an abandonment of the contract. *Brixen v. Jorgensen*, 28 Utah 290, 78 Pac. Rep. 674, 107 Am. St. Rep. 720; *Id.*, 33 Utah 97, 92 Pac. Rep. 1004.

¹⁰ *Howard v. Perrin*, 200 U. S. 71, 50 L. Ed. 374, 26 Sup. Ct. Rep. 195; *aff'g Id.*, 8 Ariz. 347, 76 Pac. Rep. 460, where the defendant claimed no title to the land except by the appropriation of subterranean waters from wells sunk thereon.

See, also, *Deseret Salt Co. v. Tarpey*, 142 U. S. 241, 35 L. Ed. 999, 12 Sup. Ct. Rep. 158.

See *Bonetti v. Ruiz*, 15 Cal. App. 7, 113 Pac. Rep. 118, holding the injunction is the proper remedy where one wrongfully diverts percolating water from an abutting owner of the fee.

hereditament, an action of ejectment will not lie for the possession of the same as against the owner of the land.¹¹ The owner of mere easement is not entitled to maintain ejectment to try title as against the fee owner of land rightfully in his possession.¹² But the remedy for the interference with an easement by the owner of the land must be by injunction, or some other form of action.¹³

In an action in ejectment, where the plaintiffs claimed that they were entitled to the possession of a certain tract of land, through a certain deed, and it was alleged by the answer of the defendant and proven by the evidence that the deed, although absolute in form, was but a mortgage given to secure the performance of a certain contract to furnish water for the irrigation of lands, it was held that ejectment would not lie, and that an obligation to complete an irrigation canal and to furnish water for land in the future has the same effect on the question of a deed to secure performance as if it were an obligation to pay a debt in a fixed sum due at a specified future date; and, further, that although in the action the deed under which the plaintiffs claimed was found to be a mortgage, it was improper to enter judgment for foreclosure, where neither the complaint nor reply brought the foreclosure in issue, and where the proof did not appear to have been offered with foreclosure in view.¹⁴

The rule in ejectment is that the plaintiff must recover, if at all, upon the strength of his own title; but, in this respect, his prior possession for any considerable length of time is *prima facie* evidence of title, and sufficient to enable him to a judgment therefor as against a mere volunteer or trespasser.¹⁵

§ 1655. **Actions for receivers.**—Under certain conditions an action for the appointment of a receiver will lie against a water com-

¹¹ *Integral etc. Co. v. Altoona etc. Co.*, 75 Fed. Rep. 379, 21 C. C. A. 409, 44 U. S. App. 566; *Tibbetts v. Bakewell*, — Cal. —, 35 Pac. Rep. 1007.

¹² *Cornick v. Arthur*, 31 Tex. Civ. App. 579, 73 S. W. Rep. 410. See, also, *Mt. Carmel Fruit Co. v. Webster*, 140 Cal. 183, 73 Pac. Rep. 826.

¹³ For injunctions for the interference with easements, see Sec. —.

See, also, *Bonetti v. Ruiz*, 15 Cal. App. 7, 113 Pac. Rep. 118.

¹⁴ *Boyer v. Paine*, 60 Wash. 56, 110 Pac. Rep. 682.

¹⁵ *Browning v. Lewis*, 39 Ore. 11, 64 Pac. Rep. 304; *Oregon etc. Co. v. Hertzberg*, 26 Ore. 216, 37 Pac. Rep. 1019; *Johnston v. Meaghr*, 14 Utah 426, 47 Pac. Rep. 861.

pany, consisting of either a corporation or a partnership, and a receiver will be appointed and authorized by the Court to take charge of all of the property and assets of the company and to either continue the management of the business, or to wind up the affairs of the company and to dispose of its property, all under the orders and direction of the Court. And it is therefore held, in a recent case in Idaho, that where the plaintiff alleges that it has acquired an interest in an irrigation system by the purchase of water rights therein, and the irrigation company owning such system becomes insolvent and is unable to protect and care for its property and comply with its contracts with the plaintiff to furnish water, the District Court or the judge thereof has the power and jurisdiction to appoint a receiver for such irrigation company to preserve and care for and operate its property pending the litigation as to plaintiff's interest in said property.¹ But a receiver will not be appointed unless the plaintiff's right is sufficiently probable, nor when the property of the company is not in danger of loss, removal, material injury, or that the business will be mismanaged; and, when wrongfully appointed by the trial court, the receiver may be removed upon appeal by a mandatory order of the Appellate Court.² It is

¹ Idaho Fruit Land Co. v. Great Western etc. Co., 17 Idaho 273, 105 Pac. Rep. 562.

See, also, Russ Lum. & M. Co. v. Muscupiabe etc. Co., 120 Cal. 521, 52 Pac. Rep. 995, 65 Am. St. Rep. 186, holding that while a receiver of an irrigation company is not bound to perform its contracts to supply water, yet a demand on him is proper, as performance, if possible, might accrue to the interest of creditors.

See, also, Savings & Trust Co. v. Bear Valley Irr. Co., 93 Fed. Rep. 339; Atlantic Trust Co. v. Woodbridge etc. Co., 79 Fed. Rep. 39; *Id.*, 79 Fed. Rep. 501; *Id.*, 86 Fed. Rep. 975; Los Angeles v. Los Angeles etc. Co., 124 Cal. 368, 57 Pac. Rep. 210; West River City 350-Inch Water Co. v. Rogers, 16 Cal. App. 262, 116 Pac. Rep. 683; Hewitt v. Great Western

Beet Sugar Co., 20 Idaho 235, 118 Pac. Rep. 296.

² Ogden City v. Bear Lake etc. Co., 16 Utah 440, 52 Pac. Rep. 697, 41 L. R. A. 305.

See, also, New Albany Waterworks v. Louisville Banking Co., 122 Fed. Rep. 776, 58 C. C. A. 576.

The court will not appoint a receiver of a public service irrigation corporation to supply the water needed to irrigate the lands of those who have purchased water rights where there has been no misappropriation of corporate funds, and, where the owners of the lands have refused to pay further water rents on the ground that the damages for the failure of the corporation to comply with the contracts to furnish water, exceeded the amount claimed for water rents, and where the only source of revenue of the cor-

held in Utah that an order appointing a receiver is a final judgment from which an appeal may be taken to the Supreme Court.³

It has sometimes occurred that a water company, even before it had got to be a fairly going concern, and before the construction of its works had been completed, has become financially involved with mortgage debts, liens for labor and material, and other claims, so that it was unable to complete the works and to perform its contracts, and to accomplish the purposes for which it was organized. A common procedure in cases of this kind is to have a receiver appointed to take charge of the property of the company and usually sell the same and apply the proceeds to the payment of the indebtedness. In cases of this nature the question has arisen as to the preference right of claims for services and materials as against prior mortgage claims. And, upon this subject it is held that claims for work and material furnished in the operation of the company's business, and which were essential to its operation and to the preservation of its property, are preferred, on the appointment of a receiver, over a prior mortgage of the company's property. But claims against the company for services and material furnished in the construction of an extension which was not necessary to preserve the property of the company, or to keep it in operation, are not entitled to preference over the prior mortgage.⁴ Neither are claims for materials furnished the company for use in the original construction of its works given the preference over a prior mortgage.⁵ The principle on which claims for labor and materials furnished to a corporation of a public nature, like a railroad or an irrigation company, are given priority in equity over a prior mortgage only apply to claims incurred to keep its business going, either

poration is the collection of water rents from the purchasers of water rights, and where it is not shown that a receiver has facilities for collecting those rents superior to those possessed by the corporation, or that sufficient funds for the operation of the irrigation plant can be collected by any one. *Grandfalls etc. Co. v. White*, — Tex. Civ. App. —, 131 S. W. Rep. 233.

³ *Ogden City v. Bear Lake etc. Co.*, 16 Utah 440, 52 Pac. Rep. 697, 41 L. R. A. 305.

⁴ *Atlantic Trust Co. v. Woodbridge etc. Co.*, 86 Fed. Rep. 975; *Id.*, 79 Fed. Rep. 501.

For preference right of mechanics' liens over mortgages, see Sec. 1022.

⁵ *Savings & Trust Co. v. Bear Valley Irr. Co.*, 93 Fed. Rep. 339.

before the receiver is appointed or while the property is in the hands of the Court.⁶

So, also, the script of a water company, issued in payment of claims for labor, which stipulates that it is accepted for the purpose only of being used in the payment for the purchase of a water right, is a floating right, not yet attached to any specific property, and, in the absence of a showing by the holder that he has land alongside the ditch or canal, and that the ditch has arrived opposite his land, accompanied by an offer of the script in payment for the water right, can not be recognized to the prejudice of a prior mortgage lien by decreeing a conveyance of a water right, or by providing in the decree that the holder shall be paid the amount of the script out of the proceeds of the sale of the company's property in advance of the mortgage, or by decreeing that it shall be recognized as a subsisting right by the purchaser of the property.⁷

§ 1656. **Actions for an accounting.**—Under certain circumstances, an action for an accounting will lie by a partner against his co-partners,¹ or by a stockholder against his corporation.² The jurisdiction of a court of equity in these actions is usually based upon the grounds of the complicated character of the accounts, the need of discovery, and the existence of a trust or fiduciary relation. There are very few cases reported which involve the rights under discussion, but that is no reason why, in a proper case, such an action would not lie. A parol agreement of partnership in the profits of buying and selling real property is not within the statute of frauds, and, therefore, an action for an accounting by one partner against another will lie.³ But in an action in California, brought by certain stockholders to compel an accounting by the directors of a ditch and canal company for losses claimed to have been sustained, resulting from the alleged fraudulent failure of the directors to sell water which flowed through the ditch of the com-

⁶ *Savings & Trust Co. v. Bear Valley Irr. Co.*, 93 Fed. Rep. 339.

See, also, *Bear Lake etc. Co. v. Garland*, 164 U. S. 1, 41 L. Ed. 327, 17 Sup. Ct. Rep. 7; *aff'g Id.*, 9 Utah 350, 34 Pac. Rep. 368.

⁷ *Atlantic Trust Co. v. Woodbridge etc. Co.*, 79 Fed. Rep. 501.

¹ For partnerships, see Secs. 1460, 1461.

² For corporations, see Secs. 1464, 1508.

³ *Bates v. Babcock*, 95 Cal. 479, 30 Pac. Rep. 605, 16 L. R. A. 745, 29 Am. St. Rep. 133.

pany, and to obtain a judgment for the amount so found due for such alleged failure to sell the water, and where the complaint alleged that the company "is incorporated under and by virtue of the laws of the State of California, for the purpose of constructing a water ditch for irrigating purposes, and that defendants have fraudulently distributed the water gratuitously," without alleging that the corporation was organized for profit or for the purpose of selling water, it was held that the complaint did not state a cause of action, since it showed no misconduct on the part of the defendants, and "having violated no obligation which was binding upon them, they can not be made to respond in damages for failing to sell water."⁴

§ 1657. **The enforcement of the criminal statutes.**—In every State of the arid and semi-arid West, there are criminal statutes relating to the interference with water rights, and the enforcement of these statutes which tend to protect valid rights in their owners.¹ The stealing of water is made, in some jurisdictions, a misdemeanor,² and in others a crime.³ The cutting into and the destruction of any irrigation, or other water works, maliciously and wilfully, is usually made a crime.⁴ Criminal statutes are also provided making it a misdemeanor to maintain appliances injurious to fish, for the discharging of refuse or deleterious matter into the streams to their injury,⁵ or for the failing to screen irrigation ditches against their access, or for failing to provide for fishways over dams and obstructions placed in the streams. There are also

⁴ Applegarth v. McQuiddy, 77 Cal. 408, 19 Pac. Rep. 692.

¹ For the statutes upon the subject, see Part XIV.

² Cal. Pen. Code, Sec. 499.

³ In a prosecution for the wrongful taking of water from an irrigating canal, the information failing to allege ownership of the canal was fatally defective, the statute under which the suit was brought being analogous to those of theft and malicious mischief involving trespass upon the property of others. *Dolan v. State*, Tex. Crim. App., 129 S. W. Rep. 840.

⁴ Wash. Ballinger's Ann. Codes, Sec. 7154, providing for the punishment of persons who shall wilfully or maliciously make any aperture in any milldam, canal, flume, aqueduct, reservoir, embankment, or other structure erected to conduct water for agricultural purposes; held, to include a dam erected for storing and conducting water for irrigation purposes. *State v. Tiffany*, 44 Wash. 602, 87 Pac. Rep. 932.

⁵ *People v. Truckee Lumber Co.*, 116 Cal. 397, 48 Pac. Rep. 374, 39 L. R. A. 581, 58 Am. St. Rep. 183.

criminal statutes against the pollution of streams or the poisoning of their waters.⁶ It is also made a misdemeanor in some States to waste water, to interfere with headgates or measuring devices, or for the interference with officers in the performance of their duties in the distribution of water. But it was held in an early case in New Mexico that an offense is not created which may be prosecuted as a crime by a statute providing for the enforcement of a pecuniary penalty against a person interfering with the water ditch or acequia without the consent of the owner thereof, and that such person should be fined for each offense, and that he may be compelled to work on the public works in default of payment, where the statute also further provides that the fine shall be recovered by the public officer and applied by him for the benefit of the ditch.⁷ In California it was held that under the penal code, Section 165, prescribing a penalty for offering bribes "to any member of a common council, board of supervisors, or board of trustees of any county, city, or corporation, with intent to corruptly influence such member in his action on any matter pending before the body of which he is a member, . . . is punishable by imprisonment in the State prison," etc., an indictment charging the defendant with having offered a bribe "to one Giddings, a member of the board of directors of a corporation, to wit, 'Alta irrigation district,' " etc., and failing to allege that such corporation is a public corporation, is fatally defective, as the section applies only to public and quasi-public corporations.⁸

The making of certain acts a crime or a misdemeanor, or the enforcement of such statute and punishment of the defendant thereunder, does not preclude a civil action for an injunction enjoining the defendant from the continuance of such acts.⁹

§ 1658. Protection of rights by physical force.—Up to a certain extent, an owner may protect his water rights or the works used in connection therewith, by physical force. To be sure the use of

⁶ For criminal statutes against pollution, see Sec. 1145. See, also, statutes under Part XIV.

⁷ Territory v. Tafoya, 2 N. M. 191; Territory v. Baca, 2 N. M. 183.

⁸ People v. Turnbull, 93 Cal. 630, 29 Pac. Rep. 224.

⁹ People v. Truckee Lumber Co., 116 Cal. 397, 48 Pac. Rep. 374, 39 L. R. A. 581, 58 Am. St. Rep. 183; Spring Valley Water Works v. Fifield, 136 Cal. 14, 68 Pac. Rep. 108.

For the criminal statutes of the respective States, see Part XIV.

physical force in the protection of such rights is not an action at law or in equity, the subject under discussion, but the use of physical force in protecting such rights has resulted in many actions at law, and some in equity. Reasonable physical force is always permitted to eject trespassers from off one's property. But the criminal and civil codes provide plenty of redress against trespassers; and, therefore, the use of physical force should not be resorted to unless it is absolutely necessary, and when the trespasser is caught in some overt act, and even then it should not be excessive in its application. In one case, cited by Mr. Wiel,¹ the Court held that this right extends to a "*moliter manus imposit*," which, according to Mr. Wiel's translation from the Latin, means "a gentle use of one's fists." We will add, upon our own responsibility, that the use of force, according to a modern slang expression, may also, under great provocation, be extended to "a swift kick in the rear." But, throughout the entire West, the use of excessive force has too often been resorted to to prevent some trespass upon the rights of another, and even to redress some real or imaginary wrong. Men have been killed, maimed, and injured for life, by others taking the law in their own hands, in the attempt to protect what they deemed to be their rights. The assailant has also been convicted for these acts, and has been punished. Therefore, a reasonable degree of physical force may be resorted to to prevent an immediate trespass on these rights, where such rights are clear and absolute in the assailant. In a recent analogous case in California, where a trespasser brought a civil action for damages resulting from an assault and battery in being forcibly ejected from an oil claim by the owner thereof, the Court held that it was a complete defense to the maintenance of the action, either for exemplary or actual damages, if it be shown that the injuries claimed to have been sustained by one wrongfully in possession were sustained while the owner of the property was exercising a right to the possession of his lands, although using force to obtain such possession, if no more force was employed than was necessary to accomplish it.² But the use of phys-

¹ Wiel on Water Rights in the Western States, 2d Ed., Sec. 215, citing Mechanics' Foundry of San Francisco v. Ryall, 75 Cal. 601, 17 Pac. Rep. 703.

² Walker v. Chanslor, 153 Cal. 118, 94 Pac. Rep. 606, 17 L. B. A., N. S., 455, 126 Am. St. Rep. 61.

See, also, Butte etc. Co. v. Morgan, 19 Cal. 609, 4 Morr. Min. Rep. 583;

ical force to any extent whatever should never be resorted to to redress a wrong, or to punish the trespasser, after the trespass has been committed, and the trespasser has departed from the premises. This matter should be left entirely to the courts.

The owner of the right to the use of water, whether he claims the same as an appropriator or as a riparian owner, has the right to go upon the upper lands of another and to remove obstructions from the natural stream, which materially interfere with his rights, as far as he can do so peaceably, doing no unnecessary injury to the lands of the other, and that, too, without rendering himself a trespasser on such lands.³ So, too, the right of an easement over the lands of another for a ditch and canal, gives as an incident thereto, the right to go upon the lands and remove obstructions from the ditch, or to make necessary repairs, without rendering the owner of the ditch a trespasser.⁴ But the one attempting to remove the obstructions or to make the repairs must be careful not to exceed his rights, or to injure the lands of the owner, for, if he does so he will be liable as a trespasser.⁵ Again, the owner of an

McCarty v. Fremont, 23 Cal. 196; Canavan v. Gray, 64 Cal. 5, 27 Pac. Rep. 788; Sterling v. Warden, 51 N. H. 217, 12 Am. Rep. 80; Burnham v. Stone, 101 Cal. 164, 35 Pac. Rep. 627.

³ For the right to remove obstructions, at common law, see Sec. 545.

See, also, Miner v. Gilmour, 12 Moore, P. C. C. 131, 7 Week. Rep. 328, 14 Eng. Reprint 861; Strong v. Benedict, 5 Conn. 210; Darlington v. Painter, 7 Pa. 473.

An appropriator may also go upon the land of an upper proprietor and remove obstructions from the bed of the natural stream. Crisman v. Heiderer, 5 Colo. 589.

Ware v. Walker, 70 Cal. 591, 12 Pac. Rep. 475; Ennor v. Raine, 27 Nev. 178, 74 Pac. Rep. 1; Keller v. Fink, 103 Cal. 17, 37 Pac. Rep. 411, where it was held that, where the plaintiff had the right to the water of a ditch and to a dam on defendant's land, which the latter used for

pasturing stock, defendant was not liable for injuries to the dam by cattle trampling and treading the same, since the plaintiff had the right to enter the land and protect the dam against such injuries.

See, also, for the appropriator's right to the flow of the stream, Secs. 801, 802.

⁴ See Secs. 991-993; Carson v. Gentner, 33 Ore. 512, 52 Pac. Rep. 506, 43 L. R. A. 130; Pico v. Colimas, 32 Cal. 578; McGuire v. Brown, 106 Cal. 660, 39 Pac. Rep. 1060, 30 L. R. A. 384; United States etc. Co. v. Gallegos, 89 Fed. Rep. 773, 32 C. C. A. 470, 61 U. S. App. 13; Flickinger v. Shaw, 87 Cal. 126, 25 Pac. Rep. 268, 11 L. R. A. 134, 22 Am. St. Rep. 234; Spear v. Cook, 8 Ore. 380; Ennor v. Raine, 27 Nev. 178, 74 Pac. Rep. 1.

⁵ Greenslade v. Halliday, 6 Bing. 379, 4 Moore & P. 71, 8 L. J. C. P. 124.

The mere right to maintain a ditch

easement can not exceed his rights and use the same for any other purpose than that for which the same was acquired. So, it is held in a Utah case, that the owners of the land, over which there was a right of way for a ditch, might forcibly remove from such right of way, building material intended to be used in the erection of a saloon, so long as no unnecessary damage is done thereto, and they were not liable to the owner thereof in damages.⁶

A city without power to take possession of a water works plant rightfully may be enjoined from doing so forcibly.⁷

§ 1659. Protection by various actions previously discussed.—

In a general sense, any action brought in a court of justice is for the protection of certain rights either to the individual or to the State or public. In addition to the miscellaneous actions discussed in this chapter for the protection of water rights, and rights kindred thereto, there are a number of other actions which have been fully discussed under different heads throughout this work, and concerning which we will give no further extended discussion here.

First and foremost among these actions are those brought for an injunction, either prohibitory or mandatory, and concerning which subject we have devoted an entire chapter.¹

Actions to determine and adjudicate water rights, either as between appropriators, riparian owners, or as between appropriators and riparian owners, and to quiet the title thereto in the respective parties, either with or without asking for injunctive relief, are in the nature of actions for the protection of rights.²

So, again, actions for past injuries to rights and for damages therefor have the tendency to protect such rights from future invasion. This subject will be fully discussed in a future chapter.³

does not give the right to use the soil of the land owner adjoining the ditch in making such repairs. *Thompson v. Uglow*, 4 Ore. 369.

⁶ *Whitmore v. Pleasant Valley etc. Co.*, 27 Utah 284, 75 Pac. Rep. 748.

⁷ *Los Angeles v. Los Angeles etc. Co.*, 124 Cal. 368, 57 Pac. Rep. 210.

¹ For the protection of rights by injunction, see Chap. 81, Secs. 1596-1647.

² For actions to adjudicate water

rights in equity, see Chap. 78, Secs. 1530-1566.

For the statutory adjudication of water rights, see Chap. 79, Secs. 1567-1584.

For the determination of water rights by boards, see Chap. 80, Secs. 1585-1595.

³ For injuries to rights and damages therefor, see Chap. 83, Secs. 1660 *et seq.*

An action at law will lie for the recovery of rent to premises and it is held that a lessee of lands may be found to have had sole and exclusive possession so as to be liable for rent, notwithstanding a brief and insignificant trespass upon water rights appurtenant thereto.⁴

Again, upon the subject of contracts, besides actions for the specific performance of contracts discussed in this chapter, we have discussed in other chapters actions for the protection of contract rights.⁵ These actions include actions for the enforcement of contracts,⁶ for the recovery on contracts for water furnished,⁷ the reformation of contract,⁸ the rescission of contracts,⁹ the cancellation or annulment of contracts,¹⁰ and for actions for the breach of contracts.¹¹ All of these actions tend in a way to protect the rights under discussion in their respective owners. Actions may also be brought to foreclose a mortgage or a mechanic's lien covering the property under discussion, and title to the property may be acquired by the purchasers at such foreclosure sale.¹² Again, in another portion of this work, we have fully discussed actions for the condemnation of land and water rights by virtue of the power of eminent domain.¹³

An action may also be brought to declare and enforce a parol trust.¹⁴

It is held, however, that "One seeking to have rights declared and enforced, founded upon a verbal or written agreement, and involving or growing out of an alleged trust or confidential relation, is

⁴ Kelly v. Long, — Cal. App. —, 122 Pac. Rep. 832.

⁵ For the enforcement of performance of contracts, see Sec. 1520.

⁶ See Sec. 1520.

⁷ Secs. 1521, 1522.

⁸ Sec. 1523.

An action may be maintained to reform a deed and to restrain the diversion of water. State v. Lorenz, 22 Wash. 289, 60 Pac. Rep. 644.

⁹ Sec. 1524.

¹⁰ Sec. 1525.

¹¹ Secs. 1526-1529.

¹² For the foreclosure of mortgages, see Secs. 1019, 1020.

For the foreclosure of mechanics' liens, see Secs. 1021, 1022.

For preference rights as between mortgage and mechanics' liens, see Sec. 1022.

See, also, Hewitt v. Great Western Beet Sugar Co., 20 Idaho 235, 118 Pac. Rep. 296.

¹³ For rights acquired by eminent domain, see Secs. 1059-1098.

For actions for condemnation, see Secs. 1092-1097.

¹⁴ Coray v. Holbrook, — Utah —, 121 Pac. Rep. 572.

required, among other things, to show, with at least reasonable certainty, the terms of the agreement and the character and extent of the trust or confidential relation. These things can not be left to loose or flexible language, or to vague or indefinite terms. The Court, from the language used, from the acts and conduct of the parties, and from all the facts and circumstances surrounding the alleged agreement, and under which it was made, must be able to ascertain, with at least reasonable certainty, the essential terms of the agreement and the character and extent of the alleged trust or confidential relation."

Action may also be brought between tenants in common and partners for contribution for the expenses of maintaining and repairing of ditches, canals, and other works, and to recover the proportion of the expenses expended by one party for the maintenance and repair of such works.¹⁵

¹⁵ See Secs. 992, 993, 1457. etc. Co., — Cal. App. —, 124
See, also, *Bogers v. West Riverside* Pac. Rep. 447.

CHAPTER 83.

ACTIONS FOR DAMAGES.

- § 1660. Scope of chapter.
- § 1661. Actions for damages—In general.
- § 1662. Damages to prior appropriator for unlawful diversion.
- § 1663. Damages to riparian owners for unlawful diversion.
- § 1664. Damages to riparian owners for diversion as against other owners.
- § 1665. Damages to riparian owners for diversion as against appropriators.
- § 1666. Damages for the unlawful diversion of subterranean waters.
- § 1667. Damages for the failure to furnish water under duty imposed by law.
- § 1668. Damages for breach of contract to furnish water.
- § 1669. Damages caused by the breakage of works.
- § 1670. Liability for negligence—Damages from reservoirs.
- § 1671. Liability fixed by statute—Damages caused by the breakage of works.
- § 1672. Liability for negligence—Damages from ditches and canals.
- § 1673. Injuries from ditches and canals—Actions for damages lie when.
- § 1674. Damages for flooding lands from overflow and leakage from works.
- § 1675. Damages from seepage of water.
- § 1676. Damages for the flowage or backing up of water.
- § 1677. Damages for flooding lands by the interference with the flow of surface waters.
- § 1678. Damages for injuries to ditches or other works.
- § 1679. Damages from logging.
- § 1680. Actions on bonds for damages.
- § 1681. Damages as the result of fraud.
- § 1682. Damages for using force.
- § 1683. Jurisdiction of courts—Venue.
- § 1684. Parties plaintiff.
- § 1685. Parties defendant—Joint or several tort feorsors.
- § 1686. Pleadings—Complaint.
- § 1687. Pleadings—Answer—Cross-complaint.
- § 1688. Pleadings—Defense—Acts of the plaintiff and contributory negligence.
- § 1689. Pleadings—Defenses—Grant or contract.
- § 1690. Pleadings—Defenses—Limitation of actions and prescriptions.
- § 1691. Act of God or inevitable accident as a defense for injuries to property.
- § 1692. Act of God as a defense for failure to deliver water under duty or contract.
- § 1693. Evidence—Burden of proof.
- § 1694. Instructions to the jury.

- § 1695. Verdict—Non-suit.
- § 1696. Judgments—Measure of damages.
- § 1697. Compensatory damages—Measure of damages for injuries to lands.
- § 1698. Compensatory damages—Measure of damages for injuries to crops.
- § 1699. Compensatory damages—Measure of damages for the loss of stock.
- § 1700. Compensatory damages—Measure of damages for loss of power.
- § 1701. Compensatory damages—Measure of damages for loss of or injury to a water right.
- § 1702. Exemplary or punitive damages.
- § 1703. Nominal damage.
- § 1704. New trial—Appeal.

§ 1660. **Scope of chapter.**—Having discussed in the previous chapters of this part of this work the adjudication of water rights, and the rights of ditches, canals, and other works constructed for the purpose of utilizing such water rights,¹ also the protection of rights by actions for injunction and miscellaneous actions,² we will now discuss the subject of actions for damages for injuries to water and kindred rights, with the exception of the question of damages for the pollution of water, which subject has been discussed in a previous chapter.³ The question of damages on eminent domain has also been discussed in previous sections.⁴

§ 1661. **Actions for damages—In general.**—The law does not always afford a complete remedy by an action in equity for injuries to water or kindred rights, but a proper action in equity, supplemented by an action at law for damages, either in the same or separate suits, will afford the party injured complete relief. An action for damages for past injuries is an action at law, and does not differ materially, where the damages suffered are caused by injuries to water rights, or the works connected therewith, from actions for damages for other injuries. There is no special procedure provided for the prosecution of these actions, as is the case in some States relative to the adjudication of water rights,¹ but the general law relating to all damage suits applies.

In order to be entitled to damages for the injury to a water right, or to the ditch, canal, or other works connected therewith, the per-

¹ For the adjudication of water rights, see Chaps. 78, 80, Secs. 1530-1595.

² See Chaps. 81, 82, Secs. 1596-1659.

³ See Chap. 58, Secs. 1129-1147.

⁴ See Secs. 1090, 1091.

¹ For the statutory adjudication of water rights, see Secs. 1567-1584.

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- § 1678. Damages for injuries to ditches or other works.
- § 1679. Damages from logging.
- § 1680. Actions on bonds for damages.
- § 1681. Damages as the result of fraud.
- § 1682. Damages for using force.
- § 1683. Jurisdiction of courts—Venue.
- § 1684. Parties plaintiff.
- § 1685. Parties defendant—Joint or several tort feasons.
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- § 1687. Pleadings—Answer—Cross-complaint.
- § 1688. Pleadings—Defense—Acts of the plaintiff and contributory negligence.
- § 1689. Pleadings—Defenses—Grant or contract.
- § 1690. Pleadings—Defenses—Limitation of actions and prescriptions.
- § 1691. Act of God or inevitable accident as a defense for injuries to property.
- § 1692. Act of God as a defense for failure to deliver water under duty or contract.
- § 1693. Evidence—Burden of proof.
- § 1694. Instructions to the jury.

- § 1695. Verdict—Non-suit.
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- § 1697. Compensatory damages—Measure of damages for injuries to lands.
- § 1698. Compensatory damages—Measure of damages for injuries to crops.
- § 1699. Compensatory damages—Measure of damages for the loss of stock.
- § 1700. Compensatory damages—Measure of damages for loss of power.
- § 1701. Compensatory damages—Measure of damages for loss of or injury to a water right.
- § 1702. Exemplary or punitive damages.
- § 1703. Nominal damage.
- § 1704. New trial—Appeal.

§ 1660. **Scope of chapter.**—Having discussed in the previous chapters of this part of this work the adjudication of water rights, and the rights of ditches, canals, and other works constructed for the purpose of utilizing such water rights,¹ also the protection of rights by actions for injunction and miscellaneous actions,² we will now discuss the subject of actions for damages for injuries to water and kindred rights, with the exception of the question of damages for the pollution of water, which subject has been discussed in a previous chapter.³ The question of damages on eminent domain has also been discussed in previous sections.⁴

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¹ For the adjudication of water rights, see Chaps. 78, 80, Secs. 1530-1595.

² See Chaps. 81, 82, Secs. 1596-1659.

³ See Chap. 58, Secs. 1129-1147.

⁴ See Secs. 1090, 1091.

¹ For the statutory adjudication of water rights, see Secs. 1567-1584.

son suing must be the owner of the title to such rights, or must have been entitled to their use.² By making the proper allegations in the complaint, an action both for damages for past injuries, and for equitable relief against future invasions of the right, may be combined in the same suit.³ So may an action for the adjudication of rights, damages for the unlawful past diversion, and for injunctive relief against future diversions be combined in the same action.⁴

§ 1662. Damages to prior appropriator for unlawful diversion.

—The rights of the prior appropriator being fixed by the nature and extent of his appropriation,¹ for any material infringement upon those rights by which he is injured, an action at law for damages will lie. He is entitled to have the full quantity of water up to the full extent of his appropriation continue to flow either in the natural stream, or his ditch or canal, in such a manner that he can enjoy its use as a property right; and, therefore, for any material interference with this flow of the water by which his rights are substantially injured, he is entitled to maintain an action for damages. This has become a well settled rule of law in all jurisdictions where the Arid Region Doctrine of appropriation is in force, from the earliest period to the present time.² Not only has a prior appropriator the right to maintain an action to recover dam-

² "A judgment for damages for the diversion of water could only be based upon the ownership or right of property in the water, and the wrongful invasion of that right." *Cash v. Thornton*, 3 Colo. App. 475, 34 Pac. Rep. 268.

³ For the combination of such actions, see Sec. 1599.

See, also, *Jerrett v. Mahan*, 20 Nev. 89, 17 Pac. Rep. 12.

⁴ See Secs. 1536, 1537, 1598, 1599.

¹ See Secs. 776-782.

² *Union Water Co. v. Crary*, 25 Cal. 502, 85 Am. Dec. 145, 1 Morr. Min. Rep. 196; *Tuolumne D. Co. v. Chapman*, 8 Cal. 392, 4 Morr. Min. Rep. 34; *Parke v. Kilham*, 8 Cal. 77, 68 Am. Dec. 310, 4 Morr. Min. Rep. 522; *Weaver v. Eureka Lake Co.*, 15 Cal.

271, 1 Morr. Min. Rep. 642; *Foreman v. Boyle*, 88 Cal. 290, 26 Pac. Rep. 94; *Hulsman v. Todd*, 96 Cal. 228, 31 Pac. Rep. 39; *Saint v. Guerrero*, 17 Colo. 448, 30 Pac. Rep. 335, 31 Am. St. Rep. 320; *Carron v. Wood*, 10 Mont. 500, 26 Pac. Rep. 388; *Brown v. Ashley*, 13 Nev. 251, 16 Nev. 312; *Gotelli v. Cardelli*, 26 Nev. 382, 69 Pac. Rep. 8; *Shotwell v. Dodge*, 8 Wash. 337, 36 Pac. Rep. 254; *Dalton v. Kelsey*, 58 Ore. 244, 114 Pac. Rep. 464; *Boulware v. Parke*, 4 Idaho 692, 43 Pac. Rep. 680; *Strait v. Brown*, 16 Nev. 317, 40 Am. Rep. 497; *Quigley v. Birdseye*, 11 Mont. 439, 28 Pac. Rep. 741; *McCarthy v. Gaston etc. Co.*, 144 Cal. 542, 78 Pac. Rep. 7; *White v. Brash*, 3 Ariz. 212, 73 Pac. Rep. 445.

ages, where his rights are injured by the unlawful diversion of the water to which he is entitled by trespassers without right,³ but he also has the right to maintain such an action against subsequent appropriators, with rights to water flowing in the same stream, for injuries caused by the acts of such subsequent appropriators above, in erecting their dams or other obstructions by which the regularity of the flow of the stream is so interfered with as to cause the prior appropriator actual injury.⁴ An action for damages will also lie for the unlawful diversion of water from a ditch, canal, or reservoir, as well as from the natural stream.⁵ Damages may also be recovered for the loss of the water by the destruction of a ditch or other works.⁶ But in all cases, in order to recover damages, the plaintiff must show that he has been actually injured in some manner. So, it is held that although the right to the use of the water is prior in the plaintiff, during the process of the construction of a dam and other works for diverting the water, and before the owner of the right is able to make use of the water, he can not maintain an action against another person for damages for the diversion of the water.⁷ The wrongful diversion of water to which the prior

³ *Browning v. Lewis*, 39 Ore. 11, 64 Pac. Rep. 304.

⁴ *Coker v. Simpson*, 7 Cal. 340; *Phoenix W. Co. v. Fletcher*, 23 Cal. 482, 15 Morr. Min. Rep. 185; *Natoma W. Co. v. McCoy*, 23 Cal. 290, 4 Morr. Min. Rep. 590; *Jerrett v. Mahan*, 20 Nev. 89, 17 Pac. Rep. 12; *Saint v. Guerrero*, 17 Colo. 448, 30 Pac. Rep. 335, 31 Am. St. Rep. 320; *Barnes v. Sabron*, 10 Nev. 217, 4 Morr. Min. Rep. 673; *Hagerman Irr. Co. v. McMurry*, 16 N. M. 172, 113 Pac. Rep. 823.

⁵ *Dalton v. Kelsey*, 58 Ore. 244, 114 Pac. Rep. 464; *Carron v. Wood*, 10 Mont. 500, 26 Pac. Rep. 388.

Defendant agreed with plaintiff that plaintiff might make a ditch across defendant's land to convey water for plaintiff's crops, defendant to have the right to carry his own water in the ditch, and to use plaintiff's water only when not required by plain-

tiff. Held, in an action for depriving plaintiff's crops of the necessary water, that it was no defense that the plaintiff did not have a valid appropriation of the water claimed by him, so long as it was not the defendant's. *Dalton v. Kelsey*, 58 Ore. 244, 114 Pac. Rep. 464.

The fact that a person entitled to one-half of the water of an irrigation ditch is denied such right by the other owner is no defense to an action by the latter for damages caused by the former digging another ditch and appropriating all of the water. *Arnett v. Linhart*, 21 Colo. 188, 40 Pac. Rep. 355.

⁶ *Denver etc. R. Co. v. Dotson*, 20 Colo. 304, 38 Pac. Rep. 322; *Parker v. Gregg*, 136 Cal. 413, 69 Pac. Rep. 22.

⁷ *Nevada etc. Co. v. Kidd*, 37 Cal. 282.

appropriator is entitled is a continuing wrong, for which successive actions for damages may be brought.⁸

But an action for damages can not be maintained for the value of so much water stated in quantity as so much per inch, cubic foot, diverted from the natural source of supply, to the injury of the plaintiff, because it does not become his property until the water is reduced to possession in his reservoir, ditches, or canals.⁹ But, it is held that the water taken from a natural stream and reduced to possession by artificial means, is personal property. It may be the subject of purchase and sale, or of larceny.¹⁰ Under these circumstances, as we view the law, an action for damages for the taking of a certain quantity of water valued at a certain amount would lie, although there seems to be no decided cases upon this exact point.

§ 1663. Damages to riparian owners for unlawful diversion.—

In those States which adhere to the doctrine of the common law of riparian rights as one of the rules of law governing waters,¹ a riparian owner may also maintain an action for damages for the unlawful diversion of the waters of a stream flowing through or adjoining his land to his injury. In fact, under the modified common law rule upon this subject, it is held that a riparian owner may maintain an action for damages, where the Court would not grant an injunction against the continuance of the very acts causing the injuries to his rights. Such is the case where a riparian owner claims merely the right to the undiminished flow of the stream, without the actual use of the water. He will be relegated under this rule to an action at law for damages for the injuries caused by the diversion of the water, or the interference with its natural flow, for a beneficial use, although such acts, under the strict construction of the common law rule, are technical invasions upon his rights.² And, upon the question of damages, under the more recent decisions of the Western States under the modified rule of ripa-

⁸ Toombs v. Hornbuckle, 3 Mont. 193.

⁹ Parks etc. Co. v. Hoyt, 57 Cal. 44.

¹⁰ Hagerman ltr. Co. v. McMurry, 16 N. M. 172, 113 Pac. Rep. 823; Bear Lake etc. Co. v. Ogden, 8 Utah 494, 33 Pac. Rep. 135; Hesperia etc.

Co. v. Gardner, 4 Cal. App. 357, 88 Pac. Rep. 286.

See, also, Secs. 773, 774.

¹ For these States, see Secs. 507, 621.

² For the right of riparian owners to an injunction, see Secs. 1611-1615.

riar rights,³ the tendency is more and more to hold that the right of a riparian proprietor to the natural flow of a stream is based upon a usufructuary right only. This is to say by virtue of his ownership of riparian lands he has a right to the use of a reasonable quantity of the water of a stream which runs through or adjoins the same, but if he does not use the water to which he is entitled within a reasonable time, he can not recover even nominal damages in an action against others, who, either as riparian owners or as appropriators, divert the water above his lands and apply such waters to a beneficial purpose. But, upon the other hand, if the riparian owner is actually using the water, and there is a diversion of the natural flow of the stream to his injury, he may recover in an action for damages against those who have caused him the injury such damages as he may have actually sustained by reason of the same, and no more. This we believe to be the correct rule, which should be applied in all the arid and semi-arid States; and, as we have said, the tendency of decision is in that direction in all the so-called common law States. The peculiar conditions of this arid country, so different from those where the common law originated, and the absolute necessity that all of the available waters be applied to some beneficial use or purpose, in order that the prosperity and general development of this portion of the country continue, demand that the strict construction of the common law of riparian rights, in relation to the undiminished flow of streams, in cases where it merely affords the owners of riparian lands "pleasure in its prospect," should be entirely abrogated. In California, where the struggle has been the greatest to maintain both the principles of the common law of riparian rights and the Arid Region Doctrine of appropriation, and where the latter doctrine originated,⁴ in one of the most recent decisions of its Supreme Court,⁵ it was said: "The fair apportionment and economic use of the waters of this State are of the utmost importance to its development and well-being. The problems presented never came within the purview of the common law. They have been of necessity, therefore, and must

³ For modified doctrine of riparian rights, see Secs. 508-512.

⁴ For the history of the Arid Region Doctrine of appropriation, see Secs. 595-626.

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⁵ San Joaquin etc. Co. v. Fresno etc. Co., 158 Cal. 626, 112 Pac. Rep. 182, 35 L. B. A., N. S., 832.

continue to be solved by this Court as cases of first impression, and, as in the past, so in the future, if a rule of decision at common law shall be found unfitted to the radically changed conditions existing in this State, so that its application will work wrong and hardship rather than betterment and good, this Court will refuse to approve and follow the doctrine."⁶ In passing it may be remarked that this was the exact reasoning of the courts of other States of the arid West in entirely abrogating the doctrine of the common law of riparian rights, and in holding that the Arid Region Doctrine of appropriation of waters for a beneficial or useful purpose was the only rule of law of waters applicable to this portion of the country.⁷

We will now discuss the right of riparian proprietors to damages, first, as between themselves; and, second, as against appropriators for use on non-riparian lands.⁸

§ 1664. **Damages to riparian owners for diversion as against other owners.**—As we have discussed in a previous portion of this work, the respective rights of the various riparian owners whose lands border a natural stream, or other source of water supply, to the use of the water naturally flowing therein, are relative or correlative. At least, under the modified common law rule, which rule of the common law is the only one which is attempted to be applied in this Western country, each proprietor has the right to a reasonable use of the water flowing in a stream for irrigation, or for any other beneficial purpose, taking into consideration a like reasonable use by all the other riparian proprietors upon the same stream, and no more.¹ It therefore follows that the right to the use of the water by each proprietor being so limited and restricted, if one uses more than his share of the water to the material injury of the rights of others, an action for damages will lie by any owner injured against the one making the excessive use of the water.² But in order to recover compensatory damages by one riparian owner against an-

⁶ See, also, *Katz v. Walkinshaw*, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. B. A. 236, 99 Am. St. Rep. 35.

⁷ See Secs. 586-594.

⁸ See Secs. 1664, 1665.

¹ For the right to the use of water at common law, see Secs. 483-497.

For irrigation as a riparian right, see Secs. 498-525.

For the modified doctrine of the common law as applied in the West, see Secs. 508-513.

² "Riparian owners have correlative rights in the stream, and neither is a trespasser against the other until

other, the acts of the latter must have caused the former actual loss or injury by the taking of the water, which the law recognizes as belonging to him, and to deprive him of that which is to take from him a substantial property right. In other words, it must be such a taking of or damage to property as to substantially and materially depreciate the value of the real estate of which it forms a part.³ Even, as held in an early Massachusetts case, where the tendency is toward a strict construction of the common law rule in this respect, one riparian owner is liable to other riparian owners below him on the same stream only for an entire diversion of the water in such stream, or for an unreasonable use thereof.⁴ The same rule is applied under the more recent decisions of the courts, which follow the holding in the case of *Katz v. Walkinshaw*,⁵ as to those percolating waters filling subterranean catchment or artesian basins.⁶

he diverts more than his share and injures and damages the other thereby." *Anaheim W. Co. v. Fuller*, 150 Cal. 327, 88 Cal. 978, 11 L. R. A., N. S., 1062.

³ A diminution of the flow of water over riparian land, caused by its use for irrigation purposes by upper riparian proprietors, occasions no injury for which damage may be allowed, unless it results in subtracting from the value of the land by interfering with the reasonable uses of the water which the land owner is able to enjoy. *Clark v. Allaman*, 71 Kan. 206, 80 Pac. Rep. 571, 70 L. R. A. 971.

See, also, *Crawford Co. v. Hathaway* (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; *Union M. & M. Co. v. Ferris*, 2 Sawy. 176, Fed. Cas. No. 14,371, 8 Morr. Min. Rep. 90; *Hayward v. Mason*, 54 Wash. 653, 104 Pac. Rep. 141; *Hough v. Porter*, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

⁴ *Elliott v. Fitchburg R. R. Co.*, 10 Cush. 191, 57 Am. Dec. 85.

See, also, *Howard v. Ingersoll*, 54

U. S. 13 How. 381, 14 L. Ed. 189; *Batavia Mfg. Co. v. Newton Wagon Co.*, 91 Ill. 230; *Tyler v. Wilkinson*, 4 Mason 397, Fed. Cas. No. 14,312; *Lux v. Haggin*, 69 Cal. 255, 4 Pac. Rep. 919, 10 Pac. Rep. 674; *Embrey v. Owen*, 6 Exch. 352, 20 L. J. Exch. N. S. 212, 15 Jur. 633; *Meng v. Coffey*, 67 Neb. 500, 93 N. W. Rep. 713, 60 L. R. A. 910, 108 Am. St. Rep. 697.

Damage to a riparian owner resulting from the diminution of the flow of water incidental to the cutting down of trees by another riparian owner higher up on the stream, thereby causing an increase of evaporation, is *damnum absque injuria*. *Fisher v. Feige*, 137 Cal. 39, 69 Pac. Rep. 618, 59 L. R. A. 333, 92 Am. St. Rep. 77.

⁵ 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

See, also, Secs. 1197-1200.

⁶ For subterranean catchment basins, see Secs. 1197, 1198.

For artesian basins, see Secs. 1177, 1178.

Again, if one riparian owner can not maintain an action for compensatory damages, for the diversion and use of the water by another owner, he can not get nominal damages.⁷ This is upon the theory that if a wrong is done by the diversion of an excessive amount by one riparian owner, the party injured may secure compensatory damages to the full extent of the injury. But, upon the other hand, if no wrong is done by the taking, the complainant is not entitled to damages in any amount.

§ 1665. Damages to riparian owners for diversion as against appropriators.—In every Western State which holds to the modified common law doctrine of riparian rights, the Arid Region Doctrine of appropriation is also in force.¹ As we have seen in previous sections, there has been, in these States, a continual clash between the respective claimants to the use of the waters of a certain stream, under these two systems, as to which class had the superior rights.² There is, therefore, another question in connection with the subject under discussion, and that is the right of a riparian proprietor to damages, as against an appropriator of the water, or as against another riparian proprietor for the diversion of the water of a stream for use on non-riparian lands, which in effect, as far as this subject is concerned, is the same thing as an appropriation of the water. Here, again, the question of the actual use of the owner seeking to recover damages should be the basis of his right to recover. The mere fact that a riparian proprietor is deprived of the full flow of the stream adjacent to his land in itself should furnish no basis for the recovery of compensatory damages. At best, under the common law, he has but a usufructuary right to the flow of the water of the stream; and, therefore, if his right is not accompanied

⁷ So, where "the plaintiff contended that if the jury were satisfied of the existence of the brook, as alleged, and the diversion of the water therefrom by the defendants, he was entitled to a verdict for nominal damages, without proof of actual damage, but the presiding judge instructed the jury that unless the plaintiff suffered actual perceptible damage in consequence of the diversion the defendants were not liable in the

action," the instruction was held good upon appeal and that the plaintiff could not recover nominal damages without proof of actual loss. *Elliott v. Fitchburg R. R. Co.*, 10 Cush. 191, 57 Am. Dec. 85.

But see *Blanchard v. Baker*, 8 Greenl. (Me.) 253, 23 Am. Dec. 504.

¹ For the States having both doctrines, see Secs. 507, 621.

² See Secs. 594, 810-823.

by an actual use of the water, or, at least, if he is not in a position to actually use it, its loss, by diminishing the natural flow of the stream by appropriation for the irrigation of non-riparian lands, or for other useful purposes, can result only in *damnum absque injuria*. The peculiar conditions of the arid West and the great need for the use of all of the available water supply, demand that the strict construction of the common law rule in this respect be abrogated. Upon this subject, the Nebraska Court has laid down the correct rule, in holding that a riparian owner can recover for only an interference with or injury to his usufructuary estate in the water, and that, without use, no compensation may rightfully be claimed, where the water of the stream is appropriated and diverted for irrigation purposes.³ So, as far as compensatory damages are concerned, as is the more modern rule in actions for injunction,⁴ a riparian proprietor, without use, should not be permitted to recover for the diversion of the natural flow of the stream above his lands, by an appropriator, where the water diverted is actually applied to a beneficial use or purpose. But, upon the other hand, if the riparian owner is actually using the water for some purpose, "other than to afford him pleasure in its prospect,"⁵ or is in a position to use it, he should recover such pecuniary damages as will recompense him fully for the actual loss sustained, and no more.

Upon the question of the right of a riparian owner to recover

³ "In order to entitle a riparian owner to compensation, he must suffer in actual loss or injury to the use of the water which the law recognizes as belonging to him, and to deprive him of which is to take from him a substantial property right. It is for an interference with or injury to his usufructuary estate in the water for which compensation may rightfully be claimed where the stream is diverted and appropriated for the use of irrigation. It is such a taking of or damage to property as materially and substantially depreciates the value of the real estate of which it forms a part." Crawford Co. v. Hathaway (Hall), 67 Neb. 325,

93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647.

See, also, Clark v. Allaman, 71 Kan. 206, 80 Pac. Rep. 571, 70 L. R. A. 971; Elliott v. Fitchburg R. R. Co., 10 Cush. 191, 57 Am. Dec. 85; Ulbricht v. Eufaula W. Co., 86 Ala. 587, 6 So. Rep. 78, 4 L. R. A. 572, 11 Am. St. Rep. 72; Hough v. Porter, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728; City of New York v. Pine, 185 U. S. 93, 46 L. Ed. 820, 20 Sup. Ct. Rep. 592.

⁴ For injunctions by riparian proprietors, see Secs. 1611-1615.

⁵ San Joaquin etc. Co. v. Fresno etc. Co., 158 Cal. 626, 112 Pac. Rep. 182, 35 L. R. A., N. S., 832.

nominal damages, we believe that the same rule should follow as stated above relative to the recovery of compensatory damages. If, as stated by the Nebraska Court, at most the naked right to the full flow of the stream, and its loss by diminishing the volume of the water, when appropriated for a useful purpose, can "result only in *damnum absque injuria*,"⁶ then a riparian proprietor, without use, should not be permitted to recover even nominal damages. The effect of a recovery of a judgment for nominal damages in such a case is but the recognition of the right of the riparian proprietor to some time in the future step in and claim the right to the use of the water as against the actual appropriators for use, and, perhaps, to utterly exclude such appropriators from any further use of the water, after they have been to the expense of diverting it and conducting it to their place of use. This is but a "dog in the manger" rule, and permits a riparian owner by successive suits, brought at intervals, to prevent the statute of limitations from running, to hold forever what is at best a mere usufructuary right, or a right of use, and that, too, where he makes no actual use of the water. Yet such is the rule of construction of the strict common law right of a riparian proprietor,⁷ and has been followed many times by not only the Eastern courts, but also those of the West, and especially by the courts of California,⁸ in actions brought to vindicate a usu-

⁶ *Crawford Co. v. Hathaway* (Hall), 67 Neb. 325, 93 N. W. Rep. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647.

⁷ "The law, in the absence of any special injury, gives nominal damages, on the ground that the undisturbed enjoyment or continuation of such acts, without the consent of the owner, would ripen into a right to do them." *Stein v. Burden*, 24 Ala. 130, 60 Am. Dec. 453; *Id.*, 27 Ala. 104; *Id.*, 29 Ala. 127, 65 Am. Dec. 394.

And, in *Ulbricht v. Eufaula W. Co.*, 86 Ala. 587, 6 So. Rep. 78, 4 L. R. A. 572, 11 Am. St. Rep. 72, it is said: "It is decided in these cases that a riparian proprietor is entitled to nominal damages for any disturbance of his right by diversion of the

waters from the stream, without returning them to the natural channel, although he offers no evidence of actual or special damage."

But see *Elliott v. Fitchburg R. R. Co.*, 10 Cush. 191, 57 Am. Dec. 85, where the Supreme Court of Massachusetts held that if the proprietor was not entitled to recover actual damages he could not recover nominal damages.

⁸ The right of a riparian proprietor to have the water of a stream run through his land is a vested right, and any interference therewith imports at least nominal damages, even if there be no actual damage. *Creighton v. Evans*, 53 Cal. 55, 8 Morr. Min. Rep. 123.

fructuary right which was not used, and in which either nominal damages were given or an injunction granted.⁹

§ 1666. **Damages for the unlawful diversion of subterranean waters.**—As discussed in a previous portion of this work, if in fact it is known that a subterranean stream of water flows in a well-defined channel, capable of being distinctly traced, it is governed by the same rules of law as are applicable to streams flowing upon the surface of the earth.¹ It therefore follows that, as is the case with surface streams, an action at law for damages will lie for the unlawful diversion of the waters of subterranean streams, and the grounds for such an action do not differ from those for the unlawful diversion of surface streams, and, of course, the procedure is the same. This right is given to both those who have acquired the right to the water by appropriation,² and under the common law by virtue of their riparian ownership on such streams.³

Under the common law, all waters flowing or moving through the ground, whose courses are not known or defined, belong to the soil as a part and parcel thereof.⁴ Therefore, under this rule of law, an action for damages for their abstraction by the owner of the land in which they are found will not lie.⁵ But, owing to the recent scientific investigations, certain subterranean waters, which were formerly treated as mere percolations, have been classified, which classifications have been recognized by the courts, especially

⁹ For right of riparian proprietors to an injunction without use, see Sec. 1613.

¹ For subterranean water courses, see Secs. 1153-1165.

² Where a subterranean stream of water appropriated by the plaintiff was diverted by the wrongful act of the defendant, plaintiff was entitled to recover whatever damages were the proximate and direct result of the diversion. *Whitmore v. Utah Fuel Co.*, 26 Utah 488, 73 Pac. Rep. 764; *Strait v. Brown*, 16 Nev. 317, 40 Am. Rep. 497.

³ For riparian ownership on subterranean streams, see Sec. 1158.

See, also, *Willis v. Perry*, 92 Iowa 297, 60 N. W. Rep. 727, 26 L. R. A. 124; *Dickinson v. Grand Junction Canal Co.*, 7 Exch. 299, 21 L. J. Exch. N. S. 241, 16 Jur. 200; *Chasemore v. Richards*, 7 H. L. Cas. 349, 29 L. J. Exch. N. S. 81, 5 Jur. N. S. 873, 7 Week. Rep. 685; affirming 2 Hurlst. & N. 168; *Acton v. Blundell*, 12 Mees. & W. 324, 13 L. J. Exch. N. S. 289; *Herriman Irr. Co. v. Keel*, 25 Utah 96, 69 Pac. Rep. 719.

⁴ See Secs. 1155, 1188-1190.

⁵ See Sec. 1188.

since the decisions in the California cases of *Los Angeles v. Pomerooy*,⁶ and *Katz v. Walkinshaw*,⁷ as either belonging to the subflow of surface streams,⁸ artesian basins,⁹ or to catchment basins,¹⁰ and that certain definite rights may be acquired in and to such waters, either by the land owners whose lands overlie the same, or by appropriation. It therefore follows that, if certain definite rights may be acquired in and to such waters, for any invasion of these rights by another, damages may be recovered upon proof of the ownership of such rights, the material and substantial injury of the same by another, and the proof of the actual damages suffered from such injuries.¹¹ But, in order to recover damages for the abstraction of such water the land owner must prove these facts, as it is held that the mere taking of such water does not imply damages, as it is not a wrong *per se*.¹² These facts in the case of underground waters are harder to prove than in the case of surface waters; but,

⁶ 124 Cal. 597, 57 Pac. Rep. 585.

⁷ 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

⁸ See Sec. 1149.

⁹ See Sec. 1168.

¹⁰ See Sec. 1197.

¹¹ Where there has been unnecessary delay in asserting the right, the party will be left to his action for such damages as he can prove, and an injunction will be refused. *Katz v. Walkinshaw*, 141 Cal. 116, 70 Pac. Rep. 663, 74 Pac. Rep. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35.

For injunctions against the taking of subterranean water, see Sec. 1616.

¹² *Newport v. Temescal W. Co.*, 149 Cal. 531, 87 Pac. Rep. 372, 6 L. R. A., N. S., 1098, where it is held that where it is to the interest of the public that water be pumped and diverted to supply the needs of a town, and the monetary damages can be determined, an absolute injunction will not be granted, but merely one conditioned on the failure to make good the damages.

In an action to recover damages

for the deprivation of water, it is sufficient for the plaintiff to show that the defendant's wrongful acts actually deprived the plaintiff of the water, to which he was legally entitled; and, if these acts consisted of subsurface excavations, it is not necessary for the plaintiff to show that a well-defined subterranean stream had been intercepted, or to show the particular subterranean conditions which were disturbed, provided it clearly appears that defendant's acts caused the destruction or diminution. *Cohen v. La Canada etc. Co.*, 142 Cal. 437, 76 Pac. Rep. 47; *Id.*, 151 Cal. 680, 91 Pac. Rep. 584, 11 L. R. A., N. S., 752.

See, also, *McClintock v. Hudson*, 141 Cal. 275, 74 Pac. Rep. 849; *Montecito W. Co. v. Santa Barbara*, 144 Cal. 578, 77 Pac. Rep. 1113; *Burr v. Maclay Rancho W. Co.*, 154 Cal. 428, 98 Pac. Rep. 260; *Verdugo Canyon W. Co. v. Verdugo*, 152 Cal. 655, 93 Pac. Rep. 1021; *Miller v. Bay Cities W. Co.*, 157 Cal. 256, 107 Pac. Rep. 115, 27 L. R. A., N. S., 772.

where proven, the party whose rights are materially injured by the unlawful acts of another may recover actual damages suffered as the direct result of such acts, or he may obtain an injunction against the future invasion of his rights.¹³

§ 1667. **Damages for the failure to furnish water under duty imposed by law.**—As we have discussed in a previous portion of this work, whenever a corporation or association is organized for the purpose of supplying consumers with water for profit or hire, a duty devolves upon such company, as a public service corporation or association, without imposing any unreasonable conditions, to furnish the water for the actual needs of such consumers, who legally apply therefor, and pay, or tender the payment of, the established rates for such water, to the full extent of the capacity of such company. Also, under certain conditions, upon the refusal of the company to furnish the water, such service may be enforced by a proper action.¹ Therefore, where a person, association, or corporation is under the duty to furnish actual consumers with water, either as imposed by law or under contract, and has failed in the past to comply with such duty and to furnish the water, an action at law for damages resulting therefrom will lie by the party injured against the party having so failed to furnish him with water.

In order for an action for damages to lie for the failure to furnish water, under the duty imposed by law, there are certain essentials which must be observed. First, the defendant company must have been a quasi-public corporation or association and under the duty to furnish the water;² second, it must have had the water under its control which it could have spared without infringing upon the rights of the prior applicants;³ third, there must have been a legal application or demand for the water, made in time,

¹³ See cases cited above.

For injunctions against the unlawful diversion of subterranean waters, see Sec. 1616.

¹ For the duty to furnish water imposed by law, see Secs. 1497-1502.

For the duty under contract to furnish water, see Sec. 1510.

For the compulsory service of water, see Sec. 1506.

For actions for mandamus to compel service, see Sec. 1649.

² See Secs. 1493, 1507.

For actions for damages for breach of contract, see Sec. 1529.

³ Where the evidence was conflicting as to whether the failure resulted from the scarcity of water in the river from which a ditch was taken, or from a failure of a corporation

and accompanied with a tender of the established rates, or an actual payment of such rates;⁴ fourth, there must have been a failure upon the part of the company to furnish the water;⁵ and, fifth, the plaintiff must have actually sustained material and substantial damage resulting from the failure of the defendant to furnish the water.⁶

An action for damages will also lie against an irrigation district for the failure to supply water to which one within the district is entitled.⁷

§ 1668. Damages for breach of contract to furnish water.—

Where the duty to furnish the water is imposed by a contract between the company and the consumer, in a proper case, the courts will enforce such contracts, either by decreeing specific performance of the same,¹ or, in some jurisdictions, by mandamus.² And, if there is a breach of the contract, and the company obligated

to maintain a proper dam across the river at the head of the ditch, and to repair a broken flume, a finding for the plaintiff will not be disturbed. *Pawnee etc. Co. v. Jenkins*, 1 Colo. App. 425, 29 Pac. Rep. 381.

⁴ *Northern Colo. Irr. Co. v. Richards*, 22 Colo. 450, 45 Pac. Rep. 423; *Crow v. San Joaquin etc. Co.*, 130 Cal. 309, 62 Pac. Rep. 562, 1058; *Lowe v. Yolo etc. Co.*, 157 Cal. 503, 108 Pac. Rep. 207; affirmed, *Id.*, 8 Cal. App. 167, 96 Pac. Rep. 379; *Western etc. Co. v. Chapman*, 8 Kan. App. 778, 59 Pac. Rep. 1098, holding that the demand must have been made in time in order for the company to be liable for the loss of crops of any particular season.

⁵ See cases cited under this section.

For exemplary damages for the failure to furnish water through malice, see Sec. 1702.

⁶ In *Northern Colo. Irr. Co. v. Richards*, 22 Colo. 450, 45 Pac. Rep. 423, damages were given the owner

of virgin land, which he had agreed to lease for farming and gardening purposes, for the refusal of the ditch company to furnish water without payment of a royalty as a condition precedent, and thus preventing the land from being broken and put in crops.

"They must have been damages capable of ascertainment by proof to a reasonable certainty. Uncertain and speculative profits, which might or might not have been realized, are not recoverable in such actions." *Crow v. San Joaquin etc. Co.*, 130 Cal. 309, 62 Pac. Rep. 562, 1058.

For the measure of damages for the failure to furnish water, see Secs. 1698, 1700.

⁷ *Snake River Valley Irr. Dist. v. Stevens*, 18 Idaho 541, 110 Pac. Rep. 1033.

¹ For the enforcement of contracts, see Secs. 1519, 1520.

² For the enforcement of contracts by mandamus, see Sec. 1649.

therefor fails to furnish the water, the consumer may maintain an action for damages. As to whether or not an action for damages will lie in such a case depends largely upon the terms of the contract itself,³ the nature of the breach thereof, and as to whether or not the consumer has been materially damaged by such breach. But the general rule upon the subject may be stated that, where a water company by a contract binds itself to furnish a consumer with a certain quantity of water at a certain time, and negligently or wilfully fails to supply the water in accordance with the terms of the contract, or fails for any reason to furnish the water except on account of an act of God, or *vis major*,⁴ or a waiver of the terms of the contract, either by explicit terms or by some act upon the part of the consumer, the company is liable in damages for any injury suffered as the direct and proximate result of such breach of the contract.⁵

Under the rule that an entire claim arising under contract or tort can not be made the subject of several suits for damages, it is held in California that one who elected to sue for the specific performance of an agreement to convey, instead of for damages for the breach of contract, was bound to recover incidentally thereto all his damages from delay in conveying, so that the decree for specific performance barred a subsequent action for damages from the delay.⁶ Again, where there is a duty to furnish water, a re-

³ For the construction of contracts, see Secs. 919, 1513.

⁴ For the defense of failure to perform on account of act of God, see Secs. 1691, 1692.

⁵ "When an irrigation company which contracts to furnish water to a consumer negligently or wilfully fails to furnish water in accordance with its contract, it is liable to the consumer for any damages suffered in the loss or injury to his crops by reason of such breach of contract." *Colorado Canal Co. v. McFarland*, 94 S. W. Rep. 400; *Id.*, 50 Tex. Civ. App. 92, 109 S. W. Rep. 435.

⁶ *Abbott v. Seventy-Six Land & Water Co.*, — Cal. —, 118 Pac. Rep. 425.

A purchaser of water rights from an irrigation company, having done nothing to justify its arbitrary action in destroying his head gates and ditches, and threatening to continue to do so, is entitled to an injunction and damages. *Hargrave v. Hall*, 3 Ariz. 252, 73 Pac. Rep. 400.

Under contracts requiring five days' written notice to furnish water, a company is not liable for damages which accrued prior to the five days after such demand was made. *Gravity Canal Co. v. Sisk*, 43 Tex. Civ. App. 194, 95 S. W. Rep. 724.

"The essence of the contract was the furnishing of 140 inches of water for a given number of acres of desert land." *Rios v. Azcuenaga*, 19 Idaho

fusal or failure to furnish the same gives concurrent remedies in tort and contract, and the consumer may recover in either form of action.⁷ Where there are several consumers named in the contract who all take their water from the same lateral, but where the lan-

739, 115 Pac. Rep. 922, holding that an action for damages would lie.

Where, after a lease of water to plaintiff by defendant, a third person was decreed to be the owner of a part of the leased water, so plaintiff was deprived of such part, plaintiff was entitled to damages for the loss. *Tilton v. Sterling etc. Co.*, 28 Utah 173, 77 Pac. Rep. 758, 107 Am. St. Rep. 689.

See, also, *Knowles v. Leggett*, 7 Colo. App. 265, 43 Pac. Rep. 154.

The recovery for a breach of a contract can not be defeated because an injunction was issued restraining the granting party from diverting the water. *Sample v. Fresno etc. Co.*, 129 Cal. 222, 61 Pac. Rep. 1085; *Orr Water-Ditch Co. v. Reno W. Co.*, 19 Nev. 60, 6 Pac. Rep. 72, where it was held that for a breach of a contract by the failure to repair a ditch, an action for damages would lie.

See, also, *Crowder v. McDonnell*, 21 Mont. 367, 54 Pac. Rep. 43.

See, also, *Roberts v. Crafts*, 141 Cal. 20, 74 Pac. Rep. 281; *Anderson v. Adams*, 43 Ore. 621, 74 Pac. Rep. 215; *Ferrea v. Chabot*, 63 Cal. 564, *Id.*, 121 Cal. 233, 53 Pac. Rep. 689; *Booth v. Chapman*, 59 Cal. 149; *Pallett v. Murphy*, 131 Cal. 192, 63 Pac. Rep. 366; *Stoner v. Mau*, 11 Wyo. 366, 72 Pac. Rep. 193; *Glick v. Weatherwax*, 14 Wash. 560, 45 Pac. Rep. 156; *Gagnon v. Molden*, 15 Idaho 727, 99 Pac. Rep. 965; *Northern Colo. Irr. Co. v. Richards*, 22 Colo. 450, 45 Pac. Rep. 423; *Pawnee etc. Co. v. Jenkins*, 1 Colo. App. 425, 29 Pac. Rep. 381; *Hewitt v. San Jacinto etc. Dist.*, 124

Cal. 186, 56 Pac. Rep. 893; *Western etc. Co. v. Chapman*, 8 Kan. App. 778, 59 Pac. Rep. 1098; *Hargrave v. Hall*, 3 Ariz. 252, 73 Pac. Rep. 400; *Rocky Ford etc. Co. v. Simpson*, 5 Colo. App. 30, 36 Pac. Rep. 638; *Candler v. Washoe Lake etc. Co.*, 28 Nev. 151, 80 Pac. Rep. 751; *Hutchinson v. Mt. Vernon etc. Co.*, 49 Wash. 469, 95 Pac. Rep. 1023; *Barstow Irr. Co. v. Cleghon*, 41 Tex. Civ. App. 531, 93 S. W. Rep. 1020; *Farmers' etc. Co. v. New Hampshire etc. Co.*, 40 Colo. 467, 92 Pac. Rep. 290; *Crow v. San Joaquin etc. Co.*, 130 Cal. 309, 62 Pac. Rep. 562, 1058; *City of Ysleta v. Babitt*, 8 Tex. Civ. App. 432, 28 S. W. Rep. 703; *Raywood etc. Co. v. Wells*, 32 Tex. Civ. App. 545, 77 S. W. Rep. 253; *Mabb v. Stewart*, 147 Cal. 413, 81 Pac. Rep. 1073; *Id.*, 133 Cal. 556, 65 Pac. Rep. 1085; *Clague v. Tri-State Land Co.*, 84 Neb. 499, 121 N. W. Rep. 570, 133 Am. St. Rep. 637; *Dunbar v. Montgomery*, — Tex. Civ. App. —, 119 S. W. Rep. 907; *Miller v. Mt. Nebo L. & Irr. Co.*, 37 Utah 1, 106 Pac. Rep. 504; *Ulrich v. Pateros W. Ditch Co.*, — Wash. —, 121 Pac. Rep. 818.

⁷ *Crow v. San Joaquin etc. Co.*, 130 Cal. 309, 62 Pac. Rep. 562, 1058; *Colorado Canal Co. v. McFarland*, 94 S. W. Rep. 400; *Sisk v. Gravity etc. Co.*, — Tex. Civ. App. —, 113 S. W. Rep. 195; *Clague v. Tri-State etc. Co.*, 84 Neb. 499, 121 N. W. Rep. 570, 133 Am. St. Rep. 637; *Sample v. Fresno etc. Co.*, 129 Cal. 222, 61 Pac. Rep. 1085; *Northern Colorado etc. Co. v. Richards*, 22 Colo. 450, 45 Pac. Rep. 423.

guage of the contract requires the company to account to each of the consumers, respectively, or, by the use of any words, imports a separate right of action, the contract is several, and each consumer may sue upon a breach for the damages sustained by himself, without joining the other consumers.⁸ A consumer may recover damages for the breach of a contract of an irrigation district agreeing to furnish him with water.⁹

It is held, however, that where the consumer did not put his land in a proper state of cultivation, and failed to avail himself of the offer of the company to furnish the water, and did not seek to minimize the injury, that he was not entitled to recover damages.¹⁰

Where an agent makes a contract on behalf of his principal to furnish a certain quantity of water, in excess of his authority, he is personally liable thereon, under an implied warranty of authority, for damages for the failure of the principal to furnish such water, even though he made no false representations concerning his authority.¹¹

§ 1669. Damages caused by the breakage of works.—Water, at times, is a most dangerous element even flowing in its natural con-

⁸ Consolidated Canal Co. v. Peters, 5 Ariz. 80, 46 Pac. Rep. 74.

⁹ Hewitt v. San Jacinto etc. Irr. Dist., 124 Cal. 186, 56 Pac. Rep. 893, where it is said: "An irrigation district may be sued. Boehmer v. Big Rock Creek Irr. Dist., 117 Cal. 19, 48 Pac. Rep. 908. And it was observed in that case that 'the legislature did not intend that such actions should be profitless to the parties.' Damage being proved to result from the default of the district, the appropriate judgment should have followed."

¹⁰ Carr v. Miller-Morris etc. Co., 105 La. 239, 29 So. Rep. 715.

See, also, Cotton v. Jennings Irr. Co., 108 La. 4, 32 So. Rep. 193.

Again, where the owners of land contract to sell it, together with certain water rights, and are unable to

transfer a title to the water rights, but did not induce the purchaser to enter into the contract by fraud, and their attempt to carry out the terms of the contract after it was made was free from bad faith, the purchaser in a suit for damages can recover moneys paid on the purchase price and the expenses legitimately incurred in pursuance of the contract, but is not entitled to damages for the loss of the bargain. Babcock-Cornish Co. v. Urquhart, 53 Wash. 168, 101 Pac. Rep. 713.

See, also, Mabb v. Stewart, 147 Cal. 413, 81 Pac. Rep. 1073, 133 Cal. 556, 65 Pac. Rep. 1085.

¹¹ Anderson v. Adams, 43 Ore. 621, 74 Pac. Rep. 215.

See, also, Sommerville v. Idaho Irr. Co., — Idaho —, 123 Pac. Rep. 302.

dition, without the influence of man; and, when formally restrained by the works of man, it suddenly breaks through its barriers and tears through the lands below to the great destruction of life and property, it becomes even more dangerous. Therefore, in a previous section of this work, we stated to the effect that it is the duty of all irrigation or water companies, especially in the construction of dams and reservoirs for the storage or the holding back of great quantities of water, to so construct them that they will be of such a strength as to withstand all pressure of water on both ordinary and extraordinary occasions, so far as skilled human foresight can determine, and with that reasonable degree of care as is commensurate with the nature and magnitude of the undertaking, in order to protect the lives and property of those below.¹ This is the common law rule, as adopted by the leading English case upon the subject. And, under that rule, the person who stores water upon his premises, which is likely to do injury if it escapes, is held to keep it there at his peril, and that he is *prima facie* answerable for all damages which are the natural consequence of its escape, and that, too, without proof of actual negligence, or the want of reasonable care, upon the part of the owner of the works so storing the water.²

The English rule as laid down in the case of *Rylands v. Fletcher*,³ has been literally followed by some of the American courts, where

¹ For the character of construction of works, see Sec. 836.

² *Rylands v. Fletcher*, L. R. 3 H. L. 330, 37 L. J. Exch. N. S. 161, 19 L. T. N. S. 220; affirming L. R. 1 Exch. 265, 12 Jur. N. S. 603, 14 Week. Rep. 799, which reversed 3 Hurlst. & C. 774, where it is said: "We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his own peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to plaintiff's

default; or, perhaps, that the escape was the consequence of *vis major*, or the act of God."

See, also, *Barber v. Nottingham Canal Co.*, 15 C. B. N. S. 726, 33 L. J. C. P. N. S. 193, 10 Jur. N. S. 260, 9 L. T. N. S. 829, 12 Week. Rep. 376, where it was held that the owner of a reservoir was not relieved from liability for injuries to a mine by the fact that the flooding of the mine was caused by the sinking of a shaft by the mine owner, which, from the porous nature of the ground, caused the water to seep from the reservoir into the mine, without the mine owner's fault.

³ *Supra*.

injuries were caused by the breaking away or the leakage of water from storage reservoirs, and from dams holding back great quantities of water.⁴ But this ruling has been rejected in other States.⁵

The effect of the English rule, as can be readily seen, is to make the owners of all such works absolute insurers against all damages, and to remove the question of negligence entirely, and to hold that if the injury occurs the owner is liable in damages without regard to his negligence. Therefore, some of the American courts have refused to follow literally the rule, but hold that it is not ap-

⁴ In the case of *Defiance Water Co. v. Olinger*, 54 Ohio St. 532, 44 N. E. Rep. 238, 32 L. R. A. 736, the Court, after citing the case of *Rylands v. Fletcher*, *supra*, said: "The general rule, as above stated, seems, on principle, just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes or noisome vapors of his neighbor's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbor, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property."

When a land owner collects a lake on his land and permits the water to escape and destroy the land and property of an adjoining owner, he becomes liable for the damages occasioned thereby, regardless of the question of negligence in its construction. *Texas etc. R. Co. v. O'Mahoney*, 24

Tex. Civ. App. 631, 60 S. W. Rep. 902.

See, also, *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 224; *Southard v. Brooklyn*, 1 App. Div. 175, 37 N. Y. Supp. 136; *Cahill v. Eastman*, 18 Minn. 324, 10 Am. Rep. 184; *Clear Creek etc. Co. v. Kilkenny*, 5 Wyo. 38, 36 Pac. Rep. 819; *Pixley v. Clark*, 35 N. Y. 520, 91 Am. Dec. 299; *Harwood v. Benton*, 32 Vt. 724; *Wilson v. New Bedford*, 108 Mass. 261, 11 Am. Rep. 352.

But see *Scott v. Longwell*, 139 Mich. 12, 102 N. W. Rep. 230, 5 Ann. Cas. 679; *Pennsylvania etc. Co. v. Sanderson*, 113 Pa. St. 126, 6 Atl. Rep. 453, 57 Am. St. Rep. 445; *Marshall v. Welwood*, 38 N. J. Law 339, 20 Am. Dec. 394.

Damages to a riparian owner caused by another maintaining a dam, boom, and pier in the river, are recoverable, irrespective of the negligence of the latter, provided the damages are caused by the obstructions in the river. *Gibson v. Cascade Lbr. Co.*, 54 Wash. 289, 103 Pac. Rep. 11.

⁵ *Losee v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623; *Moore v. Berlin etc. Co.*, 74 N. H. 305, 67 Atl. Rep. 578, 11 L. R. A., N. S., 284, 124 Am. St. Rep. 968, 13 Am. & Eng. Ann. Cas. 217; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 6 Atl. Rep. 453, 57 Am. Rep. 445.

plicable to every case of the storage of water, and that the right of recovery for such injuries depends upon the negligence of the owner, or upon his want of reasonable care in the construction and maintenance of such works.⁶ To be sure, it does not require the same degree of care to construct a small reservoir as is required in the construction of one of a larger type. Neither does it require the same degree of care in the construction of a ditch or canal used in the conveying of water to the place of use as is required in the construction of a reservoir. In the former the water is not restrained and the pressure is but comparatively slight, while in the latter the water is restrained and the pressure is small or great according to the size of the reservoir.⁷ But, in either case, why one, who constructs a reservoir upon his own premises and stores water therein, which he knows to be "a movable, wandering thing,"⁸ and always seeking to escape, should be absolutely relieved from all liability for damage when it does break out and injure the property of innocent parties, who are not in any way connected with the enterprise, simply because it can not be proven that the reservoir owner was guilty of actual negligence, or had failed to exercise ordinary care in the construction and maintenance of such works, we are unable to see. We are, therefore, very much inclined to hold that the English rule is the correct one, and that a person who so stores water upon his land does so at his peril, and is liable for the actual injuries in damages which are the direct and proximate result of the breaking out of the water, and that, too, without the proof of actual negligence, or the want of ordinary care, upon the part of the owner of such works. All parties storing water upon their lands should also be held to the same rule. The man who constructs a duck pond, requiring slight skill or care, upon his own land should be liable for damages if the water does break out and ruin his neighbor's garden or floods his cellar. So, again, the corporations constructing these enormous reservoirs throughout the West, which reservoirs cover, at times, thousands of acres of land, and the waters of which are a hundred feet or over in depth, and where the water pressure is very great, requiring the exercise of the greatest amount of skill and care in

⁶ See authorities cited in the next section.

⁷ See Sec. 1670.

For damages from ditches and canals, see Secs. 1672, 1673.

⁸ 11 Blackstone Comm. 18.

their construction and maintenance, should be held to the same rule that they are liable for all damage resulting from breakage and overflow. If the English rule is adopted and enforced by the courts of this country, it will result in better constructed dams and reservoirs, fewer breakages, and, of course, less actual injury to life and property, and, at the same time, less damage from the failure of the company to furnish the water when it is needed by the settlers. The trouble of it is that many of these enterprises are projected by speculators and are upon the boom order. And, although, under the recent statutes in the various States, the works must be constructed under the supervision and inspection of some State official,⁹ usually the State engineer, dams and reservoirs have been in the past, and undoubtedly will be in the future, hurriedly and unskillfully constructed. Settlers have been and are being induced by advertising agents to come and settle the lands, at times, in the very path of destruction, should the water break out; and, then, when it does break out and ruin the homes and farms, and perhaps destroy the lives of the settlers and their families, to hold to the rule that before damages can be recovered that the burden is upon the plaintiff to prove that the company was guilty of actual negligence, or that it failed to use reasonable care in the construction and maintenance of such reservoirs and dams, is in our opinion entirely wrong. And, if the courts do not adopt the English rule as to such liability, the legislature should, as is the case in Colorado,¹⁰ where the statute places an absolute liability upon the owners of reservoirs for all damages arising from leakage, or overflow of the water, or by floods caused by the breakage of embankments, and which statute is held by the Supreme Court of that State to be simply an affirmation of the common law principle.¹¹

§ 1670. Liability for negligence—Damages from reservoirs.—

In any event, whether the strict rule of liability under the common law, as discussed in the previous section,¹ is adopted or not as to rule of decision in any State, any person storing water upon his land

⁹ For laws of State control, see Sampson, 48 Colo. 285, 110 Pac. Secs. 1337-1367. Rep. 79.

¹⁰ See Mills' Ann. Stat., Sec. 2272.

¹¹ Sylvester v. Jerome, 19 Colo. 128,

34 Pac. Rep. 760; Garnett etc. Co. v.

193—Kin. on Irr.

See, also, for statutory liability, Sec. 1671.

¹ See Sec. 1669.

is liable for all injuries caused by the escape of the same and due to actual negligence, or from the want of reasonable or ordinary care in the construction or maintenance of the works used for the storage of the water.² But the interchangeable terms "reasonable care" or "ordinary care" used in this connection are relative. That is to say, it does not take the same degree of engineering skill to construct a small reservoir as it does a large one. And, therefore, what would be reasonable care in the construction of a small reservoir, where the water is retained by a natural depression of the earth and a brush and earthen dam, but where, even if it does break out it will do little or no damage, might be the most flagrant negligence in the construction of a large reservoir covering perhaps thousands of acres of land, and where the water pressure is very great upon the dam and natural embankments. Therefore, the degree of care which must be exercised in the construction and maintenance of these works is not the same in all cases of stored water. No rule can be stated which will be applicable to all cases; but, in those States which hold that the liability for injuries caused by the escape of the water depends upon the question of negligence or ordinary care exercised by the owners of such works in their construction and maintenance, it must also depend upon the facts and circumstances surrounding each particular case. As is said by Mr. Farnham:³ "There are many cases where water can be stored with comparative safety, and where the effect of its es-

² Griffith v. Lewis, 17 Mo. App. 605; Defiance Water Co. v. Olinger, 54 Ohio St. Rep. 532, 44 N. E. Rep. 238, 32 L. R. A. 736.

In Montana it is held that the fact that one knew of the dangerous condition of a dam, and failed to institute special proceedings provided by the Act of Feb. 16, 1877, giving persons living on a stream below a dam, who deem the same insecure, the right to institute proceedings to have the dam declared dangerous, will not bar an action by him for damages caused by a subsequent breaking of the dam. Hollenbeck v. Dingwell, 16 Mont. 335, 40 Pac. Rep. 863, 50 Am. St. Rep. 502, the Court saying: "It would

be likewise a bad precedent to exonerate the defendants, otherwise clearly negligent, because a settler below them did not avail himself of the statutes quoted, which, as we have said, were a permission expressly accorded to him, but certainly were never intended to shield those who were careless from liability in damages for the consequences of negligently maintaining a fearful danger to those lawfully occupying their homes below the point of such danger."

See, also, Frederick v. Hale, 42 Mont. 153, 112 Pac. Rep. 70.

³ 3 Farnham on Waters and Water Rights, Sec. 982.

cape will be slight, while in other cases the attempt to store is attended with such imminent danger, and the result of a breaking away of the water would be so disastrous, that the one attempting the storage may well be required to take all the risk of the enterprise. Therefore, no rule can be stated which will be applicable to all cases, but the extent of liability must be determined from the circumstances of each case as it arises."

Again, a distinction must be made as to the ordinary care which must be exercised in the construction and maintenance of dams and reservoirs and the construction and maintenance of ditches and canals, the damages caused by which we will discuss in following sections.⁴ It is generally held that the owners of ditches and canals, even in those States which by legislative enactment the liability for injuries from the escape of water from reservoirs is fixed,⁵ are held only to the exercise of ordinary care. This follows the rule that the greater the risk the greater is the care which must be exercised. As was said in a recent Colorado case, in discussing this distinction: "A ditch carrying water can, by the exercise of ordinary care, be rendered harmless. The carrying of water through ditches is not a dangerous or menacing vocation—the water is not restrained and the pressure is but slight—while in a reservoir, the water is restrained and the pressure is very great, so great that the exercise of the greatest amount of care and skill may not prevent the water from effecting its escape."⁶

So, in applying the rule of negligence or ordinary care to reservoir and dam cases, and in all cases where barriers are placed in natural streams to hold back their waters, the courts hold that a much greater degree of care must be exercised than is the rule in ditch and canal cases. The one, storing water under pressure, must exercise such a degree of skill in each case in the construction and maintenance of his works as is commensurate with the magnitude of the undertaking. They must be so constructed by such engineering skill as to withstand ordinary and extraordinary floods, and are not relieved from liability for damage caused by their breaking away, except such as comes strictly within the terms of act of God or *vis major*. This was the rule adopted by the United States Circuit Court of Appeals in what are known as the Salton Sea

⁴ See Secs. 1672, 1673.

Colo. 285, 110 Pac. Rep. 79, 1 Water and Min. Cas. Ann. 610.

⁵ See Sec. 1671.

⁶ Garnet etc. Co. v. Sampson, 48

cases,⁷ where an irrigation company constructed the intakes from the Colorado River into its canal without headgates or other means of controlling the flow, by reason of which, in a time of flood, the water flowed through in such a volume as to wash away the river bank and overflow the lands of others, and for which damages were awarded, and where the Court said: "The fact that an extraordinary flood came down the river, contributing to the disaster, does not relieve the defendant from responsibility. Under the conditions prevailing in that locality and known to have existed for many years, it was the duty of the defendant to have maintained proper control of the waters at its headgates"; quoting Kinney on Irrigation, First Edition, Section 314, which is as follows: "It is the duty of all irrigation companies in building ditches, canals, aqueducts, reservoirs, and other works, to so construct them that so far as human foresight can reasonably determine the lives and property of the people living below them will be safe from breakage and overflow. Where a company constructs a ditch which passes over the land of others it is bound to construct it and use it so as not to injure those lands regardless of the question as to who has the older right or title; and if through any fault or neglect of the owner of the ditch in not properly constructing, managing, and repairing the ditch, the water overflows or breaks through the banks, and destroys or damages the lands of others, either by washing away the crops or soil, or covering the land with sand or debris, the owner of the ditch is liable for such injury. However, the owners of the ditch or canal may not be held liable for what is known as an act of God, unless the acts of the owner are combined with it in such a manner as to render him liable."⁸ And, again, as was held in a recent

⁷ California Dev. Co. v. New Liverpool Salt Co., 172 Fed. Rep. 792, 97 C. C. A. 214.

⁸ And also quoting Kinney on Irr., 1st Ed., Sec. 315.

In the case of Defiance Water Co. v. Olinger, 54 Ohio St. 532, 44 N. E. Rep. 238, 32 L. R. A. 736, where the Court held that the common law rule as laid down in Rylands v. Fletcher was the correct rule of liability without proving negligence, but because the defendant had expressly pleaded

negligence, in the failure to make repairs, the case was decided upon that theory, and that one who collects water on his own premises liable to escape, and, if it should escape, likely to cause mischief, must at least use reasonable care to restrain it. If for want of such care it escapes and injures persons or property rightfully on adjoining premises, he is answerable for damages sustained on account thereof.

Oregon case:⁹ "The true test, considering all the circumstances, is, ought a competent and skillful engineer reasonably to have anticipated such a flood as caused the damage to the plaintiff and to have made provisions therefor?" But even this rule is not as strong as that laid down in the Salton Sea cases, as even competent engineers are liable to mistakes. In that case the Court held that it was the absolute duty of the defendant to have maintained proper control of the water at its headgates, and the fact of extraordinary flood did not relieve the defendant from responsibility.¹⁰

Floods that are of periodical occurrence must be guarded against by the ditch owner, as it is possible to take precautions against floods of this nature.¹¹

Upon the other hand, where the owner is not made the insurer by statute, there is no liability from floods, except for negligence or want of reasonable care.¹²

§ 1671. Liability fixed by statute—Damages caused by the breakage of works.—The ninth section of the Act of Congress of July 26, 1866,¹ provides: "But whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such in-

⁹ Price v. Oregon R. Co., 47 Ore. 350, 83 Pac. Rep. 843.

¹⁰ See, also, Howell v. Big Horn Basin Col. Co., 14 Wyo. 14, 81 Pac. Rep. 785, 1 L. R. A., N. S., 596, where the Court held that in reservoir cases the owners were held to the strict rule of liability, but in ditch or canal cases the owners were held only to ordinary or reasonable care.

¹¹ The Salton Sea Cases, 172 Fed. Rep. 820, 97 C. C. A. 242; Burbank v. West Walker River Ditch Co., 13 Nev. 431; Fairbury v. Chicago etc. Co., 79 Neb. 854, 113 N. W. Rep. 535, 13 L. R. A., N. S., 542.

¹² Proctor v. Jennings, 6 Nev. 83, 3 Am. Rep. 240, 4 Morr. Min. Rep. 265; Mathews v. Kinsell, 41 Cal. 512; Lisbonbee v. Monroe etc. Co., 18 Utah 343, 54 Pac. Rep. 1009, 72 Am. St.

Rep. 784; Town of Jefferson v. Hicks, 23 Okla. 684, 102 Pac. Rep. 79, 24 L. R. A., N. S., 214.

In an early case in California of Todd v. Cochell, 17 Cal. 97, in an action for damages for the breaking of a small reservoir, the Court instructed the jury that to entitle the plaintiff to recover, it must appear that the breaking of the reservoir resulted from gross negligence of the defendants. This instruction was held erroneous, but the Court held that it was cured by other instructions.

¹ Rev. Stat. of U. S., Sec. 2339; 7 Fed. Stat. Ann., 1905, p. 1090; 2 U. S. Comp. Stat., 1901, p. 1437; 14 Stat. L. 253.

For construction of above section, see Secs. 611-619, 933, 934.

jury or damage shall be liable to the party injured for such injury or damage." And, under the Right of Way Act of March 3, 1891,² the clause quoted above was re-enacted. This section has been generally construed as referring only to the injuries resulting "in the construction" of such works and not as fixing the liability for the breakage of such works after the same were constructed.³

In Colorado and Wyoming it is provided that the owners of reservoirs shall be liable for all damages arising from leakage or overflow of the waters therefrom, or by floods caused by the breaking of the embankments of such reservoirs.⁴ This section is held to be simply an affirmation of the common law rule, discussed in the previous section.⁵ This rule has been upheld as constitutional by the courts, which also hold that the liability was sufficiently absolute, as imposed by its terms, to relieve the plaintiff in an action for damages from alleging and proving negligence.⁶ And it is also

² 6 Fed. Stat. Ann., 1905, p. 508;
2 U. S. Comp. Stat., 1901, p. 1570;
26 Stat. L. 1102.

For the construction of the above section, see Secs. 938-940.

³ See *McGuire v. Brown*, 106 Cal. 660, 39 Pac. Rep. 1060, 30 L. R. A. 384; *Prentice v. McKay*, 38 Mont. 114, 98 Pac. Rep. 1081; *Culbertson etc. Co. v. Olander*, 51 Neb. 539, 71 N. W. Rep. 298; *Clear Creek etc. Co. v. Kilkenny*, 5 Wyo. 38, 36 Pac. Rep. 819; *Jennison v. Kirk*, 98 U. S. 453, 25 L. Ed. 240, 4 Morr. Min. Rep. 504; *Noteware v. Stearns*, 1 Mont. 311, 4 Morr. Min. Rep. 650; *Jacob v. Day*, 111 Cal. 571, 44 Pac. Rep. 243.

⁴ 3 Colo. Stat. Ann., Morr. Ed., 1911, Sec. 3213; Rev. Stat. 1908, Sec. 3213; *Mills' Ann. Stat.*, Sec. 2272; Rev. Stat. Wyo., 1899, Sec. 974; Wyo. Comp. Stat., 1910, Sec. 751.

⁵ See Sec. 1669; *Sylvester v. Jerome*, 19 Colo. 128, 34 Pac. Rep. 760; *Garnet etc. Co. v. Sampson*, 48 Colo. 285, 110 Pac. Rep. 79, 1 Water and Min. Cas. Ann. 610; *Canyon City etc. B. Co. v. Oxtoby*, 45 Colo. 214, 100 Pac. Rep. 1127.

See, also, *Howell v. Big Horn Basin Col. Co.*, 14 Wyo. 14, 81 Pac. Rep. 785, 1 L. R. A., N. S., 596, where the plan for the construction of an irrigation canal resulted in the creation of an extensive basin, wherein a large body of water was artificially collected and stored, it was held that such basin constituted a reservoir, within Rev. St. 1899, Sec. 947, declaring that owners of reservoirs shall be liable for all damages arising from leakage or overflow of the waters therefrom, or by floods caused by the breaking of embankments thereof.

⁶ "It would be a gross abuse of the judicial power to construe away the words of the statute by holding the owners of reservoirs exempt from liability for damages, upon their proof of the exercise of reasonable care and caution." *Garnet etc. Co. v. Sampson*, 48 Colo. 285, 110 Pac. Rep. 79.

See, also, *Larimer County D. Co. v. Zimmerman*, 4 Colo. App. 78, 34 Pac. Rep. 1111; *Sylvester v. Jerome*, 19 Colo. 128, 34 Pac. Rep. 760; *Canyon City etc. B. Co. v. Oxtoby*, 45 Colo. 214, 100 Pac. Rep. 1127; *Mustang etc.*

held in a recent case that the liability is the same, even if they have used a natural hillside as a part of the restraining wall and it washes out.⁷

As we stated in the previous section, we believe this to be the correct rule fixing the liability of all who construct dams and reservoirs for the purpose of holding back and storing water.⁸ So, where the courts of a State hold that such a company is absolved from liability by showing that it exercised reasonable care in the construction and maintenance of such works, or worse, before a party injured by the breaking of such works can recover damages that he must prove actual negligence upon the part of the owners of such works, a similar statute to the above should be enacted by the legislature.

§ 1672. **Liability for negligence—Damages from ditches and canals.**—But the strict rule of liability, as laid down in the cases of dams and reservoirs, and discussed in the previous sections,¹ is not usually applied to ditches and canals, where the water is under no, or comparatively little, pressure. The carrying of water through ditches and canals is not a dangerous or menacing undertaking, and, by the exercise of ordinary or reasonable care, it can be rendered comparatively harmless.² And, therefore, even the English courts, which hold the owners of reservoirs to the strict liability for the damages caused by water escaping from such reservoirs without proof of negligence,³ do not hold the same rule of liability in the cases of water escaping from ditches and canals, upon the ground that it is not so liable to escape except in case of actual negligence, and, if the water does escape it is liable to do little injury, as com-

Co. v. Hissman, 49 Colo. 308, 112 Pac. Rep. 800, where only the measure of damages was considered.

⁷ Garnet etc. Co. v. Sampson, 48 Colo. 285, 110 Pac. Rep. 79, 1 Water and Min. Cas. Ann. 610.

⁸ See Sec. 1669.

¹ See Secs. 1669-1672.

² Garnet etc. Co. v. Sampson, 48 Colo. 285, 110 Pac. Rep. 79, 1 Water and Min. Cas. Ann. 610; Howell v. Big Horn Basin Col. Co., 14 Wyo. 14, 81 Pac. Rep. 785, 1 L. R. A., N. S., 596, where a sharp distinction is

drawn as between the liability in reservoir and ditch cases.

See, also, Middlekamp v. Bessemer etc. Co., 46 Colo. 102, 103 Pac. Rep. 280, 23 L. R. A., N. S., 795, holding that the ditch owners are not insurers, although in reservoir cases in the same State it is held that under the statute they are insurers.

For liability in reservoir cases, see Secs. 1669-1672.

³ For the English rule as to reservoirs, see Sec. 1669.

pared with that when the escape is from a reservoir.⁴ Therefore, in applying the rule of negligence or ordinary care to ditch and canal cases, the courts hold that it is the duty of the owners thereof to exercise in their construction, maintenance, or operation, only such a degree of care, which ordinarily prudent men would exercise under like circumstances were the *risk* their own. And, that, in order to recover damages for injuries from the escape of the water from such works, the plaintiff must allege and prove negligence upon the part of the owners, or at least the want of ordinary care. In other words, the owners of an irrigation canal or ditch are not liable as insurers, for injuries sustained to adjoining property by seepage, leakage, or overflow from the canal or ditch, but are only liable for such injuries in case of actual negligence.⁵

⁴ *Boughton v. Midland etc. R. Co.*, Ir. Rep. 7 C. L. 169; *Nield v. London etc. R. Co.*, 10 Exch. 4, 23 Week. Rep. 60, 44 L. J. Exch. N. S. 15.

⁵ "The well settled rule is that the owner of an irrigation ditch is bound to exercise reasonable care and skill to prevent injury to other persons from such ditch, and he will be liable for all damages occurring to others as a result of his negligence or unskillfulness in constructing, maintaining, or operating the ditch." *Howell v. Big Horn Basin Col. Co.*, 14 Wyo. 14, 81 Pac. Rep. 785, 1 L. R. A., N. S., 596.

A person may recover for damages sustained by reason of the mismanagement of a canal, which damage resulted from defective waste gates, or from opening them to relieve the canal from an over supply of water, or from neglect in keeping the canal in proper repair, which resulted in seepage of the water. *Stuart v. Noble D. Co.*, 9 Idaho 765, 76 Pac. Rep. 255.

A ditch owner is bound to keep his ditch in good repair, so that the water will not overflow or break through its banks, or destroy or damage lands of other parties; and, if

through any fault or neglect of his in not properly managing and keeping it in repair, the water does overflow or break through the banks of the ditch and injure the lands of others, either by washing away the soil or covering the soil with sand, the law holds him responsible. *Richardson v. Kier*, 34 Cal. 63, 91 Am. Dec. 681, 4 Morr. Min. Rep. 612.

An instruction, in an action for damages from the breaking of an irrigation ditch, that it is incumbent on an irrigation company to construct its flumes and ditches in such a reasonable and prudent manner that no damages shall result to the person, whose lands are crossed, is erroneous, as making it an insurer. *King v. Miles City etc. Co.*, 16 Mont. 463, 41 Pac. Rep. 431, 50 Am. St. Rep. 506.

A corporation, to supply water to its stockholders for irrigation and domestic purposes, is not an insurer, and is only liable for injuries caused by its works when guilty of negligence, which must be pleaded and proved. *Billings Realty Co. v. Big Ditch Co.*, 43 Mont. 251, 115 Pac. Rep. 828.

A corporation which constructed an irrigation plant so as to obstruct the

And, in this connection negligence may be defined as the omission to do something which a reasonable man, guided by those

natural drainage from plaintiff's land was held not relieved from liability from a resulting flood by the fact that it employed a competent engineer to superintend the construction of its works. *Barstow Irr. Co. v. Black*, 39 Tex. Civ. App. 30, 86 S. W. Rep. 1036.

However, in Canada, it is held that where the statute authorized an owner of land to divert unrecorded and unappropriated water from any stream for the purpose of irrigating his land, it was held that such right was permissive and not imperative, and that he was liable to adjoining owners for injury done their lands, even in the absence of negligence upon his part. *Canadian P. R. Co. v. Parke*, 68 L. J. P. C. N. S. 89.

See, also, *Lisonbee v. Monroe Irr. Co.*, 18 Utah 343, 54 Pac. Rep. 1008, 72 Am. St. Rep. 784; *Kearney etc. Co. v. Akeyson*, 45 Neb. 635, 63 N. W. Rep. 921; *Malmstrom v. People's etc. Co.*, 32 Nev. 246, 107 Pac. Rep. 98; *Jenkins v. Hooper Irr. Co.*, 13 Utah 100, 44 Pac. Rep. 829; *Emison v. Owyhee D. Co.*, 37 Ore. 577, 62 Pac. Rep. 13; *McCarty v. Boise City C. Co.*, 2 Idaho 225, 10 Pac. Rep. 623; *Shields v. Orr Extension D. Co.*, 23 Nev. 349, 47 Pac. Rep. 194; *Bacon v. Kearney etc. Syndicate*, 1 Cal. App. 275, 82 Pac. Rep. 84; *Sutter v. Wenatchee etc. Co.* 35 Wash. 1, 76 Pac. Rep. 298; *Paolini v. Fresno etc. Co.*, 9 Cal. App. 1, 97 Pac. Rep. 1130; *Mullen v. Lake Drummond etc. Co.*, 130 N. C. 496, 41 S. E. Rep. 1027, 61 L. R. A. 833; *Clear Creek etc. Co. v. Kilkenney*, 5 Wyo. 38, 36 Pac. Rep. 819; *Arave v. Idaho etc. Co.*, 5 Idaho 68, 46 Pac. Rep. 1024; *Crowder v.*

McDonnell, 21 Mont. 367, 54 Pac. Rep. 43; *Boynton v. Longley*, 19 Nev. 69, 6 Pac. Rep. 437, 3 Am. St. Rep. 781; *Burbank v. West Walker River D. Co.*, 13 Nev. 431; *Thomas v. Blaisdell*, 25 Nev. 223, 58 Pac. Rep. 903; *Catlin etc. Co. v. Best*, 2 Colo. App. 481, 31 Pac. Rep. 391; *Greeley Irr. Co. v. House*, 14 Colo. 549, 24 Pac. Rep. 329; *Consolidated etc. Co. v. Hamlin*, 6 Colo. App. 341, 40 Pac. Rep. 582; *North Point Cons. Irr. Co. v. Utah etc. Co.*, 16 Utah 246, 52 Pac. Rep. 168, 40 L. R. A. 851, 67 Am. St. Rep. 607; *Platte etc. Co. v. Anderson*, 8 Colo. 131, 6 Pac. Rep. 515; *Denver etc. Co. v. Middaugh*, 12 Colo. 434, 21 Pac. Rep. 565, 13 Am. St. Rep. 234; *City of Boulder v. Fowler*, 11 Colo. 396, 18 Pac. Rep. 337; *Old v. Keener*, 22 Colo. 6, 43 Pac. Rep. 127; *Fleming v. Lockwood*, 36 Mont. 384, 92 Pac. Rep. 962, 14 L. R. A., N. S., 628, 13 Am. & Eng. Ann. Cas. 263; *Mulrone v. Marshall*, 35 Mont. 238, 88 Pac. Rep. 797; *Bean v. Stoneman*, 104 Cal. 49, 38 Pac. Rep. 39; *Parker v. Larsen*, 86 Cal. 236, 24 Pac. Rep. 989, 21 Am. St. Rep. 30; *Weidekind v. Tuolumne etc. Co.*, 65 Cal. 431, 4 Pac. Rep. 415, 12 Pac. Rep. 387; *Everett v. Hydraulic etc. Co.*, 23 Cal. 225, 4 Morr. Min. Rep. 589; *Hoffman v. Tuolumne etc. Co.*, 10 Cal. 413; *Tenney v. Miners' D. Co.*, 7 Cal. 335, 11 Morr. Min. Rep. 31; *Wolf v. St. Louis etc. Co.*, 10 Cal. 541, 10 Morr. Min. Rep. 636; *McLelland v. Brownsville etc. Co.*, 46 Tex. Civ. App. 249, 103 S. W. Rep. 206; *Todd v. Cochell*, 14 Cal. 98, 10 Morr. Min. Rep. 655; *Campbell v. Bear River etc. Co.*, 35 Cal. 679, 10 Morr. Min. Rep. 656; *Gibson v.*

considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. Moreover, negligence is not absolute or intrinsic, but always relative, and depends upon the circumstances of time, place, or person, or other facts surrounding each particular case. And, upon the subject of the standard of care in such cases, it may be said: "The legal test of negligence, whether negligence be conceived as a sort of legal or moral delinquency, or whether it be conceived as a breach of implied duty, is this: Did the defendant, in doing the alleged negligent act, use that reasonable care and caution which an ordinarily prudent person would have used in the same situation? If not, he is guilty of negligence. Stated in another way, conduct is said to be negligent when a prudent man in the position of the tortfeasor would have foreseen that a harmful effect was sufficiently probable to warrant his foregoing the conduct or guarding against its consequences." ⁶

It is the duty of the ditch owner to keep his ditch in such a condition that the water therefrom will not cause a breach in it and flood the adjoining property.⁷ In most of the States this duty is fixed by statute, and any failure to comply with the same is deemed negligence.⁸ But negligence can not be presumed from the mere fact of the breaking of the ditch or canal, without other evidence, so as to shift the burden of proof upon the defendant to relieve himself from negligence.⁹ But in a late Washington case,¹⁰ it was held that the rule of *res ipsa loquitur* does apply to the breaking of an irrigation ditch, and that this rule, like all other rules of evidence, must be applied with reference to the particular case.

Puchta, 33 Cal. 310, 12 Morr. Min. Rep. 39; Parker v. Larsen, 86 Cal. 236, 24 Pac. Rep. 989, 21 Am. St. Rep. 30; Parker v. Gregg, 136 Cal. 413, 69 Pac. Rep. 22.

⁶ Street on Foundation of Legal Liability, Vol. 1, p. 96.

⁷ Where the defendant permitted a break in his ditch to remain unrepaired for three weeks, whereby plaintiff's land was flooded, such conduct was held negligence *per se*. Cat-

lin etc. Co. v. Best, 2 Colo. App. 481, 31 Pac. Rep. 391.

⁸ For the statutes of the various States, see Part XIV.

⁹ For pleading negligence, see Sec. 1686.

For evidence, burden of proof, see Sec. 1693; Tenney v. Miners' etc. Co., 7 Cal. 335, 11 Morr. Min. Rep. 31.

¹⁰ Dalton v. Selah Water Users' Association, — Wash. —, 122 Pac. Rep. 4.

In summing up the principles of law applicable to ditch and canal cases, as decided almost unanimously by the authorities, we find the following: First, the owner of a ditch or canal is not an insurer against damages which may result from its construction, maintenance, or operation. Second, the owner of a ditch or canal, where his negligence or unskillfulness in the construction, maintenance, or operation of the same is sufficiently established, or his want of reasonable and ordinary care, is liable in damages for injuries resulting from breakage and overflow, leakage, seepage, or the escape of the water in any manner upon the lands and premises of others, if without fault of the land owner himself,¹¹ or due to an act of God or *vis major*.¹²

§ 1673. Injuries from ditches and canals—Actions for damages lie when.—The conveyance of water from the natural streams to the place of use for all beneficial purposes, being a legitimate and most necessary enterprise, especially in the Western portion of this country, and protected and encouraged by the law to the fullest extent possible, and the liability of ditch owners for damage from overflow, leakage, seepage, or the escape of the water in any manner, depending upon the negligence of the ditch owner,¹ and the actual injury caused thereby, there is, therefore, no liability imposed upon the owner of a canal or ditch, existing by lawful authority, for damages resulting from the mere existence of a ditch or canal, *ipso facto*.² In order for the plaintiff to recover damages in ditch and canal cases not only must there have been actual injuries, but those injuries must have been caused by some negligent act upon the

¹¹ For contributory negligence, see Sec. 1688.

¹² For act of God as a defense, see Secs. 1691, 1692.

¹ See Sec. 1672.

² A ditch existing by lawful authority, its proprietors are not liable for damages resulting from such existence of the ditch *ipso facto*. *Platte & Denver D. Co. v. Anderson*, 8 Colo. 131, 6 Pac. Rep. 515.

See, also, *City of Denver v. Mullin*, 7 Colo. 345, 3 Pac. Rep. 693; *Walley v. Platte & Denver D. Co.*, 15

Colo. 579, 26 Pac. Rep. 129; *Gibson v. Puchta*, 33 Cal. 310, 12 Morr. Min. Rep. 227.

The maintenance of ditches and canals, or other works, is not in and of itself a nuisance. *Bliss v. Grayson*, 24 Nev. 422, 56 Pac. Rep. 231.

See, also, *Fresno v. Fresno etc. Co.*, 98 Cal. 179, 32 Pac. Rep. 943; *Middlekamp v. Bessemer etc. Co.*, 46 Colo. 102, 103 Pac. Rep. 280, 23 L. R. A., N. S., 795; *Boise City v. Boise City Canal Co.*, 19 Idaho 717, 115 Pac. Rep. 505.

part of the ditch owner.³ But, when these two elements are present in any case, and properly alleged and proven,⁴ the plaintiff should recover damages against the ditch owner, regardless as to who he may be, and also against his servants and agents whose acts jointly contributed to his injuries.⁵ A recovery may be had for injuries to the person, as well as for injuries to property, or for the death of a person.⁶ Damages may also be recovered for injuries to personal property, such as horses or cattle, as well as for injuries to land.⁷ So, again, damages may be recovered for injuries to growing crops.⁸

It was also held that a notice or warning to the ditch owner of certain defects in his works is sufficient to fix him with negligence if he remains inactive and permits the damages thereafter to occur.⁹ Where a right of way has been granted to a ditch owner over the lands of others, either by deed or by condemnation proceedings, damages may be recovered for injuries resulting from the negligent maintenance of the ditch.¹⁰ Although an owner of a ditch may acquire an easement for the same by prescription,¹¹ he can not acquire a prescriptive right to be negligent in the maintenance of his

³ See previous section, No. 1672, and cases cited.

⁴ For pleadings in damage cases, see Secs. 1686-1690.

For proof, see Sec. 1693.

⁵ *Bates v. Van Pelt*, 1 Tex. Civ. App. 185, 20 S. W. Rep. 949.

See, also, for parties defendant, Sec. 1685.

⁶ *Platte & Denver Canal Co. v. Dowell*, 17 Colo. 376, 30 Pac. Rep. 68, where the parents recovered for the drowning of a child.

But see *Farmers' High Line etc. Co. v. Westlake*, 23 Colo. 26, 46 Pac. Rep. 134, where it was held that the frightening of a horse was the proximate cause of the accident, and not the ditch.

⁷ For actions for damages for injuries to stock, see Sec. 1699.

⁸ For actions for damages to crops, see Sec. 1698.

⁹ *Grooley etc. Co. v. House*, 14 Colo.

549, 24 Pac. Rep. 329; *McCarty v. Boise etc. Co.*, 2 Idaho 225, 10 Pac. Rep. 623.

¹⁰ *Old v. Keener*, 22 Colo. 6, 43 Pac. Rep. 127; *Clear Creek etc. Co. v. Kilkenney*, 5 Wyo. 38, 36 Pac. Rep. 819; *Middlekamp v. Bessemer etc. Co.*, 46 Colo. 102, 103 Pac. Rep. 280, 23 L. R. A., N. S., 795; *Turpen v. Turlock Irr. Dist.*, 141 Cal. 1, 74 Pac. Rep. 295.

In condemnation proceedings all damages, present and prospective, that are the natural, necessary, or reasonable incident of the improvement must be assessed, not including such as may arise from negligent or unskillful construction or use thereof. *Denver etc. Co. v. Middaugh*, 12 Colo. 434, 21 Pac. Rep. 565, 13 Am. St. Rep. 234.

¹¹ For the acquisition of rights of way by prescription, see Secs. 1044, 1045.

ditch, however long he may have been guilty of it; nor can he excuse his negligence by showing the custom used by other companies in repairing their ditches at the same time and in the same manner.¹² A person can not recover damages for a public nuisance, unless he has actually suffered damages peculiar to himself.¹³

§ 1674. **Damages for flooding lands from overflow and leakage from works.**—Coming down to the results of negligence in the handling of waters, or the actual injuries themselves, we find that one of the most common causes of action for damages is for the flooding of lands by the escape of water from canals, ditches, or other works, by overflow or leakage therefrom. And, upon this subject, it is the general duty of the owners of all such works to carefully construct and maintain the embankments so that the water will not escape to the injury of adjoining property. But, with the exception of the owners of reservoirs, as discussed in a previous section,¹ the owners of other works are not liable as insurers, for injuries sustained to adjoining property from overflow and leakage from such works, but are liable only for injuries which are the direct results of the negligence of such owners, in the construction, maintenance, or operation of the same.² So, in the case of the construction of a canal, where no care was taken to prevent leakage, except an endeavor to tramp the earth solid by teams, such construction was held to constitute negligence.³ In actions of this

¹² *Jenkins v. Hooper Irr. Co.*, 13 Utah 100, 44 Pac. Rep. 829.

¹³ "Of course the plaintiff can not recover damages for a public nuisance so far as the injury is to the public only, but if he suffers damage peculiar to himself, as by flooding his land and thereby depriving him of the use of it, the nuisance is to that extent a private nuisance as to him for which he may recover damages." *Grigsby v. Clear Lake Water Co.*, 40 Cal. 396. See, also, *Blanc v. Klumpke*, 29 Cal. 156.

See, also, for injunctions against nuisances, Sec. 1621.

¹ See Secs. 1669-1671.

² For liability for damages from ditches and canals, see Sec. 1673.

³ *Howell v. Big Horn Basin Col. Co.*, 14 Wyo. 14, 81 Pac. Rep. 785, 1 L. R. A., N. S., 596.

See, also, *Platte & Denver D. Co. v. Anderson*, 8 Colo. 131, 6 Pac. Rep. 515; *Denver City, etc. Co. v. Mid-daugh*, 12 Colo. 434, 21 Pac. Rep. 565, 13 Am. St. Rep. 234.

A corporation owning a ditch or canal is not liable for the acts of one to whom it has granted the right to manage the ditch for a definite period of time and whose conduct is not under its control, and when the injury claimed was during the latter's man-

nature the principle of actual compensation governs, and the damages awarded must be confined to the actual damages sustained as the results of such negligence.⁴ But a canal or ditch owner is not an insurer against all damages caused by his works. Therefore, an instruction that "It is incumbent upon the defendant company to construct its flumes and ditches in such a reasonable and prudent manner as that no damage shall result to the person whose lands are crossed by the ditch," was held erroneous.⁵ He is liable only for such injuries as are caused by his negligence.⁶ And, in order

agement. *Alexander v. Winters*, 23 Nev. 475, 49 Pac. Rep. 116, 24 Nev. 143, 50 Pac. Rep. 798.

See, also, *Greeley Irr. Co. v. House*, 14 Colo. 549, 24 Pac. Rep. 329; *Shurtliff v. Extension D. Co.*, 14 Idaho 416, 94 Pac. Rep. 574; *California Dev. Co. v. New Liverpool Salt Co.*, 172 Fed. Rep. 792, 97 C. C. A. 214; *Bacon v. Kearney etc. Syndicate*, 1 Cal. App. 275, 82 Pac. Rep. 84; *Thomas v. Bolsa Land Co.*, 1 Cal. App. 335, 82 Pac. Rep. 207; *Ladd v. Redle*, 12 Wyo. 362, 75 Pac. Rep. 691; *Dennis v. Crocker-Huffman etc. Co.*, 6 Cal. App. 58, 91 Pac. Rep. 425; *Tubbs v. Roberts*, 40 Colo. 498, 92 Pac. Rep. 220; *French v. West Seattle etc. Co.*, 50 Wash. 257, 97 Pac. Rep. 60; *McPherson v. Alta Irr. Dist.*, 14 Cal. App. 353, 112 Pac. Rep. 193; *Mustang etc. Co. v. Hessman*, 49 Colo. 308, 112 Pac. Rep. 800; *Hayden v. Consolidated etc. Co.*, 3 Cal. App. 136, 84 Pac. Rep. 422; *Young v. Extension D. Co.*, 13 Idaho 174, 89 Pac. Rep. 296; *Emison v. Owyhee D. Co.*, 37 Ore. 577, 62 Pac. Rep. 13; *Stuart v. Noble D. Co.*, 9 Idaho 765, 76 Pac. Rep. 255; *Oldenburg v. Oregon Sugar Co.*, 39 Ore. 564, 65 Pac. Rep. 869; *Jenkins v. Hooper Irr. Co.*, 13 Utah 100, 44 Pac. Rep. 829; *Richardson v. City of Eureka*, 110 Cal. 441, 42 Pac. Rep. 965; *Wilson v. Boise City*, 6 Idaho 391, 55 Pac. Rep. 887; *Arave v. Idaho C. Co.*, 5 Idaho 68,

46 Pac. Rep. 1024; *Orchard Place Land Co. v. Brady*, 53 Kan. 420, 36 Pac. Rep. 728; *De Baker v. Southern Cal. R. Co.*, 106 Cal. 257, 39 Pac. Rep. 610, 46 Am. St. Rep. 237; *Kearney v. Akeyson*, 45 Neb. 635, 63 N. W. Rep. 921; *Big Goose etc. Co. v. Morrow*, 8 Wyo. 537, 59 Pac. Rep. 159, 80 Am. St. Rep. 955; *Messenger v. Gordon*, 15 Colo. App. 429, 62 Pac. Rep. 959; *Catlin etc. Co. v. Best*, 2 Colo. App. 481, 31 Pac. Rep. 391; *Learned v. Castle*, 78 Cal. 454, 18 Pac. Rep. 872, 21 Pac. Rep. 11; *Chidester v. Consolidated etc. Co.*, 53 Cal. 56; *De Costa v. Massachusetts Flat etc. Co.*, 17 Cal. 613; *Crowder v. McDonnell*, 21 Mont. 367, 54 Pac. Rep. 43; *Lyon v. Chicago etc. Co.*, — Mont. —, 121 Pac. Rep. 886; *Colorado Springs etc. Co. v. Albrecht*, — Colo. App. —, 123 Pac. Rep. 957.

⁴ *Young v. Extension D. Co.*, 13 Idaho 174, 89 Pac. Rep. 296; *Old v. Keener*, 22 Colo. 6, 43 Pac. Rep. 127; *Malmstrom v. People's Drain D. Co.*, 32 Nev. 246, 107 Pac. Rep. 98.

See, also, for the measure of damages, Secs. 1697-1701.

⁵ *King v. Miles City etc. Co.*, 16 Mont. 463, 41 Pac. Rep. 431, 50 Am. St. Rep. 506; *Whitehouse Birmingham Canal Co.*, 27 L. J. Exch. N. S. 25.

⁶ See Secs. 1673; *Colorado etc. Co. v. Morris*, 1 Colo. App. 401, 29 Pac. Rep. 302, where there was no evi-

for the plaintiff to recover, he must not have contributed to the injuries in any manner.⁷ A riparian proprietor who interferes with the flow of a natural stream by the construction of works, so that the water floods the lands of others is liable for the actual damages incurred.⁸

It is also an act of negligence upon the part of an appropriator who diverts water into his ditches and canals, and who either permits the surplus water, or the water after it has been used, to flow away from his works over the land of others to their injury. The one diverting water from a stream must provide adequate means for the drainage of the unused or surplus water through some outlet by the means of which it can be either returned to the natural stream or pass away without doing injury to the lands of others; and, if he does not do so, he is liable for the damages sustained.⁹

It is held that a ditch owner is not liable for damages from leakage, caused by the burrowing of some animal, unless after notice he should negligently permit the same to continue.¹⁰

dence as to which of two companies caused the injury.

⁷ For contributory negligence as a defense, see Sec. 1688.

⁸ A proprietor of land over which surface water is wont to flow in two or more channels may not collect such water into a single channel and discharge the aggregate volume upon the land of a lower proprietor, to the detriment of the latter. *Humphreys v. Moulton*, 1 Cal. App. 257, 81 Pac. Rep. 1085.

See, also, *Hartshorn v. Chaddock*, 135 N. Y. 116, 31 N. E. Rep. 997, 17 L. R. A., 426.

⁹ *Boynton v. Longley*, 19 Nev. 69, 6 Pac. Rep. 437, 3 Am. St. Rep. 781; *Lisonbee v. Monroe Irr. Co.*, 18 Utah 343, 54 Pac. Rep. 1009, 72 Am. St. Rep. 784; *Blaisdell v. Stephens*, 14 Nev. 17, 33 Am. Rep. 523; *Richardson v. Kier*, 37 Cal. 63, 91 Am. Dec. 681, 4 Morr. Min. Rep. 612; *North*

Point Consolidated Irr. Co. v. Utah etc. Co., 16 Utah 246, 52 Pac. Rep. 168, 40 L. R. A. 851, 67 Am. St. Rep. 607.

In a recent case in Colorado, where plaintiff was entitled to the unobstructed use of waste water as the same should be discharged into her ditch at the terminus of a particular lateral connected with an irrigation system of a water company, it was held that the defendants could not wilfully and maliciously discharge water as waste and at the same time invoke the rule that they were not bound to maintain conditions so as to supply plaintiff's appropriation of waste water at any time or in any quantity. *Green Valley D. Co. v. Schneider*, 50 Colo. 606, 115 Pac. Rep. 705.

¹⁰ *Tenney v. Miners' Ditch Co.*, 7 Cal. 335, 11 Morr. Min. Rep. 31; *Greeley etc. Co. v. House*, 14 Colo. 549, 24 Pac. Rep. 329.

§ 1675. **Damages from seepage of water.**—The seepage of water from ditches, canals, or other works, is but one method of its escape from such works. Therefore, the same duty devolves upon the owner of such works to so construct them as far as possible so that the water will not seep or percolate therefrom to the injury of the lands of others below. The law upon this subject and that of overflow and leakage, discussed in the last section,¹ is tersely expressed in the legal maxim, *Sic utere tuo ut alienum non laedas*, which expressed in English and applied to the subject under discussion, is: "The owner of such works must so use, maintain, and operate his works as not to injure the property of another."² And, as in other cases, the owner is held not to be the insurer against all damages incurred, he is held liable in damages for all injuries which are the direct and proximate result of his actual negligence, or the failure to exercise ordinary and reasonable care.³ And, therefore, it is held that, if a ditch owner negligently permits water to escape onto the land of another, because of defects in the ditch, or allows the flow of the water to be obstructed so as to cause it to seep or percolate through the ditch and injure the land, the owner is liable in damages for such injuries; the injury not being *damnum absque injuria*.⁴ It is held to be the duty of ditch and canal com-

¹ See Sec. 1674.

² *Parker v. Larsen*, 86 Cal. 236, 24 Pac. Rep. 989, 21 Am. St. Rep. 30.

³ The owner of an irrigation ditch, seepage of the water from which, not intentionally caused, injures the property of another, is liable for the injury only in case of negligence. *Fleming v. Lockwood*, 36 Mont. 384, 92 Pac. Rep. 962, 14 L. R. A., N. S., 628, 13 Am. & Eng. Ann. Cas. 263.

See, also, *Howell v. Big Horn Basin C. Co.*, 14 Wyo. 14, 81 Pac. Rep. 785, 1 L. R. A., N. S., 596, where it is said: "The failure to specifically require the observance of care in constructing and guarding the bottom of a ditch can not be regarded as an exemption from liability, should damage be caused through negligence in that respect."

"But assuming, under our constitution and legislative enactments, the owners of canals are liable for damages to distant proprietors occasioned by waters seeping therefrom, although not negligent in their construction or operation, they are not insurers, and have never been so held by this Court." *Middlekamp v. Bessemer etc. Co.*, 46 Colo. 102, 103 Pac. Rep. 280, 23 L. R. A., N. S., 795.

See, also, *Malmstrom v. People's Drain D. Co.*, 32 Nev. 246, 107 Pac. Rep. 98.

⁴ *Paolini v. Fresno etc. Co.*, 9 Cal. App. 1, 97 Pac. Rep. 1130.

See, also, *Sylvester v. Jerome*, 19 Colo. 128, 34 Pac. Rep. 760; *Shields v. Orr Ext. D. Co.*, 23 Nev. 349, 47 Pac. Rep. 194; *Jenkins v. Hooper Irr. Co.*, 13 Utah 100, 44 Pac. Rep. 829;

panies to take care of their own seepage and percolating waters. And, where this may be done by the construction of a "sweat" ditch, it is held to be negligence not to construct such a ditch.⁵ But there is no duty imposed upon the party injured to construct such a ditch to avoid the injury.⁶

It often happens that the irrigation of upper lands has the effect of causing seepage to the lands of those lying below. Here, again, the liability of the upper owner for damages resulting from such seepage depends upon his negligence, as is the case where the seepage is directly from the ditches or canals, discussed above. And, when the lower land becomes soaked and too wet from the seepage from irrigated lands, the upper land owners can not be held liable, when they use ordinary and reasonable care in the irrigation of their lands, and when they use no more water than is reasonably necessary in so doing.⁷ But the land owner who, in irrigating his land, uses more water than is necessary, and permits the water to form in pools thereon, and from thence to seep and percolate to his neighbor's land, is guilty of negligence and is liable for the injuries sustained.⁸

Negligence being the gist of such actions, the plaintiff has the

Stuart v. Noble D. Co., 9 Idaho 765, 76 Pac. Rep. 255; *Consolidated etc. Co. v. Hamlin*, 6 Colo. App. 341, 40 Pac. Rep. 582; *Canyon City R. Co. v. Oxtoby*, 45 Colo. 214, 100 Pac. Rep. 1127; *Middlekamp v. Bessemer etc. Co.*, 46 Colo. 102, 103 Pac. Rep. 280, 23 L. R. A., N. S., 795; *McCarty v. Boise City Canal Co.*, 2 Idaho 225, 10 Pac. Rep. 623; *North Point Consol. Irr. Co. v. Utah etc. Co.*, 16 Utah 246, 52 Pac. Rep. 168, 40 L. R. A. 851, 67 Am. St. Rep. 607; *Shurtliff v. Extension D. Co.*, 14 Idaho 416, 94 Pac. Rep. 574; *Parker v. Larsen*, 86 Cal. 236, 24 Pac. Rep. 989, 21 Am. St. Rep. 30; *Lisonbee v. Monroe Irr. Co.*, 18 Utah 343, 54 Pac. Rep. 1009, 72 Am. St. Rep. 784; *Mullen v. Lake Drummond etc. Co.*, 130 N. C. 496, 41 S. E. Rep. 1027, 61 L. R. A. 833;

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Turpen v. Turlock Irr. Dist., 141 Cal. 1, 74 Pac. Rep. 295; *Schuster v. Albrecht*, 98 Wis. 241, 73 N. W. Rep. 990, 67 Am. St. Rep. 804; *Ward v. Ford*, 58 S. C. 557, 36 S. E. Rep. 916; *Gibson v. Puchta*, 33 Cal. 310, 12 Morr. Min. Rep. 227.

⁵ *Mullen v. Lake Drummond etc. Co.*, 130 N. C. 496, 41 S. E. Rep. 1027, 61 L. R. A. 833; *North Point Cons. Irr. Co. v. Utah etc. Co.*, 16 Utah 246, 52 Pac. Rep. 168, 40 L. R. A. 851, 67 Am. St. Rep. 607.

⁶ *McCarty v. Boise City C. Co.*, 2 Idaho 225, 10 Pac. Rep. 623.

⁷ *Lisonbee v. Monroe Irr. Co.*, 18 Utah 343, 54 Pac. Rep. 1009, 72 Am. St. Rep. 784.

⁸ *Parker v. Larsen*, 86 Cal. 236, 24 Pac. Rep. 989, 21 Am. St. Rep. 30.

burden of proof, in the first instance, to prove negligence on the part of the defendant.⁹

It is held in Colorado that injuries to land from water seeping from a properly constructed irrigation ditch which is maintained to be permanent constitutes a single cause of action, and as affected by the statute of limitations accrues at the beginning of the injury.¹⁰

§ 1676. **Damages for the flowage or backing up of water.**—One of the results of the placing of dams or other obstructions in natural streams is the flowage or the backing up of the waters so that they cover the lands above such obstructions. Flowage is usually governed by statute, and where the use to which the water is to be put is a public one, the right to acquire such land as may be necessary is given by virtue of the power of eminent domain, upon just compensation.¹ Such a right may also be acquired by grant or prescription.² But, where the flowage covers the lands of others, over which the party constructing such works has no right, such party is liable for the injuries caused thereby. So, again, where a party has the right to a certain amount of flowage land, and reconstructs his works so that other lands are flooded, he is liable for the additional injuries incurred thereby.³ To render one liable for damages in such cases it is sufficient if the obstruction was such that a reasonably prudent man would know that it would be likely to do injury by the backing up of the water, and would have taken

⁹ *Fleming v. Lockwood*, 36 Mont. 384, 92 Pac. Rep. 962, 14 L. R. A., N. S., 628, 13 Am. & Eng. Ann. Cas. 263; *Greeley Irr. Co. v. House*, 14 Colo. 549, 24 Pac. Rep. 329.

¹⁰ *Middlekamp v. Bessemer Irr. Ditch Co.*, 46 Colo. 102, 103 Pac. Rep. 280, 23 L. R. A., N. S., 795.

¹ For the right of eminent domain, see Secs. 1059-1098.

The flowing of land by a dam for manufacturing purposes is a taking within the meaning of the constitutional provision regulating the taking of land by right of eminent domain. *Avery v. Vermont Elec. Co.*, 75 Vt. 235, 54 Atl. Rep. 179, 59 L. R. A. 817, 98 Am. St. Rep. 818.

For the defense of prescription, see Sec. 1690.

For the defense of a contract right to flow land, see Sec. 1689.

² See Secs. 1659-1698.

³ *Greeley Irr. Co. v. Von Trotha*, 48 Colo. 12, 108 Pac. Rep. 985.

See, also, *Charnley v. Shawano etc. Co.*, 109 Wis. 563, 85 N. W. Rep. 507, 53 L. R. A. 895, and note; *Avery v. Vermont Elec. Co.*, 75 Vt. 235, 54 Atl. Rep. 179, 59 L. R. A. 817, 98 Am. St. Rep. 818, and note; *McCombs v. Stewart*, 40 Ohio St. 647; *Fredericks v. Pennsylvania Canal Co.*, 148 Pa. 317, 23 Atl. Rep. 1067.

the precaution to guard against it.⁴ Therefore, where a party constructs a permanent dam across a stream, the effect of which can be but apparent that it will back up the water over the lands of others to which he has no right, it must be presumed that he intended the natural consequences of his act, and he will be therefore charged with notice of whatever conditions resulted from the same, and liable for the injuries caused thereby, without the proof of negligence upon his part in the construction of such works.⁵ Where, however, there are but partial obstructions placed in a stream, which, upon all ordinary occasions, will permit the water to pass down as it was wont, as is the case of bridges and culverts, the party owning such works is liable only for such injuries as reasonably might have been foreseen by persons skillful and competent to construct such works in accordance with the demands of the physical conditions of each particular case.⁶ But the owner of such works is not bound to provide against unusual and extraordinary floods such as come within the terms of "act of God," or "inevitable accident." And whether or not such floods do come within the meaning of such terms is a question of fact to be submitted to the jury.⁷

Where certain expert witnesses testified that a dam is a given elevation above sea level, and that it did not, and could not hold back flood waters, and cause the overflow above that elevation, and other witnesses saw the lands at the time of high or flood season,

⁴ *Schmeckpepper v. Chicago etc. R. Co.*, 116 Wis. 592, 93 N. W. Rep. 533.

He will be liable even though the work may have been performed with reasonable care and skill. *Selden v. Delaware etc. Co.*, 24 Barb. 362.

See, also, *Chicago etc. Co. v. Davis*, 26 Okla. 434, 109 Pac. Rep. 214, 1 Water and Min. Cas. Ann. 566.

⁵ *Wilhite v. Billings etc. Co.*, 39 Mont. 1, 101 Pac. Rep. 168; *Greeley Irr. Co. v. Von Trotha*, 48 Colo. 12, 108 Pac. Rep. 985.

⁶ *Price v. Oregon R. Co.*, 47 Ore. 350, 83 Pac. Rep. 843, where it was held that the true test, considering the circumstances, was, ought a competent and skillful engineer reasonably to have anticipated such a flood as caused the damage to the plain-

tiff's land, and to have made provision therefor?

That such works must be constructed in accordance with skillful engineering, see *Ohio etc. R. Co. v. Nuetzel*, 43 Ill. App. 108; *Illinois C. R. Co. v. Bethel*, 11 Ill. App. 17; *Omaha etc. R. Co. v. Brown*, 14 Neb. 170, 15 N. W. Rep. 321; *Pittsburg etc. R. Co. v. Gilleland*, 56 Pa. 445, 94 Am. Dec. 98.

⁷ *Price v. Oregon R. Co.*, 47 Ore. 350, 83 Pac. Rep. 843; *Peoria etc. R. Co. v. Barton*, 38 Ill. App. 469; *Gulf etc. R. Co. v. Pool*, 70 Tex. 713, 8 S. W. Rep. 535; *Southern R. Co. v. Piott*, 131 Ala. 312, 31 So. Rep. 33; *Ohio etc. Co. v. Thillman*, 143 Ill. 127, 32 N. E. Rep. 529, 36 Am. St. Rep. 539.

and testified that they actually were flooded and submerged to a higher elevation than that testified to by the expert witnesses, there is such a substantial conflict in the evidence as to go to the jury.⁸

§ 1677. **Damages for flooding lands by the interference with the flow of surface waters.**—As to whether or not an action at law will lie for damages resulting from the interference with the flow of what are strictly surface waters,¹ depends largely upon the fact as to whether the common law or the civil law has been adopted as the rule of decision in the jurisdiction where the action is brought. According to the rule of the common law, as accepted in England and in many of the States of this country, surface water may be regarded as a common enemy which every land owner may fight and get rid of as best he may, and for which acts no action for damages will lie, the same being *damnum absque injuria*.² Under this

⁸ *Petajaniemi v. Washington W. Pr. Co.*, — Idaho —, 124 Pac. Rep. 783.

¹ As to what constitutes surface waters, see Sec. 318.

² "At common law, for the purpose of drainage, construction, or any other lawful purpose, every proprietor had the right to elevate the surface of his own land, or to erect embankments whereby the natural flow of the water from the upper ground shall be stopped, without liability." *Chicago etc. Co. v. Groves*, 20 Okla. 101, 93 Pac. Rep. 755, 22 L. R. A., N. S., 802.

An obstruction by a railroad embankment of the ordinary ditches and passageways which surface water will cut in a generally level district in its efforts to reach some flowing stream does not constitute an injury to other land owners, where the common law is recognized as the rule of practice and decision, and there are no special statutory provisions in respect to the matter. *Walker v. New Mexico etc. Co.*, 165 U. S. 593, 41 L.

Ed. 837, 17 Sup. Ct. Rep. 421; affirming *Id.*, 7 N. M. 282, 34 Pac. Rep. 43.

"Under this rule it is within the control of the owner of any land upon which it falls or over which it flows. He may use all of it that comes upon his own, or decline to receive any that falls on his neighbor's land. . . . The doctrine of the common law with respect to the obstruction and flow of mere surface water is not only in force in England, but in Connecticut, Indiana, Massachusetts, Missouri, New Jersey, New Hampshire, New York, Vermont, and Wisconsin. . . . The rule of the civil law seems to be in force in Pennsylvania, Iowa, Illinois, California, Louisiana, and referred to with approval in Ohio." *Kansas City etc. Co. v. Riley*, 33 Kan. 374, 6 Pac. Rep. 581.

See, also, *Greatrex v. Hayward*, 8 Exch. 291, 22 L. J. Ex. 137; *Wood v. Waud*, 3 Exch. 748, 18 L. J. Exch. N. S. 305, 13 Jur. 472; *Broadbent v. Ramsbotham*, 11 Exch. 602, 25 L. J. Ex. N. S. 115, 4 Week. Rep. 290,

rule, not only may a land owner get rid of mere surface water by casting it upon the lands of others, but he may also appropriate the same to his own use for any purpose, or for the express purpose of depriving an adjoining land owner of it,³ and any person from whose land it is withheld, and whose supply is depleted thereby, will have no right of action for damages for such diversion or obstruction.⁴

In distinction from the common law rule upon the subject, discussed above, the doctrine of the civil law is, that each of the owners of both the upper and lower estates has a natural easement or servitude in the estate of the other for the flow of mere surface water as it was wont to flow by nature. Therefore, the lower owner can not reject the water as it naturally comes to his land, from the land of the upper owner, by interposing obstructions or barriers against the same; and, upon the other hand, the upper owner can not entirely withhold the supply that would naturally flow to the lands of the lower owner. But, under the American decisions, it is held that either land owner may somewhat interfere with the natural flow of surface water, where it is needed for domestic purposes, or for use upon the land according to the ordinary modes of good husbandry.⁵ And it therefore follows that, for any material interference by one party with the reciprocal rights of the other to the natural flow of the surface water, an action for damages will lie.⁶

34 Eng. L. & Eq. 553; Atchison etc. R. Co. v. Hammer, 22 Kan. 763, 31 Am. Rep. 216; Gibbs v. Williams, 25 Kan. 214, 37 Am. Rep. 241; Buffum v. Harris, 5 R. I. 243; Barkley v. Wilcox, 86 N. Y. 140, 19 Hun, 320, 40 Am. Rep. 519; Flagg v. Worcester, 13 Gray 601; Franklin v. Fisk, 13 Allen 211, 90 Am. Dec. 194; Walker v. Old Colony etc. R. Co., 103 Mass. 10, 4 Am. Rep. 509; Hoyt v. Hudson, 27 Wis. 656, 9 Am. Rep. 473.

³ Chatfield v. Wilson, 28 Vt. 49; Rawson v. Taylor, 11 Exch. 369, 4 Week. Rep. 290; Barkley v. Wilcox, 86 N. Y. 140, 19 Hun, 320, 40 Am. Rep. 519.

⁴ See cases, *supra*.

⁵ Hoyt v. Hudson, 27 Wis. 656, 9 Am. Rep. 473; Martin v. Jett, 12 La. 503, 32 Am. Dec. 120; Kauffman v. Griesmer, 26 Pa. St. 407, 67 Am. Dec. 437; Butler v. Peck, 16 Ohio St. 334, 88 Am. Dec. 452; Gillham v. Madison County R. Co., 49 Ill. 484, 95 Am. Dec. 627; Porter v. Dunham, 74 N. C. 767; Mizzell v. McGowan, 125 N. C. 439, 34 S. E. Rep. 538; Livingston v. McDonald, 21 Iowa 160, 89 Am. Dec. 563; Goldsmith v. Elsas, 53 Ga. 186; McCormick v. Kansas City R. Co., 70 Mo. 395, 35 Am. Rep. 431.

⁶ Interference with the natural flow of surface water is regarded as a nuisance, for which nominal damages

In the arid and semi-arid States of this country, where at times every drop of available water is needed for the proper cultivation of lands, and where it is held that there can be no appropriation of what is strictly mere surface water,⁷ the courts are inclined to hold more in accordance with the rule of the civil law, which, as it seems to the writer, is more consistent with the needs and necessities of an arid region than is the rule of the common law which originated where the question was more one of drainage than of the right to use the water. Some of the Western courts, however, have adopted the common law rule. The leading State to reject the common law rule upon the subject as inapplicable, and to adopt the rule of the civil law, is California. And, in a late case upon the subject, in which damages were recovered in the trial court, by a lower proprietor against an upper for maintaining certain embankments and thereby changing the natural course of surface water, which resulted in flooding of the plaintiff's land, it is said: "It follows, therefore, that the owner of higher lands has no right, for his own relief, either to divert surface or storm waters from his lands onto the lands of another, over which they would not naturally have flowed, nor has he the right, by accumulating surface water upon his own lands in ditches or other artificial channels, to precipitate them upon his neighbor's land in larger quantities or in different form from that which they would have had or taken in the course of nature. The rule of this State is the rule of the civil law, '*Aqua currit, et debet currere, ut currere solebat*,' and we have, moreover, modified, to meet our conditions, the harsh and drastic common-law maxim of '*Cujus est solum, ejus est usque ad coelum et ad infernos*,' by applying with it the more benign and equitable rule of '*Sic utere tuo ut alienum non laedas*.'" ⁸ The

may be recovered without proof of actual damages. *Tootle v. Clifton*, 22 Ohio St. 274, 10 Am. Rep. 732.

See, also, *Schrope v. Pioneer Tp.*, 111 Iowa 113, 82 N. W. Rep. 466; *Butler v. Peck*, 16 Ohio St. 334, 88 Am. Dec. 452.

⁷ See Sec. 654.

⁸ *Wood v. Moulton*, 146 Cal. 317, 80 Pac. Rep. 92.

See, also, *Cushing v. Pires*, 124 Cal.

663, 57 Pac. Rep. 572; *Ogburn v. Connor*, 46 Cal. 346, 13 Am. Rep. 213; *Learned v. Castle*, 78 Cal. 454, 18 Pac. Rep. 872, 21 Pac. Rep. 11; *McDaniel v. Cummings*, 83 Cal. 515, 23 Pac. Rep. 795, 8 L. R. A. 575; *Gray v. McWilliams*, 98 Cal. 157, 32 Pac. Rep. 976, 21 L. R. A. 593, 35 Am. St. Rep. 163; *Los Angeles Cemetery Assn. v. Los Angeles*, 103 Cal. 461, 37 Pac. Rep. 375; *Rudel v. Los Angeles*

rule of the civil law is adopted as the rule of decision in Montana,⁹ Texas,¹⁰ and Wyoming.¹¹ The common law rule is followed in Kansas,¹² New Mexico,¹³ and Oklahoma.¹⁴ In Oregon, as late as 1906, the question had not been decided.¹⁵ This rule is adopted in Washington. As was said in a recent case:¹⁶ "It is also the settled doctrine in this State that surface water, caused by the falling of rain or the melting of snow, is to be regarded as an outlaw or common enemy against which every proprietor of land may defend himself, even if in consequence of such defense injury result to others. As to surface waters this Court has definitely adopted the

County, 118 Cal. 281, 50 Pac. Rep. 400; *Larabee v. Cloverdale*, 131 Cal. 96, 63 Pac. Rep. 143; *Sanguinetti v. Pock*, 136 Cal. 466, 69 Pac. Rep. 98, 89 Am. St. Rep. 169; *Galbreath v. Hopkins*, 159 Cal. 297, 113 Pac. Rep. 174; *Peck v. Peterson*, 15 Cal. App. 543, 115 Pac. Rep. 327; *Humphreys v. Moulton*, 1 Cal. App. 257, 81 Pac. Rep. 1085; *Cox v. Odell*, 1 Cal. App. 682, 82 Pac. Rep. 1086; *Cederberg v. Dutra*, 3 Cal. App. 572, 86 Pac. Rep. 838.

⁹ *Lyon v. Chicago etc. R. Co.*, — Mont. —, 121 Pac. Rep. 886.

¹⁰ *Sabin etc. R. Co. v. Joachumi*, 58 Tex. 456.

¹¹ *Ladd v. Redle*, 12 Wyo. 362, 75 Pac. Rep. 691.

¹² *Darlington v. Board of Commissioners of Cloud County*, 75 Kan. 810, 88 Pac. Rep. 529; *Bryant v. Merritt*, 71 Kan. 272, 80 Pac. Rep. 600; *Missouri Pac. R. Co. v. Keys*, 55 Kan. 205, 40 Pac. Rep. 275, 49 Am. St. Rep. 249; *Singleton v. Atchison etc. R. Co.*, 67 Kan. 284, 72 Pac. Rep. 786; *Baldwin v. Ohio Tp.*, 70 Kan. 102, 78 Pac. Rep. 424, 67 L. R. A. 642, 109 Am. St. Rep. 414; *Atchison etc. R. Co. v. Hammer*, 22 Kan. 763, 31 Am. Rep. 216; *Gibbs v. Williams*, 25 Kan. 214, 37 Am. Rep. 241; *Kansas City etc. R. Co. v. Riley*, 33 Kan. 374, 6 Pac. Rep. 581.

But in the latest decision of the

Supreme Court of that State, the court seems to modify the strict common-law rule by holding that the owner of land is not responsible for injuries occasioned by the flow of surface water from his land upon adjacent lands; but, if he causes it to accumulate and then casts it in a volume upon the land of his neighbor, he is responsible for the increased damages, if any, caused thereby. *Johnston v. Hyre*, 83 Kan. 38, 109 Pac. Rep. 1075.

¹³ *Walker v. New Mexico etc. Co.*, 165 U. S. 593, 41 L. Ed. 837, 17 Sup. Ct. Rep. 421; *aff'g Id.*, 7 N. M. 282, 34 Pac. Rep. 43.

¹⁴ *Town of Jefferson v. Hicks*, 23 Okla. 684, 102 Pac. Rep. 79, 24 L. R. A., N. S., 214, *Chicago etc. Co. v. Groves*, 20 Okla. 101, 93 Pac. Rep. 755, 22 L. R. A., N. S., 802; *Davis v. Frey*, 14 Okla. 340, 78 Pac. Rep. 180, 69 L. R. A. 460; *Chicago etc. R. Co. v. Davis*, 26 Okla. 434, 109 Pac. Rep. 214, 1 *Water and Min. Cas. Ann.* 566.

¹⁵ "The question has never been decided in this State." *Price v. Oregon R. Co.*, 47 Ore. 350, 83 Pac. Rep. 843.

See, also, *West v. Taylor*, 16 Ore. 165, 13 Pac. Rep. 665; *Brosnan v. Harris*, 39 Ore. 148, 65 Pac. Rep. 867, 54 L. R. A. 628, 87 Am. St. Rep. 649.

¹⁶ *Wood v. City of Tacoma*, — Wash. —, 119 Pac. Rep. 859.

rule of the common law as distinguished from the contrary rule of the civil law." ¹⁷

It is held by the Supreme Court of the United States that that Court will follow the State's decisions as to the rights and liabilities respecting surface water as a matter of local law. ¹⁸

§ 1678. **Damages for injuries to ditches or other works.**—Not only will an injunction be granted the owner in a proper case against any future unlawful interference with ditches, canals, or other works,¹ but also an action for damages will lie for any past injury to such works, committed negligently or wilfully, either by the owner of the land over which such works are constructed or by others.² In an early case decided by the Supreme Court of the United States, it was held that the owner of a water right who, in constructing his ditch, crosses the ditch of another person in such a way as to cut into it and carry the water down his own ditch, can not complain if the owner of the first ditch in making repairs cuts down and washes away a portion of the intersecting ditch, and it "was not, therefore, an injury for which damages could be recovered."³ A covenant in a lease to defend the lessee in the peaceful and quiet possession of the premises and every part thereof does not require the lessor to maintain a ditch running through the premises; and therefore the lessor is not liable to the lessee for damages caused

¹⁷ See, also, *Harvey v. Northern Pacific Ry Co.*, — Wash. —, 116 Pac. Rep. 464.

But see *Peters v. Lewis*, 28 Wash. 366, 68 Pac. Rep. 869; *Id.*, 33 Wash. 617, 74 Pac. Rep. 815.

¹⁸ *Walker v. New Mexico etc. Co.*, 165 U. S. 593, 41 L. Ed. 837, 17 Sup. Ct. Rep. 421; *aff'g Id.*, 7 N. M. 282, 34 Pac. Rep. 43.

¹ See injunctions, Secs. 1596-1647.

² In an action for destroying plaintiff's ditch, which crossed the defendant's mine, the fact that there had been locations covering part of the mine before the ditch was constructed is immaterial when defendant's title was not connected with them, but was

based upon a survey and location made after the construction of the ditch. *Jacob v. Lorenz*, 98 Cal. 332, 33 Pac. Rep. 119.

See, also, as to priorities, *Denver etc. Co. v. Dotson*, 20 Colo. 304, 38 Pac. Rep. 322; *Tynon v. Despain*, 22 Colo. 240, 43 Pac. Rep. 1039.

For the recovery for damages to a flume, see *Jones v. Bondurant*, — Colo. App. —, 120 Pac. Rep. 1047; *Gustin v. Harting*, — Wyo. —, 121 Pac. Rep. 522.

³ *Jennison v. Kirk*, 98 U. S. 453, 25 L. Ed. 240, 4 Morr. Min. Rep. 504.

See, also, *Clark v. Willett*, 35 Cal. 534, 4 Morr. Min. Rep. 628; *Gregory v. Nelson*, 41 Cal. 278.

by the temporary destruction of the ditch by floods.⁴ If one owns a ditch and a right of way for the same, a court of equity has no authority by its judgment to allow the ditch to be washed away for mining purposes, even after providing that such portion of the ditch as might be destroyed should be replaced by a metal pipe or flume which would answer all the purposes of the ditch. The court should not license a trespass on such property or compel the owner thereof to exchange the same for other property for the convenience of a private person.⁵ Damages may be recovered against a railway company for changing the course of an irrigation ditch;⁶ also, for the interfering with such ditch by improperly constructing a syphon to pass the water under a right of way.⁷ So, also, against a corporation for unlawfully placing a dam in a river which caused the washing away of plaintiff's ditches.⁸ As it is the duty of the ditch owner to keep his ditch in repair, and for this purpose he may go upon the lands of others through which the ditch runs, and for the purpose of which he has acquired in some manner a right of way, it is also his duty to protect his ditch against the invasion of cattle of the land owner; and, as a general thing, the land owner is not liable for injuries to a ditch of another passing through his land from the tramping of cattle.

It was held in Nevada that no action for damages will lie where a subsequent appropriator of water removed a portion of a dam constructed upon public land by a prior appropriator in such a manner as to divert the entire stream, and by such removal allowed a portion of the stream to continue in its natural course to the prior appropriator, where the latter did not employ a reasonable and economical method of diverting the water and where he permitted two-thirds of the water diverted to become lost in a swamp without any good excuse therefor.⁹ But it was held in Oregon that the owner of

⁴ *Stevens v. Wadleigh*, 50 Ariz. 90, 46 Pac. Rep. 70.

⁵ *Gregory v. Nelson*, 41 Cal. 278.

⁶ *Denver etc. R. Co. v. Heckman*, 45 Colo. 470, 101 Pac. Rep. 976.

⁷ *Chicago etc. Co. v. McPhillamey*, — Wyo. —, 118 Pac. Rep. 682.

⁸ *Oldenburg v. Oregon Sugar Co.*, 39 Ore. 564, 65 Pac. Rep. 869.

See, also, *Stockert v. Kirtley*, 6 Idaho 795, 59 Pac. Rep. 891; *Tynon v. De-*

Spain, 22 Colo. 240, 43 Pac. Rep. 1039; *Walker v. Emerson*, 89 Cal. 456, 26 Pac. Rep. 968; *Arnett v. Linhart*, 21 Colo. 188, 40 Pac. Rep. 355.

⁹ *Doherty v. Pratt*, — Nev. —, 124 Pac. 574; *Durfee v. Garvey*, 78 Cal. 546, 21 Pac. Rep. 302; *City of Bellevue v. Daly*, 14 Idaho 545, 94 Pac. Rep. 1036, 15 L. R. A., N. S., 992; *Keller v. Fink*, 103 Cal. 17, 37 Pac. Rep. 411.

sheep can be held in damages for injuries done by them to a ditch running across the unfenced public lands, and in the absence of proof that they were purposely or negligently driven thereon.¹⁰ It is held that the measure of damages for the permanent destruction of an irrigation ditch is the difference between the value of the land irrigated with and without the ditch.¹¹

§ 1679. **Damages from logging.**—Many of the rivers and streams of the arid and semi-arid West are navigable at least to the extent that they are used for floating logs from the timber lands along their sources to the market.¹ And where a stream is of sufficient capacity to be used for this purpose, the right to its use is vested in the public. In this use, it frequently happens that the lands of the riparian owners are injured by the destruction of improvements or by the flooding or washing of their lands. As we have discussed in a preceding section, an injunction may be granted in certain cases against continuous negligent logging;² so, also, an action for damages will lie to recover compensation for the actual injuries sustained by the negligent acts of those using the stream for this purpose. But the one so using the stream is not an insurer that the riparian owner shall not suffer injury. One engaged in driving logs down a stream is bound to exercise ordinary prudence and skill, and where it is so exercised any injuries which may be caused by his operations will be *damnum absque injuria*.³ But for all injuries resulting from actual negligence or the want of ordinary or reasonable care he is liable.⁴

¹⁰ *Bileu v. Paisley*, 18 Ore. 47, 21 Pac. Rep. 934, 4 L. R. A. 840.

¹¹ *Denver etc. Co. v. Dotson*, 20 Colo. 304, 38 Pac. Rep. 322.

¹ As to what constitutes a navigable stream, see Secs. 344-346.

² See Sec. 1617.

³ "The gist of this action is negligence, and until some negligence is shown there can not be said to be any liability." *Hopkins v. Butte etc. Co.*, 13 Mont. 223, 33 Pac. Rep. 817, 16 Mont. 356, 40 Pac. Rep. 865, 40 Am. St. Rep. 438.

See, also, *Haines v. Welch*, 14 Ore. 319, 12 Pac. Rep. 502; *Watkinson v. McCoy*, 23 Wash. 372, 63 Pac. Rep. 245; *Hunter v. Grande Ronde Lum. Co.*, 39 Ore. 448, 65 Pac. Rep. 598; *Eeraert v. Eureka Lbr. Co.*, 43 Mont. 517, 117 Pac. Rep. 1060.

See, also, *Brisky v. Leavenworth etc. Co.*, — Wash. —, 123 Pac. Rep. 519.

⁴ *Watkinson v. McCoy*, 23 Wash. 372, 63 Pac. Rep. 245; *Watkins v. Dorris*, 24 Wash. 636, 64 Pac. Rep. 840, 54 L. R. A. 199; *Bryant v. Frank*

Again, damages may be recovered by one using a navigable stream for the floating of logs against the riparian owner for placing obstructions in the stream, which prevent the plaintiff from driving their logs.⁵

§ 1680. **Actions on bonds for damages.**—Where a party entitled to the use of water is prevented from exercising his right by an injunction wrongfully sued out by a party who gives a bond, an action for damages will lie on the bond for all damages which are the direct result of his being deprived of the water.¹ But it is held that damages from the issuance of a temporary injunction can not be recovered in the injunction suit itself by way of cross-complaint.² A bond given to an incorporated reservoir company for whatever damages might be awarded through the granting of an injunction against the distribution of water does not include damages to an individual stockholder of the company for the loss of crops, unless the company through some valid contract, made antecedently, would be compelled to make good the loss.³ A plaintiff in an action on such a bond can not recover a greater sum in damages than he would have had to expend to obtain water from another source, from which he could have obtained a sufficient supply by a reasonable exertion. Nor can he recover more than nominal damages for the loss of his crops by being deprived by the injunction of the use of the water, where during the time the injunction was in force the water was so low that it could not have reached the plaintiff's land.⁴

§ 1681. **Damages as the result of fraud.**—It has sometimes happened that fraud has entered into the operations of certain water companies. And where this is the case, upon properly alleging and proving the fraud, and that the plaintiff acted thereon to his injury,

H. Lamb Timber Co., 37 Wash. 168, 26 Pac. Rep. 1116; Mack v. Jackson, 79 Pac. Rep. 622; Lowndale v. Grays Harbor Boom Co., 36 Wash. 198, 78 9 Colo. 536, 13 Pac. Rep. 542; Watkins v. Dorris, 24 Wash. 636, 64 Pac. Rep. 904; Ingram v. Wishkah Boom Co., 35 Wash. 191, 77 Pac. Rep. 840, 54 L. R. A. 199.
34; Sacchi v. Bayside Lbr. Co., 13 2 Sullivan v. Jones, 13 Ariz. 229, 108 Pac. Rep. 476.
Cal. App. 72, 108 Pac. Rep. 885. 3 Eaton v. Larimer etc. Co., 3 Colo. App. 366, 33 Pac. Rep. 278.

5 Creech v. Humptulips etc. Co., 37 Wash. 172, 79 Pac. Rep. 633.

4 Mack v. Jackson, 9 Colo. 536, 13 Pac. Rep. 542.

1 Rohwer v. Chadwick, 7 Utah 385,

damages may be recovered against the party making the misrepresentations, or if these were made by a duly authorized agent, against the company of which he was the agent. So, in an action against an irrigation company for false representations of its general manager, a petition alleging that the general manager, on being applied to for information as to the location of a water right, consulted certain records, and informed the plaintiff that the water right was located on a certain tract on which there was, in fact, no water right, was held sufficient on a general demurrer in showing that the general manager held authority to make the representations complained of, which, if proven, would make the company liable in damages to the plaintiff.¹

It has sometimes happened that the promoters of companies have sought to reap secret profits at the expense of the stockholders of the corporation which they have organized. "If, without the knowledge or consent of such stockholders, the promoters cause funds of the corporation to be so disbursed as to secure undisclosed profits to themselves, they may be called to account."² So, where this was attempted by one of these enterprising gentlemen, but who was frustrated in his efforts, and afterward had the assurance to bring an action against the corporation for damages to recover the "undisclosed profits," it was held that he could not recover.³

§ 1682. **Damages for using force.**—As we have discussed in a previous section of this work, the owner of a water right, ditch, canal, or other works, may, under certain circumstances, use a reasonable amount of force in protecting his rights. It has sometimes happened that following the use of force an action for damages has

¹ Cleghon v. Barstow Irr. Co., 41 Tex. Civ. App. 531, 93 S. W. Rep. 1020. See, also, Grant v. Huschke, — Wash. —, 126 Pac. Rep. 416.

² Mangold v. Adrian Irr. Co., 60 Wash. 286, 111 Pac. Rep. 173; Camden Land Co. v. Lewis, 101 Mo. 78, 63 Atl. Rep. 523.

³ Mangold v. Adrian Irr. Co., 60 Wash. 286, 111 Pac. Rep. 173.

Where a purchaser of stock of an irrigation company agreed that the corporation would convey to the sell-

ers all water rights not theretofore conveyed to others, which it subsequently did, evidence of false representations by the sellers as to the capacity of the company's canal was not admissible in an action for failure to deliver water in accordance with the conveyance; the plaintiffs not asking for damages from such representations or a rescission of the contract not being asked by the defendants. Lombard v. Schlotfeldt, — Wash. —, 123 Pac. Rep. 787.

followed. Of course, if the use of force was justified and not used to excess, no damages in such an action should be recovered.¹ This force is not necessarily confined to assault and battery upon the person, but it may have been used in the removal of obstructions from a stream or ditch which prevented the water from reaching the prior appropriator,² or the removal of building material placed upon a right of way for an unlawful purpose.³ Where, however, the use of force was not justified, or there was an excessive use of force, a plaintiff in an action for damages should recover.

§ 1683. **Jurisdiction of courts—Venue.**—An action for damages for injuries to a water right, or to a ditch, canal, or other works used to utilize a water right, being an action for injuries to real property,¹ the general rule is that it must be commenced, or tried, at least, in the county where the real property or some portion thereof is situated. Upon this subject, however, the constitutions and statutes of the respective States govern, and should be consulted before such an action is instituted. Where, however, an action is commenced in the wrong county, it is generally the rule that the failure of the defendant at the proper time to object to the jurisdiction of the Court, or to move for its transfer to the proper county, waives the want of jurisdiction of the trial court. In a recent case decided in California it was therein decided that the statute² only requires that such actions must be tried in the county where the real estate injured is situated, and that it is not required to be commenced there. And when it is commenced in a county other than the one where the real property injured is located, the Court acquires jurisdiction to try the cause, unless the defendant applies for its transfer for trial to the county where the real property is situated.³

¹ Walker v. Chanslor, 153 Cal. 118, 94 Pac. Rep. 606, 17 L. R. A., N. S., 455, 126 Am. St. Rep. 61; Butte etc. Co. v. Morgan, 19 Cal. 609, 4 Morr. Min. Rep. 583; McCarty v. Fremont, 23 Cal. 196.

² Ennor v. Raine, 27 Nev. 178, 74 Pac. Rep. 1.

³ Whitmore v. Pleasant Valley Coal Co., 27 Utah 284, 75 Pac. Rep. 748.

¹ That a water right is real property, see Sec. 769.

² Sec. 392, subd. 1, Code Civ. Proc.

³ Miller & Lux v. Madera etc. Co., 155 Cal. 59, 99 Pac. Rep. 503, 22 L. R. A., N. S., 391.

See, also, Miller & Lux v. Kern County Land Co., 140 Cal. 132, 73 Pac. Rep. 836; Grocers' etc. Union v. Kern County Land Co., 150 Cal. 466, 89 Pac. Rep. 120.

Where the property injured lies in two or more counties, the plaintiff may select the county in which the action may be commenced and tried. These rules are also subject to the provisions for the change of venue for trial in another county, as provided by the respective statutes.

Under certain conditions, as in other cases, a change of venue may be had of the trial of such an action from one county to another. In this respect the statute of the State where the action is pending must be followed, both by the moving party and by the Court. However, an application for a change of venue is addressed to the sound legal discretion of the trial court, and the decision reached by such Court on such matter will not be reversed on appeal unless the showing made is such as to convince the Appellate Court that the trial court has abused such discretion.⁴

§ 1684. Parties plaintiff.—The several owners of the waters of a stream, ditch, canal, or other works, as we have discussed in previous portions of this work, may unite as parties plaintiff in an action to enjoin the unlawful diversion by a third person ¹ to quiet title to their respective rights ² or to abate a nuisance; ³ but unless there is a community of interest between such parties they can not unite as parties plaintiff in an action at law for damages for past injuries to their rights, and where this is attempted there is a misjoinder of parties plaintiff.⁴ So, it is held that a cause of action

⁴ An application for a change of venue ought to be supported by the affidavits of persons who have either been over the county generally, or through large communities thereof, and have heard the citizens generally express themselves in regard to the matter in issue, or by residents of different portions of the county who know of the sentiment prevailing in their respective communities. *Gibbert v. Washington etc. Co.*, 19 Idaho 637, 115 Pac. Rep. 924.

¹ For parties plaintiff in injunction suits, see Sec. 1631.

² For parties plaintiff in actions to adjudicate water rights, see Sec. 1544.

³ See Sec. 1621.

⁴ "It has been frequently held that the appropriators and users of water from the same stream, where each owned his separate tract of land and right, could not join in an action against other appropriators and users of water from the same stream for the recovery of damages for an obstruction of their rights or an unlawful diversion of the water, to their damage or prejudice." *Frost v. Alturas W. Co.*, 11 Idaho 294, 81 Pac. Rep. 996; citing *Kinney on Irr.*, 1st Ed., Sec. 327.

See, also, *Foreman v. Boyle*, 88 Cal. 290, 26 Pac. Rep. 94; *Barham v. Hostetter*, 67 Cal. 272, 7 Pac. Rep. 689; *Blaisdell v. Stephens*, 14 Nev.

for injunction, which is common to all the plaintiffs, can not be joined with a cause of action for damages which is not joint as to all the plaintiffs, but several.⁵

Where the rights of the parties plaintiff are based upon a contract, as to whether such contract is several or joint depends upon the terms expressed in the contract itself. It is therefore a question of its construction. Generally, where there are joint obligees the contract is joint, and such obligees must join in an action for damages for the breach thereof. Where, however, the language of the contract requires the obligor to account to each of the obligees, respectively, or by the use of any words imports a separate right of action, the contract is several to the extent that each obligee may maintain an action for damages resulting from the breach of the contract.⁶ So, in an Arizona case, it is held that a contract between a canal company and the shareholders in an unincorporated mutual association whereby the canal company agreed to furnish water to the "respective" parties forming the mutual association, naming them, and the latter agreed to rent their "respective" shares in the association to the first party, it was held to be a several contract, and that either of the second parties might maintain an action for damages occurring to him through a breach of the contract without joining the others.⁷ Parties to a contract for cropping land on shares, each of whom owns an interest in the growing crop, are properly joined as parties plaintiff in an action for damages for the destruction of their crop.⁸ In Nevada, where the law of community property is in force, where the title to land purchased with money earned after marriage is taken in the name of the wife, the land is held to be "community property" under the husband's control, so

17, 3 Am. Rep. 523; *Miller v. Highland D. Co.*, 87 Cal. 430, 25 Pac. Rep. 550, 22 Am. St. Rep. 254; *Ronnow v. Delmue*, 23 Nev. 29, 41 Pac. Rep. 1074.

See, also, *Bliss on Code Pleading*, Sec. 76.

⁵ *Barham v. Hostetter*, 67 Cal. 272, 7 Pac. Rep. 689; *Ronnow v. Delmue*, 23 Nev. 29, 41 Pac. Rep. 1074; *Foreman v. Boyle*, 88 Cal. 290, 26 Pac. Rep. 94; *Geurkink v. City of Peta-*

luma, 112 Cal. 306, 44 Pac. Rep. 570; *Senior v. Anderson*, 138 Cal. 716, 72 Pac. Rep. 349.

See, however, the Revised Codes of Montana, 1907, Sec. 4852.

⁶ *Consolidated C. Co. v. Peters*, 5 Ariz. 80, 46 Pac. Rep. 74; *Lawless v. Lawless*, 39 Mo. App. 539.

⁷ *Consolidated Canal Co. v. Peters*, 5 Ariz. 80, 46 Pac. Rep. 74.

⁸ *Thomas v. Bolsa Land Co.*, 1 Cal. App. 335, 82 Pac. Rep. 207.

that an action for damages for injuries thereto from flooding and seepage may be maintained by him alone.⁹

A corporation organized to furnish water for hire or profit may maintain an action for damages against one unlawfully depriving it of the water which the corporation has obligated itself to furnish its consumers.¹⁰ But where no obligation has been entered into to furnish the water to consumers, and the company has not been compelled to respond for the breach of a valid contract to furnish such water, it is held that a corporation can not maintain an action for damages which have been suffered by stockholders by their inability to obtain water.¹¹ In Oklahoma it is held that a private citizen, although a taxpayer of a municipality, can not maintain an action against a water company to recover damages for losses by fire sustained by him in consequence of the failure of the company to perform its contract with the municipality to furnish a supply of water for the extinguishment of fires, for the reason that there is no privity between the citizen and the company.¹² The mortgagee of a mortgage covering all the crops on certain land for a year is entitled to maintain an action against a water company failing to furnish water to the land as bound by its obligation to the mortgagor.¹³ So, also, may an action be maintained by the pledger of water stock for damages caused by the act of the pledgee in directing a water company to withhold the water from the pledger.¹⁴ So, again, an action for damages may be maintained by a landlord against a tenant for injuries to his rights or for the failure to make

⁹ *Malmstrom v. People's Drain D. Co.*, 32 Nev. 246, 107 Pac. Rep. 98; *Dimmick v. Dimmick*, 95 Cal. 323, 30 Pac. Rep. 547.

¹⁰ Where it appeared that the plaintiff had undertaken to supply water to about 200 farmers, some of them at lands thirty-five miles away, and that it would be unable to perform its agreements with them if it should be deprived of the water which defendant was unlawfully taking for his own use, it was said by the Court: "Clearly, that would amount not merely to the loss of a certain amount of water for which compensation could be given in

a suit for damages, but to injure the plaintiff's business so seriously as to be considered irreparable." *Hagerman Irr. Co. v. McMurry*, 16 N. M. 172, 113 Pac. Rep. 823.

¹¹ *Eaton v. Larimer etc. Co.*, 3 Colo. App. 366, 33 Pac. Rep. 278.

¹² *Lutz v. Talequah W. Co.*, 29 Okla. 171, 118 Pac. Rep. 128, 36 L. R. A., N. S., 568.

¹³ *Equitable Securities Co. v. Montrose etc. Co.*, 20 Colo. App. 465, 79 Pac. Rep. 747.

¹⁴ *Mabb v. Stewart*, 147 Cal. 413, 81 Pac. Rep. 1073; *Id.*, 133 Cal. 556, 65 Pac. Rep. 1085.

repairs to a ditch;¹⁵ or against a water company for failure to furnish his tenant with water.¹⁶ A tenant may maintain an action for damages against his landlord for a breach of an agreement by the landlord to furnish the tenant with water;¹⁷ and he may also sue as party plaintiff in an action for damages against a third party whose duty it is to furnish the land with water, but who has failed to furnish it.¹⁸

§ 1685. **Parties defendant—Joint or several tortfeasors.**—Although in an equitable action any number of persons whose rights are invaded may join as parties plaintiff against any number of persons as parties defendant to adjudicate water rights,¹ or to prevent by injunction the unlawful invasion of rights,² this can not be done in an action at law for damages unless, as far as parties plaintiff are concerned, there is such a community of interest in the subject matter of the suit that it makes them practically one party,³ or, so far as parties defendant are concerned, unless they all acted in concert or jointly, so that by their concurrent wrongdoing they caused the injuries for which damages are asked. It is a well-settled principle of law of procedure that an action at law for damages can not be maintained against several persons as parties defendant when each acted independently of the others and there was no concert or unity of design or action between them.⁴ It is held

¹⁵ *Hayden v. Consolidated etc. Co.*, 3 Cal. App. 136, 84 Pac. Rep. 422.

¹⁶ *Farmers' etc. Co. v. New Hampshire etc. Co.*, 40 Colo. 467, 92 Pac. Rep. 290.

¹⁷ *Knowles v. Leggett*, 7 Colo. App. 265, 43 Pac. Rep. 154; *Dunbar v. Montgomery*, 119 S. W. Rep. 907.

¹⁸ *Pallett v. Murphy*, 131 Cal. 192, 63 Pac. Rep. 366.

¹ See Secs. 1544, 1545.

² See Secs. 1631, 1632.

³ See preceding section, No. 1694.

⁴ In a leading case upon this subject in Nevada, involving an action for damages against several defendants and asking for an injunction, it was held that tortfeasors who "own, occupy, and irrigate separate and dis-

tinget tracts or parcels of land," and where it did not appear that the injury complained of "was the result of the joint or concurrent act of defendants," can not be held jointly liable, or be joined as parties defendant, and that a motion for a non-suit should be sustained by the trial court, so far as the cause of action for damages was concerned, although as far as the injunctive feature was concerned such a joinder was held proper. "The general principle is well settled that where two or more parties act, each for himself, in producing a result injurious to plaintiff, they can not be held jointly liable for the acts of each other." *Blaisdell v. Stephens*, 14 Nev. 17, 33 Am. Rep. 523.

that in such a case the tort of each defendant is several when committed, and that it does not become joint because afterward its consequences united with the consequences of several other torts committed by other persons. If the rule were otherwise, the authorities hold that one defendant, however little he might have contributed to the injury of the plaintiff, would be liable for all the injury caused by the wrongful acts of all the other defendants, and he would have no remedy against the latter because no contribution can be enforced between tort feasons.⁵

But where the parties acted in concert and by their concurrent wrongdoing jointly committed the unlawful act complained of, or the act of one causing the injury was made for the benefit of the others, who took advantage of such benefit, they are jointly and severally liable, and should be joined in an action for damages as

In a law action for damages for wrongful diversion, where no equitable relief is asked, and no facts are alleged which would authorize the granting of such relief, plaintiff can not join as defendants persons who did not act jointly in diverting the water. *Miles v. Du Bey*, 15 Mont. 340, 39 Pac. Rep. 313.

But see the earlier case decided by the same court as last above of *Carron v. Wood*, 10 Mont. 500, 26 Pac. Rep. 388, where equitable relief was asked and the verdict of the jury, "that plaintiff had suffered damage in the sum of \$1,535.88 by reason of the defendants wrongfully depriving plaintiff of the use of said waters during the year 1889, which damage was apportioned against twelve defendants in divers sums, found by the jury, and set forth in the verdict," was upheld by the Supreme Court. Upon principle as set forth in the text above, and the decision in the case of *Miles v. DuBey*, *supra*, we believe that this decision was erroneous, although from the record as stated in the opinion no

objections were made to the misjoinder of parties defendant.

See, also, *Miller v. Highland etc. Co.*, 87 Cal. 430, 25 Pac. Rep. 550, 22 Am. St. Rep. 254; *Foreman v. Boyle*, 88 Cal. 290, 26 Pac. Rep. 94; *Barham v. Hostetter*, 67 Cal. 272, 7 Pac. Rep. 689; *Miles v. DuBey*, 15 Mont. 340, 39 Pac. Rep. 313; *Evans v. Ross*, 67 Cal. 19, 8 Pac. Rep. 88; *Saint v. Guerrierio*, 17 Colo. 448, 30 Pac. Rep. 335, 31 Am. St. Rep. 320; *Frost v. Alturas W. Co.*, 11 Idaho 294, 81 Pac. Rep. 996; *Mau v. Stoner*, 15 Wyo. 109, 87 Pac. Rep. 434, 89 Pac. Rep. 466; *Hillman v. Newington*, 57 Cal. 56; *People v. Gold Run etc. Co.*, 66 Cal. 138, 4 Pac. Rep. 1152, 56 Am. St. Rep. 80; *Montecito W. Co. v. Santa Barbara*, 144 Cal. 578, 77 Pac. Rep. 1113; *Ronnow v. Delmue*, 23 Nev. 29, 41 Pac. Rep. 1074; *Watson v. Colusa-Parrott etc. Co.*, 31 Mont. 513, 79 Pac. Rep. 14; *Hulsman v. Todd*, 96 Cal. 228, 31 Pac. Rep. 39.

⁵ *Chipman v. Palmer*, 77 N. Y. 51; *Pomeroy on Remedies*, Secs. 207, 308.

parties defendant.⁶ Where there is a water master and he fails to apportion the water according to the decree adjudicating such rights, such water master may be joined with the consumers to whom the water was wrongfully given as a party defendant.⁷

The plaintiff in an action for damages must make the party causing the injury the party defendant.⁸ Municipalities may be made parties defendant, as well as individuals or private corporations.⁹

⁶ "It is well settled that where two or more parties, by their concurrent wrongdoing, cause injury to a third person, they are jointly and severally liable. It is optional with the injured party to proceed against one or all of those contributing to the injury, as any one who aids and assists in committing the wrong is liable for the whole." *City of Kansas City v. Slangstrom*, 53 Kan. 431, 36 Pac. Rep. 706.

Where defendants in an action for diversion of water admit the diversion, and set up a claim of right to use the water on land farmed by them jointly, a finding that defendants caused the diversion is not necessary to support a joint judgment against them. *Williams v. Harter*, 121 Cal. 47, 53 Pac. Rep. 405.

See, also, *Hulsman v. Todd*, 96 Cal. 228, 31 Pac. Rep. 39; *Hillman v. Newington*, 57 Cal. 56; *Bowman v. Bowman*, 35 Ore. 279, 57 Pac. Rep. 546; *Bates v. Van Pelt*, 1 Tex. Civ. App. 185, 20 S. W. 949.

If defendant and the corporation for whom he worked were both responsible for trespass to plaintiff's reservoir, plaintiff could elect to sue one or both of them in an action for damages and injunction. *Koch v. Story*, 47 Colo. 335, 107 Pac. Rep. 1093.

Where a contractor constructs for a city a work which, by reason of its nature and location, causes damage to another, which might have been pre-

vented by the exercise of reasonable prudence as to the plan and location of such works, the contractor and the city are severally liable. *De Baker v. Southern Cal. R. Co.*, 106 Cal. 257, 39 Pac. Rep. 610, 46 Am. St. Rep. 237.

"If two or more parties, acting jointly, wrong and injure another, they are jointly and severally liable for the consequences, and the injured party may at his option sue one or all of those contributing to the injury." *Arnold v. Chicago etc. R. Co.*, — Kan. —, 119 Pac. Rep. 373.

⁷ In an action, where it does not appear from the complaint that the subject of litigation is within any water district, or that there is any water master in charge of the water in question, a demurrer based on the non-joinder of the water master is not well taken. *Boulware v. Parke*, 4 Idaho 692, 43 Pac. Rep. 680.

⁸ *Colorado etc. Co. v. Morris*, 1 Colo. App. 401, 29 Pac. Rep. 302.

⁹ *Boulder v. Fowler*, 11 Colo. 396, 18 Pac. Rep. 337; *Hughes v. City of Austin*, 12 Tex. Civ. App. 178, 33 S. W. Rep. 607; *City of Paris v. Tucker*, —Tex. Civ. App. —, 93 S. W. Rep. 233; *City of San Antonio v. Rivas*, Tex. Civ. App., 57 S. W. Rep. 855; *Umschied v. City of San Antonio*, Tex. Civ. App., 69 S. W. Rep. 496; *Levy v. Salt Lake City*, 3 Utah 63, 1 Pac. Rep. 160; *Id.*, 5 Utah 302, 16 Pac. Rep. 598; *Richardson v. City of Eureka*, 110 Cal. 441, 42 Pac. Rep.

So, also, may public corporations, such as irrigation districts.¹⁰ And both municipalities or irrigation districts are held to the same rule for negligence, as are private individuals or corporations.

The tenant is the proper party defendant for injuries caused by his acts during his tenancy to the lands of third parties, without the landlord's direction or control.¹¹

In Montana it is provided by statute that when damages are claimed for the wrongful diversion of water, in any such action the same may be assessed and apportioned by the jury in their verdicts, and the judgment thereon may be entered for or against one or more of several plaintiffs, or for or against one or more of several defendants. In any action concerning joint water rights or joint rights in ditch, unless partition of the same is asked by parties to the action, the Court shall hear and determine such controversy as if the same were several as well as joint.¹²

§ 1636. Pleadings—Complaint.—The material allegations in a complaint in an action for damages for injuries to water rights, ditches, or canals, or other works, lands, growing crops, or personal property, do not differ materially from the allegations of a complaint for damages caused from other injuries. The plaintiff should allege his ownership, or right of possession, of the property in question; ¹ the specific injury to such property caused by the act of the

965; Willson v. Boise City, 6 Idaho 391, 55 Pac. Rep. 887; Esberg-Gunst Cigar Co. v. City of Portland, 34 Ore. 282, 55 Pac. Rep. 961, 43 L. R. A. 435, 75 Am. St. Rep. 651.

¹⁰ McPherson v. Alta Irr. Dist., 14 Cal. App. 353, 112 Pac. Rep. 193; Turpen v. Turlock Irr. Dist. 141 Cal. 1, 74 Pac. Rep. 295.

¹¹ A landlord is not liable for injuries to adjoining land by the diversion of surface water by the tenant plowing without the landlord's direction or control. Peck v. Peterson, 15 Cal. App. 543, 115 Pac. Rep. 327.

See, also, Booth v. Trager, 44 Colo. 409, 99 Pac. Rep. 60.

¹² Rev. Codes Mont. 1907, Sec. 4352; Beach v. Spokane Ranch Co., 25 Mont.

367, 65 Pac. Rep. 106; McNinch v. Crawford, 30 Mont. 297, 76 Pac. Rep. 698; Sloan v. Byers, 37 Mont. 503, 97 Pac. Rep. 855.

See, also, Comp. Laws, Utah, 1907, Sec. 1288x40.

¹ Where the water rights in question have been decreed to the plaintiff, such decree should be set up. Boulware v. Parke, 4 Idaho 692, 43 Pac. Rep. 680.

Carter v. Wakeman, 42 Ore. 147, 70 Pac. Rep. 393, holding that a complaint for the obstruction of an easement need only state plaintiff's ownership thereof, describing it, without stating how it was acquired.

A complaint, in an action for injury to real estate by water from an irrigation canal, which describes the prem-

defendant,² and, in cases of negligence, except in actions caused from the breakage or leakage of reservoirs, where the owner is held to be the insurer against damage,³ he must set forth the specific act or acts which constituted the negligence upon the part of the defendant, or the facts which constituted his want of reasonable or ordinary care;⁴ the amount that he was damaged by such injuries and pray for the same.⁵ The motive of the defendant in committing the injuries need not be stated, and when so stated may, upon motion, be stricken out.⁶

ises as the north half of the northwest quarter of a specified section in a designated township and range, with the exception of twenty-nine acres previously sold, which twenty-nine acres were unaffected, sufficiently describes the land against a general demurrer or objection to evidence. *Billings Realty Co. v. Big Ditch Co.*, 43 Mont. 251, 115 Pac. Rep. 828.

In an action for injury to crops by the destruction of a flume feeding and conveying water to irrigate plaintiff's land, and proof of plaintiff's occupancy for over thirty years is sufficient proof of title without deraigning a record title. *Gustin v. Harting*, — Wyo. —, 121 Pac. Rep. 522.

² *Dennis v. Crocker-Huffman etc. Co.*, 6 Cal. App. 58, 91 Pac. Rep. 425.

The date of such injury must be pleaded. *Miller v. Douglass*, 7 Ariz. 41, 60 Pac. Rep. 722.

The damages claimed must be for injuries to plaintiff's enterprise, and not for the value of a certain quantity of water. *Parks etc. Co. v. Hoyt*, 57 Cal. 44.

³ See Secs. 1669-1674.

See, also, *Garnet etc. Co. v. Sampson*, 48 Colo. 285, 110 Pac. Rep. 79.

⁴ A complaint that the damage caused was due to defendant's gross and willful negligence in failing to properly construct the canal and head-

gate, and in failing to properly maintain the headgate and to control the water in the canal, was held to be sufficiently specific as to the manner in which the defendant was guilty of the negligence charged. *Dennis v. Crocker-Huffman etc. Co.*, 6 Cal. App. 58, 91 Pac. Rep. 425.

See, also, *Crowder v. McDonnell*, 21 Mont. 367, 54 Pac. Rep. 43; *Consolidated Canal Co. v. Peters*, 5 Ariz. 80, 46 Pac. Rep. 74; *McDonald v. Bear River etc. Co.*, 15 Cal. 145, 1 Morr. Min. Rep. 626.

That negligence must be pleaded and proved, see *Billings Realty Co. v. Big Ditch Co.*, 43 Mont. 251, 115 Pac. Rep. 828.

Hill v. Standard Min. Co., 12 Idaho 223, 85 Pac. Rep. 907.

⁵ *Boulware v. Parke*, 4 Idaho 692, 43 Pac. Rep. 680.

In an action for damages by a riparian owner for injuries caused by the diversion of the waters of a stream to plaintiff's land and cattle, evidence is not admissible for injuries to lands or cattle not mentioned in the complaint, or to lands not bordering on the stream. *Heinlen v. Fresno etc. Co.*, 68 Cal. 35, 8 Pac. Rep. 513.

⁶ *Equitable Securities Co. v. Montrose etc. Co.*, 20 Colo. App. 465, 79 Pac. Rep. 747.

Where a complaint alleged that defendant had constructed an irrigation ditch intersecting land on which the plaintiff had a right of pasture, and that the defendant negligently permitted the ditch to enlarge, and that plaintiff's cattle were lost by miring therein, but did not state that after its enlargement the ditch was larger than its right of way, and did not state whether the plaintiff knew the conditions of the ditch when he turned his cattle on the land, it was held that the complaint did not state a cause of action.⁷ Where the plaintiff alleged and relied wholly upon an express contract, he can not recover on a *quantum meruit*, no contract being proven.⁸ All special damages must be pleaded before a recovery can be had.⁹

Where the basis of the action is for damages resulting from a breach of contract, the substance of such contract should, at least, be pleaded, also that the plaintiff has complied with all of its terms upon his part to be performed, the facts constituting the breach, and the injuries resulting therefrom, and the amount of damages resulting therefrom. A complaint by one who entered into a contract with a company alleged that the defendant refused to deliver water in sufficient quantities to irrigate plaintiff's crops when there was water flowing in the river sufficient for such purpose, and, at periods of low water, had refused to deliver to the plaintiff the amount of water called for. The complaint did not allege that the plaintiff ever requested the defendant to deliver water to him, and did not state how much was necessary, nor the quantity actually delivered. It was held that the complaint did not state a cause of action.¹⁰

In an action for damages based upon fraud, a complaint alleging that, by virtue of a water right held by the plaintiff, appurtenant to one of four subdivisions of land which he owned, he was entitled to receive from the defendant irrigation company water

⁷ *Messenger v. Gordon*, 15 Colo. App. 428, 62 Pac. Rep. 956.

⁸ *Wright v. Sonoma County*, 156 Cal. 475, 105 Pac. Rep. 409, 134 Am. St. Rep. 140.

⁹ *Sommerville v. Idaho Irr. Co.*, — *Idaho* —, 123 Pac. Rep. 302.

¹⁰ *Consolidated Canal Co. v. Peters*, 5 Ariz. 80, 46 Pac. Rep. 74.

It was held that where one framed his complaint for damages on the theory that the defendants were liable for a violation of a general duty, that he could still recover for breach of contract, and where the defendant in his answer had set up the contract. *Crowder v. McDonnell*, 21 Mont. 367, 54 Pac. Rep. 43.

with which to irrigate the parcel of land on which the water right was located; that he did not know the true location of the water right, and that the defendant company was the only depository of the desired information; that on application of the general manager plaintiff was falsely and fraudulently informed that the evidence in his custody showed the location of the water right on a subdivision on which no such right existed; that such representation was knowingly made that the plaintiff should act thereon; and that he did act thereon. It was held by the Court that such complaint was sufficient.¹¹

In an action for damages by a riparian owner as such, a complaint which states that the plaintiff is the owner and in the possession of a certain tract of land, describing it, through which a certain stream was accustomed to flow, and that the defendant diverted the water from the stream from its accustomed channel to his injury, describing it, need not also allege that the plaintiff had the right to the use of the water, since such right is implied from his ownership of the land.¹²

The courts are usually liberal in allowing amendments to pleadings, and should always allow them when they do not impair the rights of the opposite party by such procedure.¹³

§ 1687. Pleadings—Answer—Cross-complaint.—The defendant may demur to the complaint of the plaintiff, upon any ground allowed by the statute of the State where the action is brought.¹

¹¹ Cleghon v. Barstow Irr. Co., 41 Tex. Civ. App. 531, 93 S. W. Rep. 1020.

¹² Shotwell v. Dodge, 8 Wash. 337, 36 Pac. Rep. 254; Chauvet v. Hill, 93 Cal. 407, 28 Pac. Rep. 1066; Rincon etc. Co. v. Anaheim etc. Co., 115 Fed. Rep. 543; Swift v. Goodrich, 70 Cal. 103, 11 Pac. Rep. 561; Shurtliff v. Extension D. Co., 14 Idaho 416, 94 Pac. Rep. 574.

See, also, damages to riparian ownership, Secs. 1662, 1665.

¹³ An amendment of the *ad damnum* clause by increasing the amount claimed may be allowed during the

trial. Shields v. Orr Extension D. Co., 23 Nev. 349, 47 Pac. Rep. 194.

See, also, Saint v. Guerrero, 17 Colo. 448, 30 Pac. Rep. 335, 31 Am. St. Rep. 320; Bean v. Stoneman, 104 Cal. 49, 37 Pac. Rep. 777, 38 Pac. Rep. 39; Gould v. Stafford, 101 Cal. 32, 35 Pac. Rep. 429.

¹ Boulware v. Parke, 4 Idaho 692, 43 Pac. Rep. 680; Equitable Securities Co. v. Montrose etc. Co., 20 Colo. App. 465, 79 Pac. Rep. 747.

The failure of a complaint to state a cause of action may be availed of by demurrer, by objection to the evidence, by motion for judgment on the

In the consideration of a general demurrer, by the Court, every intendment favorable to the pleader should be indulged in to sustain the pleading.² But objections to a complaint, not taken by demurrer or answer, are waived.³ The defendant may also answer the allegations of the plaintiff's complaint by merely denying the allegations therein contained.⁴ The defendant may, also, in addition thereto, set up as many affirmative defenses as he may have, such as contributory negligence,⁵ contract,⁶ the limitation of the action,⁷ or act of God.⁸ He may amend his answer by omitting the original defense, and set up by new allegations an entirely new defense.⁹ Again, should the defendant have a cause of action

pleadings, by motion in arrest of judgment, or on motion for new trial. *Consolidated Canal Co. v. Peters*, 5 Ariz. 80, 46 Pac. Rep. 74.

² *Cleghon v. Barstow Irr. Co.*, 41 Tex. Civ. App. 531, 93 S. W. Rep. 1020.

³ Under Rev. Codes, Sec. 6539, providing that objections to a complaint, not taken by demurrer or answer, are waived, an objection to a complaint for injury to land, because it is indefinite in the description of the land involved, must be made by special demurrer, or it is waived. *Billings Realty Co. v. Big Ditch Co.*, 43 Mont. 251, 115 Pac. Rep. 828.

⁴ The failure of the owner of an irrigation ditch to file a statement and map thereof as required by the statute is no defense to an action by the owners against a railroad company for the destruction of the ditch in building its roadbed. *Denver etc. Co. v. Dotson*, 20 Colo. 304, 38 Pac. Rep. 322.

It is no defense to an action against a water company for refusal to furnish water to an applicant for water for irrigation, that his ditch for taking water from the ditch of the company is in part upon its right of way, if it be there with its consent, or if its refusal was not based on such

ground. *Lowe v. Yolo County etc. Co.*, 157 Cal. 503, 108 Pac. Rep. 207, 8 Cal. App. 167, 96 Pac. Rep. 379.

The fact that a person entitled to the use of one-half of the water of an irrigation ditch is denied such right by the other owner is no defense to an action by the latter for damages caused by the former digging another ditch and appropriating all of the water. *Arnett v. Linhart*, 21 Colo. 188, 40 Pac. Rep. 355.

In an action for damages sustained by defendant's cutting plaintiff's irrigation ditch and diverting water from plaintiff's land, it is no defense that the defendant was a lessee of plaintiff and had a right to take the water as a tenant for the year, or, if not a tenant, that he was a licensee of plaintiff, where such tenancy or license had been terminated by defendant's act of "jumping" the land and claiming the same adversely to plaintiff. *White v. Brash*, 3 Ariz. 212, 73 Pac. Rep. 445.

⁵ See Sec. 1688.

⁶ See Sec. 1689.

⁷ See Sec. 1690.

⁸ See Secs. 1691, 1692.

⁹ As an amendment to a pleading may be allowed to correct certain enumerated mistakes, or "a mistake in any other respect," and "in other

against the plaintiff which is germane to the original action, he may set the same up by way of cross-complaint. But he should plead his right and the injuries thereto with the same particularity as is required of the plaintiff in his complaint.¹⁰

§ 1688. Pleadings—Defenses—Acts of the plaintiff and contributory negligence.—The plaintiff can not recover where the injuries to his property were the direct result of his own acts, or where he assisted the defendant by acts of his own whereby the injuries resulted, or through his own negligence. So, where such is the case, the defendant in an action for damages may set up such acts of the plaintiff as a defense. So, it is held in an action for damages for the diversion of the water by the building and maintenance of a dam by defendants, and where it appeared that plaintiff assisted in maintaining the dam and diverting the water, he can not recover, and that such participation in the diversion of the water need not be specially pleaded, but that it might be proved under the issue raised by the defendant's denial that the plaintiff was injured by such diversion.¹

particulars'' (Code Civil Proc., Sec. 473), the Court may allow an amendment to an answer, though it is mainly to correct a mistake of law made by defendant's attorney. *Gould v. Stafford*, 101 Cal. 32, 35 Pac. Rep. 429.

In an action for depriving plaintiff's crops of the necessary water, it is held that it was no defense that plaintiff did not have a valid appropriation of the water claimed by him so long as it was not defendant's. *Dalton v. Kelsey*, 58 Ore. 244, 144 Pac. Rep. 464.

¹⁰ *Silver Creek etc. Co. v. Hayes*, 113 Cal. 142, 45 Pac. Rep. 191; *Peters v. Lewis*, 33 Wash. 617, 74 Pac. Rep. 815.

Damages from the issuance of a temporary injunction can not be recovered in the injunction suit itself by cross-complaint. *Sullivan v. Jones*, 13 Ariz. 229, 108 Pac. Rep. 476.

¹ *Churchill v. Bauman*, 95 Cal. 541, 30 Pac. Rep. 770; 104 Cal. 369, 36 Pac. Rep. 93, 38 Pac. Rep. 43. In the first appeal *Haven, J.*, dissented for the reason that such defense should have been specially set out in the answer.

In an action against an irrigation company, by a stockholder, for failure to supply her with her proportion of the water, where the defendant relied upon the defense that it had done the best it could, and that the ditch was new, and that the laterals built by the plaintiff were not properly constructed, it was held that the questions thus raised were for the jury. *Rocky Ford etc. Co. v. Simpson*, 5 Colo. App. 30, 36 Pac. Rep. 638.

See, also, *McLellan v. Brownsville etc. Co.*, 46 Tex. Civ. App. 249, 103 S. W. Rep. 206; *Cline v. Stock*, 71

Where the injuries to the plaintiff resulted from his own negligent act, the defendant may set up as one of his defenses that of contributory negligence, and, if proven, such a defense will be good. And, in this connection, contributory negligence may be defined as the want of ordinary care upon the part of the person injured by the actionable negligence of another, combining and concurring with that negligence, and contributing to the injury, as the proximate cause thereof, without which the injury would not have occurred.² But, the contributory negligence in cases of this nature must consist of some overt act of the plaintiff, which was the proximate cause of his injuries. So, in an action for flooding land, in order to successfully maintain a defense of contributory negligence, the defendant must show that the plaintiff himself opened the waste gate of the defendant's canal, or broke through its bank, or committed some other overt act, and thus caused the overflow of the water.³

The duty to exercise reasonable and ordinary care in the construction, maintenance, or operation of a ditch, canal, or other

Neb. 70, 98 N. W. Rep. 454, 102 N. W. Rep. 265; *McCook Irr. Co. v. Crews*, 70 Neb. 115, 102 N. W. Rep. 249.

² *Moakler v. Willamette etc. R. Co.*, 18 Ore. 189, 22 Pac. Rep. 948, 6 L. R. A. 656, 17 Am. St. Rep. 717; *Emlison v. Owyhee D. Co.*, 37 Ore. 577, 62 Pac. Rep. 13; *Platte etc. Co. v. Dwell*, 17 Colo. 376, 30 Pac. Rep. 68.

An affirmative defense in an action for damages by drainage from defendant's lands, simply stating that, if plaintiff was damaged, it was by reason of his own neglect, and not by any act of the defendants, is sufficient. *Peters v. Lewis*, 33 Wash. 617, 74 Pac. Rep. 815.

Where plaintiffs claimed injuries to their premises by the overflow of defendant's irrigation ditch, it was not liable for that part of the injury which was caused by plaintiffs' own acts in excavating their cellar and placing the foundation of their house

so dangerously close to the ditch or on such low and wet ground that the cellar was flooded and the earth soaked and softened under the foundations by percolating water, which might have come into and stood stagnant in the cellar if the ditch had never overflowed. *Malmstrom v. People's etc. Co.*, 32 Nev. 246, 107 Pac. Rep. 98, the Court saying: "If the defendant were holden for any injury resulting to the plaintiffs from their own acts under these circumstances, the owners of ditches that traverse the lands of others would have little protection for their prior rights."

See, also, *Johnston v. Hyre*, 83 Kan. 38, 109 Pac. Rep. 1075; *Shotwell v. Dodge*, 8 Wash. 337, 36 Pac. Rep. 254; *Parker v. Gregg*, 136 Cal. 413, 69 Pac. Rep. 22.

³ *Emlison v. Owyhee D. Co.*, 37 Ore. 577, 62 Pac. Rep. 13.

works, so that property shall not be injured from overflow or leakage, rests wholly with the ditch owner. Furthermore, there is no duty resting upon the land owner to avoid the consequences of the ditch owner's negligence. The doctrine of contributory negligence, therefore, is usually not applicable to cases of this nature; and, where the plaintiff is merely passive, although he may have had knowledge of the defects in the works, and could by effort upon his part have prevented the injury, he is not liable for contributory negligence on account of his mere inactivity.⁴ And it is held that

⁴ An instruction was also asked to the effect that the plaintiff himself should have exercised ordinary care to have avoided the consequences of defendant's acts, and, failing to do so, the parties were in mutual fault. The doctrine of contributory negligence is not applicable to cases of this nature, where the defendant had knowledge of the defects of its ditch, and could have prevented the injury. Under these circumstances, no duty rested upon the plaintiff to have avoided the consequences of defendant's acts." *Shields v. Orr etc. Co.*, 23 Nev. 349, 47 Pac. Rep. 194.

The fact that the plaintiff knew of the dangerous condition of a dam, and failed to institute special proceedings, for his protection, will not bar an action by him for damages caused by a subsequent breaking of the dam. *Hollenbeck v. Dingwell*, 16 Mont. 335, 40 Pac. Rep. 863, 50 Am. St. Rep. 502.

Where an action is brought to recover damages for injuries immediately resulting to land by the construction of a dam, and not for any injury that might thereafter occur, evidence as to whether or not plaintiff had made any effort to protect the land from erosion is immaterial. *Oldenburg v. Oregon Sugar Co.*, 39 Ore. 564, 65 Pac. Rep. 869.

See, also, *Reynolds v. Chandler*

River Co., 43 Me. 513; *Plummer v. Penobscot Lum. Association*, 67 Me. 363.

See, also, *McCarty v. Boise City C. Co.*, 2 Idaho 225, 10 Pac. Rep. 623; *McLeod v. Lee*, 17 Nev. 103, 28 Pac. Rep. 124; *Bacon v. Kearney Vineyard Syndicate*, 1 Cal. App. 275, 82 Pac. Rep. 84; *North Point etc. Co. v. Utah etc. Co.*, 16 Utah 246, 52 Pac. Rep. 168, 40 L. R. A. 851, 67 Am. St. Rep. 607; *Jenkins v. Hooper Irr. Co.*, 13 Utah 100, 44 Pac. Rep. 829; *Fraser v. Sears etc. Co.*, 12 Cal. 555, 73 Am. Dec. 562; *Greeley Irr. Co. v. House*, 14 Colo. 549, 24 Pac. Rep. 329; *Arave v. Idaho C. Co.*, 5 Idaho 68, 46 Pac. Rep. 1024; *Lisonbee v. Monroe Irr. Co.*, 18 Utah 343, 54 Pac. Rep. 1009, 72 Am. St. Rep. 784.

See, also, *Shields v. Orr etc. Co.*, 23 Nev. 349, 47 Pac. Rep. 194; *Consolidated etc. Co. v. Hamlin*, 6 Colo. App. 341, 40 Pac. Rep. 582; *Stuart v. Noble Ditch Co.*, 9 Idaho 765, 76 Pac. Rep. 255; *McLellan v. Brownsville etc. Co.*, 46 Tex. Civ. App. 249, 103 S. W. Rep. 206.

But see *Sweeney v. Montana Cent. R. Co.*, 25 Mont. 543, 65 Pac. Rep. 912, where it was held that, in an action for injuries caused by the diversion of a stream, evidence that plaintiff, by a small expense in riprapping the bank of the new channel,

in order that contributory negligence of the plaintiff should defeat his recovery, his act must be the proximate cause of his injury; and if, without certain remote negligence, he still would have suffered the injuries for which he has brought an action for damages, the same was not contributory, in a legal sense.⁵

It was held in Colorado that where a party sues for damages by being restrained from using the water from a certain ditch, if it is shown that he could have obtained sufficient water from another source, he will not be entitled to receive a greater sum than he would have had to expend to obtain water from such source.⁶

§ 1689. **Pleadings—Defenses—Grant or contract.**—A good defense if properly pleaded is that the defendant had acquired the right to commit the act or acts complained of by grant or contract. So, where the defendants had a grant in writing for a valuable consideration for the erection of certain dams across a river, a judgment against them for damages under a complaint charging them with "wrongfully erecting and maintaining" such dams was erroneous, as violating the rights of the defendants under the grant.¹ But it is held in Oregon that a clause in a lease of water power, that, in default of a sufficient supply of water the lessor shall forfeit a *pro rata* proportion of the water rents accruing during such deficiency, is not a provision for the liquidated damages, such as will prevent the recovery of other damages by the lessee, when it appeared that the deficiency was the result of the lessor's failure to repair injuries to the race and dam.²

Local customs can not change the law of negligence; but it is held by the Utah Court, that when such customs are reasonable, un-

could have avoided or diminished the damages to his property, was admissible, it being his duty to use reasonable care to save it from injury.

See, also, Fullerton v. Fordyce, 144 Mo. 519, 44 S. W. Rep. 1053; Douglass v. Stephens, 18 Mo. 362; Lawson v. Price, 45 Md. 123; Scherrer v. Baltzer, 84 Ill. App. 126; Kansas Pac. R. Co. v. Muhlman, 17 Kan. 224.

⁵ O'Connor v. North Truckee D. Co., 17 Nev. 245, 30 Pac. Rep. 882.

⁶ Mack v. Jackson, 9 Colo. 536, 13 Pac. Rep. 542.

¹ Peay v. Salt Lake City, 11 Utah 331, 40 Pac. Rep. 206; Sweetland v. Grants Pass etc. Co., 46 Ore. 85, 79 Pac. Rep. 337; Alexander v. Winters, 23 Nev. 475, 49 Pac. Rep. 116; *Id.*, 24 Nev. 143, 50 Pac. Rep. 798; Malmstrom v. People's etc. Co., 32 Nev. 246, 107 Pac. Rep. 98.

² Pengra v. Wheeler, 24 Ore. 532, 34 Pac. Rep. 354, 21 L. R. A. 726.

interrupted, and uniform, and not contrary to public policy, they may affect the interpretation of contracts in their locality.³

The fact that there are also other wrong-doers is no defense to an action for damages, although the evidence of such is receivable in mitigation of damages.⁴

§ 1690. Pleadings—Defenses—Limitation of actions and prescription.—An action for damages must be brought within the period provided by the statute of limitations of the State where the cause of action arose; otherwise it will be barred. And, upon this subject, it is held that the statute of limitations begins to run from the time the cause of action accrues, even though the actual damages resulting therefrom may not have accrued until some time afterwards.¹ So, it is held that injuries to land from water seeping from a properly constructed irrigation ditch which is intended to be permanent constitutes a single cause of action; and, as affected by the statute of limitations accrues at the beginning of the injury.² And, in cases where the statute of limitations has run,

³ *Jenkins v. Hooper Irr. Co.*, 13 Utah 100, 44 Pac. Rep. 829; *Hartson v. Dill*, 151 Cal. 137, 90 Pac. Rep. 530.

⁴ *Gould v. Stafford*, 77 Cal. 66, 18 Pac. Rep. 879; *Beck v. Bono*, 59 Wash. 479, 110 Pac. Rep. 13.

An irrigation company sued for failure to furnish sufficient water for plaintiff's rice crops during a certain season can not rely upon a release of liability contained in a contract for service for the succeeding season if there was no other consideration than the agreement for such subsequent service; the company being legally bound to furnish the water. *Lone Star Canal Co. v. Cannon*, — Tex. Civ. App. —, 141 S. W. Rep. 799.

¹ *Middlekamp v. Bessemer etc. Co.*, 46 Colo. 102, 103 Pac. Rep. 280, 23 L. R. A., N. S., 795, and cases cited.

Where plaintiff and defendant had an agreement whose express purpose

was to settle and establish the respective rights of the parties to the water and ditches therein mentioned, an action by plaintiff for interfering with his rights thereunder, in that defendant entered upon the ditch upon his own land and diverted the water so that it failed to reach the land of the plaintiff, but did not enter upon the plaintiff's land, is an action on the case, and is barred in two years under L. O. L., Sec. 8, subd. 1, and is not an action on the contract or for trespass, which are barred in six years by L. O. L., Sec. 6, subd. 1. *Dalton v. Kelsey*, 58 Ore. 244, 114 Pac. Rep. 464.

² *Middlekamp v. Bessemer etc. Co.*, 46 Colo. 102, 103 Pac. Rep. 280, 23 L. R. A., N. S., 795.

See, also, *Sulens v. Chicago etc. R. Co.*, 74 Iowa 659, 38 N. W. Rep. 545, 7 Am. St. Rep. 501; *Drake v. Chicago etc. R. Co.*, 63 Iowa 302, 19 N. W. Rep. 215, 50 Am. Rep. 746; *Kansas*

where such statute is properly pleaded, it constitutes a good defense in an action for damages of all character.³ But in order to maintain such a defense, or one based upon a prescriptive right, it must be properly pleaded.⁴ A finding of fact which found that the damages sought to be recovered accrued within the period covered by the statute of limitations immediately prior to the commencement of the action, when such statute is made a defense, is a sufficient finding on such defense, and negatives it.⁵

§1691. **Act of God or inevitable accident as a defense for injuries to property.**—The defense of act of God, or *vis major*, or inevitable accident, has been oftentimes interposed in actions for damages for injuries from the flooding of land, or other destruction of property, resulting from the breakage, overflow, or leakage of works. As to whether such a defense can be maintained or not depends upon the circumstances of each particular case. To be sure, "No one is responsible for that which is merely the act of God, or inevitable accident."¹ But, in order to determine whether a

City v. Frohwerk, 10 Kan. App. 120, 62 Pac. Rep. 432.

A cause of action for flooding lands by the erection of a dam accrues for the purpose of determining limitations when the land is flooded, and not when the dam is erected. Greeley Irr. Co. v. Von Trotha, 48 Colo. 12, 108 Pac. Rep. 985.

³ Middlekamp v. Bessemer etc. Co., 46 Colo. 102, 103 Pac. Rep. 280, 23 L. R. A., N. S., 795; Toombs v. Hornbuckle, 3 Mont. 193; Greeley Irr. Co. v. Von Trotha, 48 Colo. 12, 108 Pac. Rep. 985; Shurtliff v. Extension D. Co., 14 Idaho 416, 94 Pac. Rep. 574; Suter v. Wenatchee etc. Co., 35 Wash. 1, 76 Pac. Rep. 298; Conniff v. San Francisco, 67 Cal. 45, 7 Pac. Rep. 41; Kansas City v. Frohwerk, 10 Kan. App. 120, 62 Pac. Rep. 432.

⁴ Churchill v. Louie, 135 Cal. 608, 67 Pac. Rep. 1052.

For pleading a prescriptive right, see Sec. 1055.

⁵ Shurtliff v. Extension D. Co., 14 Idaho 416, 94 Pac. Rep. 574.

¹ Chidester v. Consolidated D. Co., 59 Cal. 197.

Canal companies and others attempting to control and use water are only required to anticipate and prepare to meet such emergencies as may reasonably be expected to arise in the course of nature. They are not required to meet unlooked-for and overwhelming displays of power—such as storms of unusual violence as to surprise cautious and reasonable men. Lisonbee v. Monroe etc. Co., 18 Utah 343, 54 Pac. Rep. 1008, 72 Am. St. Rep. 784.

"So far as disclosed by the evidence, the damage proximately resulted, not from human agency, but from one of those unexpected, unanticipated, superior causes over which the canal company had no control, and which no reasonable precaution could have prevented. We think it clear,

ditch, canal, or reservoir owner can maintain such a plea in an action for damages against him, it is necessary to ascertain the true legal significance of the term "act of God," or "inevitable accident." One of the best definitions that we have found and especially applicable to the cases under discussion, is taken from the work of an eminent law book writer, and we will therefore adopt it as our own. It is stated thus: "The act of God signifies, in legal phraseology, any inevitable accident occurring without the intervention of man, and may, indeed, be considered to mean something in opposition to the act of man, as storms, tempests, and lightning. The above maxim may therefore be paraphrased and explained as follows: It would be unreasonable that those things which are inevitable by the act of God, which no industry can avoid, nor policy prevent, should be construed to the prejudice of any person in whom there has been no laches."² The expression, as

therefore, that, under the case as presented here, the defendant can not be held liable." *Grand Valley Irr. Co. v. Pitzer*, 14 Colo. App. 123, 59 Pac. Rep. 420.

See, also, *Proctor v. Jennings*, 6 Nev. 83, 3 Am. St. Rep. 240, 4 Morr. Min. Rep. 265; *Mathews v. Kinsell*, 41 Cal. 512; *Ohio etc. R. Co. v. Thillman*, 143 Ill. 127, 32 N. E. Rep. 529, 36 Am. St. Rep. 359; *Blythe v. Denver etc. R. Co.*, 15 Colo. 333, 25 Pac. Rep. 702, 11 L. R. A. 615, 22 Am. St. Rep. 403; *Denver etc. R. Co. v. Andrews*, 11 Colo. App. 204, 53 Pac. Rep. 518; *Town of Jefferson v. Hicks*, 23 Okla. 684, 102 Pac. Rep. 79, 24 L. R. A., N. S., 214; *Broadway Mfg. Co. v. Leavenworth etc. Co.*, 81 Kan. 616, 106 Pac. Rep. 1034; *Eagan v. Central Vermont R. Co.*, 81 Vt. 141, 69 Atl. Rep. 732, 16 L. R. A., N. S., 928, 130 Am. St. Rep. 1031; *Buel v. Chicago etc. R. Co.*, 81 Neb. 130, 116 N. W. Rep. 299.

A charge which after defining an act of God stated that a person is not liable for injuries resulting there-

from, "provided reasonable and ordinary care is exercised to guard against such occurrences," is erroneous, since a person is not bound to anticipate or guard against an act of God. *Lyon v. Chicago etc. R. Co.*, — Mont. —, 121 Pac. Rep. 886.

² *Broom's Legal Maxims*, pp. 227, 228.

"But an act of God, in legal phraseology, means an accident against which ordinary skill and foresight are not expected to provide. This, applied to water courses, would include only floods or extraordinary freshets, and not such rises or high water in a stream as are usual and ordinary, and reasonably anticipated at particular seasons of the year." *Dorman v. Ames*, 12 Minn. 451 (Gil. 347).

The term "act of God," in its legal sense, applies only to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them. *Gulf Red Cedar Co. v. Walker*, 132 Ala. 553, 31 So. Rep. 374.

will be noticed, excludes the idea of human agency; and, therefore, if it appears that the injuries happened in any way through the intervention of man, it can not be held to have been the act of God, but must be regarded as the act of man.³ This principle is well illustrated by the Circuit Court of Appeals in the recent Salton Sea cases.⁴ There, as the Court states: "The evidence shows conclusively that it was the defendant's method of constructing the intakes that resulted in turning the flood of the Colorado River into the Salton Sink," and the result of which was the destruction of a large amount of farming land. And, although "the fact that an extraordinary flood came down the river contributing to the disaster," the Court held that that fact did not relieve the defendant from liability. If it had not been for the intervention of man in the construction of the works, the flood, although extraordinary, would have passed down the river without doing damage, as it had done on previous occasions. Therefore, the Court held that the injuries could not be regarded as having been caused by act of God, but must be regarded as the act of the ditch owners, and for which they were held liable.

As well stated in a Washington case:⁵ "The 'act of God' as that expression is known in law, is a mixed question of law and fact. The defining and limitation of the term, its several characteristics, its possibilities as establishing and controlling exemption from liability, are questions of law for the Court; but the existence or non-existence of the facts upon which it is predicated are questions for the jury."⁶

So, therefore, the correct rule of law in actions for damages, where the defense is set up that the injuries were caused by act of

³ Polack v. Pioche, 35 Cal. 416, 95 Am. Dec. 115; Chidester v. Consolidated D. Co., 59 Cal. 197.

⁴ California Dev. Co. v. New Liverpool Salt Co., 172 Fed. Rep. 792, 97 C. C. A. 214, quoting from Kinney on Irr., 1st Ed., Secs. 314, 315.

⁵ Gibson v. Cascade Lbr. Co., 54 Wash. 289, 103 Pac. Rep. 11.

⁶ Where the Court, in instructing the jury, defined "an extraordinary flood" that it "means one of the heaviest that ever occurred in that

locality," it was held that such instruction was not misleading, where the jury were also instructed that if the river overflowed its banks by reason of an extraordinary flood, or freshet, which it was not capable of carrying within its banks, and was not occasioned by the dam of the defendants, plaintiffs could not recover, and that defendants would be excused from liability on account of an extraordinary flood which could not be foreseen and guarded against. Greeley

God, is that, when two causes combine to produce the injury, both of which causes are, in their nature, proximate, the one being a negligent act of the defendant, and the other in the nature of an act of God, for which neither party is responsible, then the defendant is liable for such loss as is proximately caused by his own negligent act concurring with the act of God, provided the loss would not have been sustained by the plaintiff, but for such negligent act of the defendant.⁷

In order to take advantage of act of God as a defense, it must be properly pleaded by the defendant.⁸ No definite rule can be laid down as to what will or will not constitute a defense of act of God which will apply to all cases, but it is a question of fact for the jury to determine under the facts and circumstances of each particular case, and under the proper instructions of the Court.⁹

Irr. Co. v. Von Trotha, 48 Colo. 12, 108 Pac. Rep. 985. Judgment in this case was rendered in favor of the plaintiffs, and affirmed by the Supreme Court.

See, also, *Jordan v. City of Mt. Pleasant*, 15 Utah 449, 49 Pac. Rep. 746; *Mulrone v. Marshall*, 35 Mont. 238, 88 Pac. Rep. 797; *Turner v. Tuolumne etc. Co.*, 25 Cal. 397, 1 Morr. Min. Rep. 107; *Burbank v. West Walker River D. Co.*, 13 Nev. 431; *Brown v. Pine Creek R. Co.*, 183 Pa. 38, 38 Atl. Rep. 401; *Ohio etc. Co. v. Ramey*, 139 Ill. 9, 28 N. E. Rep. 1087, 32 Am. St. Rep. 176; *Van Duzer v. Elmira etc. Co.*, 75 Hun 487, 27 N. Y. Supp. 474; *Fairbury etc. Co. v. Chicago etc. R. Co.*, 79 Neb. 854, 113 N. W. Rep. 535, 13 L. R. A., N. S., 542; *Ryan v. Rogers*, 96 Cal. 349, 31 Pac. Rep. 244; *Greeley etc. Co. v. House*, 14 Colo. 549, 24 Pac. Rep. 329; *Price v. Oregon R. Co.*, 47 Ore. 350, 83 Pac. Rep. 843; *City of Oroville v. Indiana Gold Dredging Co.*, 165 Fed. Rep. 505; *Vyse v. Chicago etc. R. Co.*, 125 Iowa 90, 101 N. W. Rep. 736.

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⁷ *Mulrone v. Marshall*, 35 Mont. 238, 88 Pac. Rep. 797.

Where damage to property by a flood was occasioned by a combination of negligence of the owner of a dam and by an unprecedented flood constituting an act of God, the owner of the property can recover damages from the owner of the dam provided his negligence was the proximate cause of the injury. *Frederick v. Hale*, 42 Mont. 153, 112 Pac. Rep. 70.

See, also, *Meisner v. City of Dillon*, 29 Mont. 116, 74 Pac. Rep. 130; *Birsch v. Citizens Electric Co.*, 36 Mont. 574, 93 Pac. Rep. 940.

⁸ *Pengra v. Wheeler*, 24 Ore. 532, 34 Pac. Rep. 354, 21 L. R. A. 726; *Chicago etc. R. Co. v. Shaw*, 63 Neb. 380, 88 N. W. Rep. 508, 56 L. R. A. 341.

⁹ *Mulrone v. Marshall*, 35 Mont. 238, 88 Pac. Rep. 797; *Price v. Oregon R. Co.*, 47 Ore. 350, 83 Pac. Rep. 843; *Greeley v. Von Trotha*, 48 Colo. 12, 108 Pac. Rep. 985; *Ohio etc. Co. v. Thillman*, 143 Ill. 127, 32 N. E. Rep. 529, 36 Am. St. Rep. 359; *Chicago etc. Co. v. Schaffer*, 26 Ill. App. 250.

§ 1692. **Act of God as a defense for failure to deliver water under duty or contract.**—Where a person or company is under the duty or contract of furnishing water to consumers, and is prevented from so furnishing the water by storms whereby their works are broken, the defense of act of God has often been pleaded in actions for damages for the breach of such contract or the violation of such duty.¹ But, as to whether such a defense can be maintained or not depends entirely as to whether or not the disaster was caused solely by an act of God, as defined in the preceding section,² or whether the acts of the defendant contributed to the injuries. Where, however, the injuries resulted from the failure of the company to furnish water caused solely by act of God, such as some extraordinary and unprecedented storm, or even some extraordinary and unprecedented drought, whereby the water in the natural source of supply is so lowered to such an unusual stage that it could not have been anticipated by engineering skill or the residents of the neighborhood,³ or through some other unforeseen and extraordinary occurrence, which ordinary prudence might not have anticipated, and at the same time have taken the proper steps to guard against, through which it is a physical impossibility for the company to furnish the water as contracted, the company will be excused from performing the contract in that respect. In such a case there will be no such breach of the contract that an action will lie for damages by a consumer against the company for its failure to perform.⁴

¹ For such a defense in actions for damages to property, see Sec. 1507.

² See Sec. 1691.

³ "If the stream had, in consequence of drought, failed to furnish the necessary amount of water to operate defendant's mills, this would have been a destruction of the subject matter of the contract which would have been excused." *Pengra v. Wheeler*, 24 Ore. 532, 34 Pac. Rep. 354, 21 L. R. A. 726.

A party must perform his contract, unless its performance is rendered impossible by act of God, the law, or the other party. Unforeseen difficul-

ties, however great, will not excuse him. *Ingle v. Jones*, 69 U. S. 2 Wall. 1, 17 L. Ed. 762.

See, also, *Beebe v. Johnson*, 19 Wend. 500, 32 Am. Dec. 518.

⁴ The impossibility of repairing leased dams or races ten days after the water falls to the average winter stage, as agreed upon by the lease, because the water immediately rises again and continues high, releases the lessor from liability for breach of the covenant, if he makes the repairs as soon as possible. *Pengra v. Wheeler*, 24 Ore. 532, 34 Pac. Rep. 354, 21 L. R. A. 726.

Such is the rule of law upon the subject, especially in cases of fire, but the fact is that the cases are very few where a water company has been excused from the solemn obligations of its contracts, whereby it bound itself to furnish its consumers with water at a certain time, for such an alleged reason. There is usually some fact connected with the case which does not bring it within the rule. As was said in a Colorado case: "Under the conditions and circumstances shown in this case, the results to the users of water, in a failure to supply it, are so disastrous and irremediable that the party contracting to supply it should not be exonerated from a failure to perform, except under circumstances clearly showing that the failure was chargeable to *vis major*, and not to negligence and inattention."⁵ It is no excuse for the non-performance of a contract that it is impossible for the company to fulfill it, if the performance be in its nature possible.⁶

If, however, the failure to furnish the water was not due to any negligence or inattention upon the part of the company, and it is provided in the contract itself that the company is exempt from all liability on account of any unforeseen causes of accident, or where from natural causes there is an unusual shortage of water in its source of supply, the company will not be able to furnish its consumers the amount of water contracted for, the courts will uphold such a provision in the contract and excuse the company from such a cause from furnishing the full amount of water;⁷ and, in such a

For release from liability from torts by act of God, see Sec. 1691.

⁵ Pawnee etc. Co. v. Jenkins, 1 Colo. App. 425, 29 Pac. Rep. 381; Sacchi v. Bayside Lbr. Co., 13 Cal. App. 72, 108 Pac. Rep. 885; Evans v. Prosser Falls Land & Pr. Co., 62 Wash. 178, 113 Pac. Rep. 271; Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 Pac. Rep. 404, 29 L. R. A., N. S., 213.

⁶ The facts "do not tend to show that the source of the water was wholly exhausted, so as to render the irrigation of the land physically impossible; and for this reason the act of God is not involved." Anderson v. Adams, 43 Ore. 621, 74 Pac. Rep. 215.

See, also, Reid v. Alaska etc. Co., 43 Ore. 429, 73 Pac. Rep. 337; Pengra v. Wheeler, 24 Ore. 532, 34 Pac. Rep. 354, 21 L. R. A. 726, where it was held that it was no excuse that the work could not be profitably done within the time agreed upon.

Ryan v. Rogers, 96 Cal. 349, 31 Pac. Rep. 244.

⁷ Landers v. Garland Canal Co., 52 La. 1465, 27 So. Rep. 717.

A contract releasing a company from damages by reason of unavoidable accidents and breaks in its works, will not release a liability for damages which are the result of gross and continued negligence. Catlin etc.

case, the consumers are not liable to the company for the water rates for the amount of water not furnished.⁸ And, contracts which provide that in time of unusual drought the consumers shall prorate the supply according to their respective rights are upheld by the courts, and, where the shortage of supply is due to no fault of the company, it is exempt from further liability for not furnishing the full amount.⁹ But it should be provided in such contracts to the effect that the consumers should have a *pro rata* deduction from the sum stipulated to be paid each year for the water.¹⁰ But where the deficiency was caused by other means than by an act of God, as where there would have been sufficient water except for some new use made by the company, the company will be held liable.¹¹

§ 1693. **Evidence—Burden of proof.**—In all actions for damages for the injury to property from breakage and overflow, except in reservoir and dam cases in jurisdictions where by statute, or by court decisions, the owner is made the insurer against all damages,¹ the gist of such actions is negligence; and, therefore, until such negligence is shown by the evidence, there can be no liability upon the part of the defendant causing the injuries.² We have shown in previous sections that the acts constituting the negligence must be alleged with particularity, otherwise the complaint does not state a cause of action and is demurrable.³ And, it being necessary to allege such acts, it is also necessary to prove them by a preponderance of the evidence; and, therefore, the burden of proof rests in the first instance upon the plaintiff to prove the negligence in

Co. v. Best, 2 Colo. App. 481, 31 Pac. Rep. 391.

See, also, Landers v. Garland Canal Co., 25 La. 1465, 27 So. Rep. 717.

But see Dalton v. Selah Water Users Ass'n, — Wash. —, 122 Pac. Rep. 4, holding that the maxim of *res ipsa loquitur* applies to the breaking of an irrigation ditch.

⁸ Landers v. Garland Canal Co., 52 La. 1465, 27 So. Rep. 717.

⁹ Souther v. San Diego Flume Co., 112 Fed. Rep. 228, 121 Fed. Rep. 347, 57 C. C. A. 561; O'Neil v. Ft. Lyon

Canal Co., 39 Colo. 487, 90 Pac. Rep. 849; Jackson v. Indian Creek etc. Co., 16 Idaho 430, 101 Pac. Rep. 814; Great Western Sugar Co. v. White, 47 Colo. 547, 108 Pac. Rep. 156.

For prorating water, see Sec. 769.

¹⁰ Great Western Sugar Co. v. White, 47 Colo. 547, 108 Pac. Rep. 156.

¹¹ Evans v. Prosser Falls etc. Co., 62 Wash. 178, 113 Pac. Rep. 271.

¹ See Secs. 1668-1671.

² See Sec. 1672.

³ See Sec. 1686.

conformity with the allegations in his complaint charging the same. In reservoir and dam cases, however, where the owner is made the insurer, it is only necessary for the plaintiff to prove the injury and that it was caused from such works, and it is not necessary to prove negligence upon the part of the defendant.⁴ But, in ditch and canal cases, owing to the fact that with ordinary care a ditch and canal can be rendered harmless, and owing to the rule of law that the owner thereof is not made the insurer against all damages, the mere fact of the water overflowing, breaking, or seeping through the banks of a ditch or canal, while it may be one fact tending to prove negligence upon the part of the owner thereof, which may be considered by the jury together with the other facts and circumstances surrounding each particular case, it can not be considered as a legal presumption in and of itself of negligence. Mr. Farnham states a different rule, as follows: "If a break occurs, the burden is upon the owner of the ditch to establish his freedom from negligence, and his failure to do this will render him liable."⁵ That this is not the rule of law in these cases is borne out by the great weight of authority. As was held in an early California case, the rule of *res ipsa loquitur* does not apply to such cases.⁶ In a late Washington case, however, the exact contrary rule was adopted, and the Court said: "We think the better rule is that the doctrine of *res ipsa loquitur* applies in cases of this character."⁷ If the rule of reasonable and ordinary care in ditch and canal cases is to be adhered to, and the ditch owner is not to be held as the insurer of all damages caused by the escape of the water, the rule as stated by Mr. Farn-

⁴ Rylands v. Fletcher, L. R. 3 H. L. 330, 37 L. J. Exch. N. S. 161, 19 L. T. N. S. 220; affirming L. R. 1 Exch. 265, 12 Jur. N. S. 603, 14 Week. Rep. 799; Texas etc. R. Co. v. O'Mahoney, 24 Tex. Civ. App. 631, 60 S. W. Rep. 902; Clear Creek etc. Co. v. Kilkenney, 5 Wyo. 38, 36 Pac. Rep. 819; Garnett etc. Co. v. Sampson, 48 Colo. 285, 110 Pac. Rep. 79; Larimer County D. Co. v. Zimmerman, 4 Colo. App. 78, 34 Pac. Rep. 1111; Sylvester v. Jerome, 19 Colo. 128, 34 Pac. Rep. 760; Can-

yon City R. Co. v. Oxtoby, 45 Colo. 214, 100 Pac. Rep. 1127; Mustang etc. Co. v. Hissman, 49 Colo. 308, 112 Pac. Rep. 800; Billings Realty Co. v. Big Ditch Co., 43 Mont. 251, 115 Pac. Rep. 828.

⁵ Farnham on Waters and Water Rights, Sec. 634.

⁶ Tenney v. Miners' etc. Co., 7 Cal. 335, 11 Morr. Min. Rep. 31.

⁷ Dalton v. Selah W. Users' Assn., — Wash. —, 122 Pac. Rep. 4.

ham is not the correct one as laid down by the authorities, neither is it the logical one.⁸

The mere fact of the breaking of a ditch, although it is one circumstance of evidence which may be considered by the jury with the other circumstances proven in any particular case, does not, in and of itself raise the legal presumption of negligence, and thus throw the burden upon the defendant "to establish his freedom of negligence." But, as in other cases involving negligence, the negligent acts of the defendant must be pleaded, and the burden of proof is upon the plaintiff to establish by a preponderance of the evidence the negligent acts of the defendant as pleaded.⁹ And, fur-

⁸ "A ditch owner is not an insurer of his ditch against damages which may result from its operation." *Fleming v. Lockwood*, 36 Mont. 384, 92 Pac. Rep. 962, 14 L. R. A., N. S., 628, 13 Am. & Eng. Ann. Cas. 263.

See, also, *Howell v. Big Horn Basin C. Co.*, 14 Wyo. 14, 81 Pac. Rep. 785, 1 L. R. A., N. S., 596; *King v. Miles City etc. Co.*, 16 Mont. 463, 41 Pac. Rep. 431, 50 Am. St. Rep. 506; *Chidester v. Consolidated D. Co.*, 59 Cal. 197; *Lisonbee v. Monroe Irr. Co.*, 18 Utah 343, 54 Pac. Rep. 1009, 72 Am. St. Rep. 784; *Frederick v. Hale*, 42 Mont. 153, 112 Pac. Rep. 70.

The owner of a ditch is not liable *per se* from leakage from his ditch, without negligence upon his part, by the burrowing of gophers or other animals. *Tenney v. Miners' etc. Co.*, 7 Cal. 335, 11 Morr. Min. Rep. 31. However, if the ditch owner is negligent and injuries occur from this cause, he is liable. *Greeley etc. Co. v. House*, 14 Colo. 549, 24 Pac. Rep. 329.

⁹ "The gist of this action is negligence; and until some negligence is shown there can not be said to be any liability." *Hopkins v. Butte etc. Co.*, 13 Mont. 223, 33 Pac. Rep. 817, 40 Am. St. Rep. 438.

"The burden of proof was on the

plaintiff to show that this water broke through the mismanagement or imperfect construction, repair, or management of the ditch, and damaged the property of the plaintiff; and the burden devolves upon the plaintiff to show the amount of damages to her property, or the value of the property destroyed." *Greeley Irr. Co. v. House*, 14 Colo. 549, 24 Pac. Rep. 329.

Where several acts of negligence are charged in the complaint, a recovery will be sustained on proof of any one of them, provided the negligence proved was the proximate cause of the injury; but where two acts of negligence are charged, and the pleading discloses that neither act in itself would have caused the injury, but that the concurrence of both was necessary, proof of both acts is necessary to justify a recovery. *Frederick v. Hale*, 42 Mont. 153, 112 Pac. Rep. 70.

The burden in such case is on the one claiming damages to show an appreciable injury to his crops. *Lum Ah Lee v. Ah Soong*, 16 Hawn. 163.

See, also, *Malmstrom v. People's Drain D. Co.*, 32 Nev. 246, 107 Pac. Rep. 98; *King v. Miles City Irr. Co.*, 16 Mont. 463, 41 Pac. Rep. 431, 50 Am. St. Rep. 506; *Tenney v. Miners' D. Co.*, 7 Cal. 335, 11 Morr. Min. Rep.

thermore, the proof must conform to the allegations of negligence as set forth in the complaint. Otherwise there will be a fatal variance, and the plaintiff can not recover.¹⁰

Where the defendant in his answer sets up an affirmative defense,¹¹ the burden is, of course, upon the defendant to prove such defense, by a preponderance of all the evidence in the case upon that point. So, it therefore follows that where the defendant sets up an act of God as a defense, the burden of proof is upon him.¹²

It is error for the Court to refuse to admit in evidence an original complaint for the purpose of contradicting the allegations of an amended complaint.¹³ It is competent to prove that a headgate in defendant's ditch was lowered after the suit was brought, and that the water then flowed down, and ceased to stand in it, as evidence tending to prove that the defendants were negligent in not lowering the gate before the injury complained of.¹⁴ Photographs after

31; Colorado etc. Co. v. Morris, 1 Colo. App. 401, 29 Pac. Rep. 302; Fleming v. Lockwood, 36 Mont. 384, 92 Pac. Rep. 962, 14 L. R. A., N. S., 620, 13 Am. & Eng. Ann. Cas. 263; Howell v. Big Horn Basin C. Co., 14 Wyo. 14, 81 Pac. Rep. 785, 1 L. R. A., N. S., 596; Dennis v. Crocker-Huffman etc. Co., 6 Cal. App. 58, 91 Pac. Rep. 425; Young v. Extension D. Co., 13 Idaho 174, 89 Pac. Rep. 296; Billings Realty Co. v. Big Ditch Co., 43 Mont. 251, 115 Pac. Rep. 828; Poutra v. Martin, — Tex. Civ. App. —, 135 S. W. Rep. 725.

10 "We think the law is well settled that a plaintiff can not declare on one theory and recover on another. It is a well-established rule of evidence that the testimony offered must correspond with the allegations in the complaint, and not show an entirely different state of facts." So, it is held that, under a complaint alleging that defendants had wrongfully erected and maintained dams across the natural outlet of a lake, causing the waters of the lake to overflow and damage plaintiff's land, proof that such dams were

erected under a contract with the plaintiff and others constituted a fatal variance, and that the plaintiff could not recover. Peay v. Salt Lake City, 11 Utah 331, 40 Pac. Rep. 206.

See, also, Equitable Securities Co. v. Montrose etc. Co., 20 Colo. App. 465, 79 Pac. Rep. 747.

A defendant can not complain of the variance between the pleadings and the proof, resulting from the Court relieving the defendant of the duty of meeting a part of the allegations of the complaint. Frederick v. Hale, 42 Mont. 153, 112 Pac. Rep. 70.

Where the defect in the complaint was cured by the answer of the defendant, see Crowder v. McDonald, 21 Mont. 367, 54 Pac. Rep. 43.

11 For affirmative defenses, see Secs. 1688-1692.

12 Buel v. Chicago etc. Co., 81 Neb. 130, 116 N. W. Rep. 299.

13 Shurtliff v. Extension D. Co., 14 Idaho 416, 94 Pac. Rep. 574.

14 Jenkins v. Hooper Irr. Co., 13 Utah 100, 44 Pac. Rep. 829.

Where evidence was introduced as to damages accruing since the commence-

proof of correctness and time of taking are properly admitted in evidence to show the condition of the land and the works.¹⁵ A tax list is held as inadmissible to prove the value of the land injured.¹⁶

Under the provisions of Section 5950 of the Revised Codes of Idaho, 1908, it is held that the courts of that State will take judicial notice of the laws of Nature, and in such cases resort for their aid and information to appropriate books and documents of reference.¹⁷

§ 1694. **Instructions to the jury.**—As in other actions for damages, the questions of negligence and the measure of damages are for the consideration of the jury under proper instructions of the Court.¹ In an action for damages for diverting water from an irrigation ditch, an instruction that, where the Court in a former action had found certainly upon any point that had arisen in the action at bar, its finding must control, and was conclusive upon the parties thereto, was held erroneous, as leaving to the jury the construction of the findings of the Court, which the Court should have construed and explained to the jury.² A requested instruction, in an action against a water company for refusal to furnish water to an applicant, that before the company was required to deliver the water the applicant must make necessary provision for receiving it was properly refused, where the refusal of the company was not based on that ground.³ It is held to be improper for the Court to

ment of the action, but was afterward withdrawn, and the jury instructed not to consider it, there was no error. *Gotelli v. Cardelli*, 26 Nev. 382, 69 Pac. Rep. 8.

¹⁵ *Pickett v. Atlantic Coast Line R. Co.*, 153 N. C. 148, 69 S. E. Rep. 8.

¹⁶ *Oldenburg v. Oregon Sugar Co.*, 39 Ore. 564, 65 Pac. Rep. 869.

¹⁷ *Petajaniemi v. Washington W. & Pr. Co.*, — Idaho —, 124 Pac. Rep. 783.

¹ The Court should instruct the jury as to the measure of damages, including the elements of damage involved; and hence, in an action for damages to land by flooding through the breaking of defendant's reservoir, the Court should have instructed on its own mo-

tion as to plaintiff's measure of damages. *Mustang etc. Co. v. Hissman*, 49 Colo. 308, 112 Pac. Rep. 800.

Error of an instruction, in putting on plaintiff too high a degree of proof, is harmless, his right of recovery depending on negligence, of which there was no proof, he taking the position that plaintiff was an insurer. *Fleming v. Lockwood*, 36 Mont. 384, 92 Pac. Rep. 962, 14 L. R. A., N. S., 628, 13 Am. & Eng. Ann. Cas. 263.

² *Dalton v. Kelsey*, 58 Ore. 244, 114 Pac. Rep. 464.

See, also, *Colorado Springs etc. R. Co. v. Albrecht*, — Colo. App. —, 123 Pac. Rep. 957.

³ *Lowe v. Yolo etc. Co.*, 157 Cal. 503, 108 Pac. Rep. 207.

charge that the doctrine of contributory negligence was not applicable to the case if defendant knew of the danger to the plaintiff's premises and could have prevented the injury.⁴

An instruction in an action for damages from the breaking of an irrigation ditch, as follows: "In this connection the Court further instructs the jury that it is incumbent upon the defendant company to construct its flumes and ditches in such a reasonable and prudent manner as that no damage will result to persons whose lands are crossed by the ditch," was held to be erroneous as making the ditch owner an insurer.⁵

The instructions given by the Court must be read together, and are sufficient if, when so read, they appear to cover the whole case and state correctly the law applicable thereto.⁶ It is not error for the Court to refuse a correct instruction, where other appropriate instructions on the same subject have been given.⁷ Where an instruction does not fully set forth the issues as fully as counsel for a party desires, he must offer an instruction to meet his views, or he can not complain on appeal.⁸

§ 1695. Verdict—Non-suit.—After hearing the evidence, except in cases which are tried before the Court alone, a jury having been waived, and the Court having instructed the jury, the case must be submitted to them for their verdict.

In deciding a motion for a non-suit or a directed verdict for the defendant, the Court should take the plaintiff's evidence as ad-

⁴ *Malmstrom v. People's Drain D. Co.*, 32 Nev. 246, 107 Pac. Rep. 98; distinguishing *Shields v. Orr. D. Co.*, 23 Nev. 349, 47 Pac. Rep. 194.

An instruction that plaintiff could not recover if her own carelessness in the management of her estate contributed to her injury—there being no evidence to that effect—was erroneous. *Emison v. Owyhee D. Co.*, 37 Ore. 577, 62 Pac. Rep. 13.

⁵ *King v. Miles City Irr. D. Co.*, 16 Mont. 463, 41 Pac. Rep. 431, 50 Am. St. Rep. 506.

⁶ *Hayden v. Consolidated etc. Co.*, 3 Cal. App. 136, 84 Pac. Rep. 422; *Wood v. Moulton*, 146 Cal. 317, 80

Pac. Rep. 92; *Frederick v. Hale*, 42 Mont. 153, 112 Pac. Rep. 70.

⁷ *Billings Realty Co. v. Big Ditch Co.*, 43 Mont. 251, 115 Pac. Rep. 828.

⁸ *Frederick v. Hale*, 42 Mont. 153, 112 Pac. Rep. 70.

"The measure of damages for destruction of apple trees planted and growing is what such destroyed trees were worth on the premises in their growing state, and the jury in determining this may consider the difference in the value of the land with and without such growing trees thereon at the time of the destruction." *Hanes v. Idaho Irr. Co.*, — Idaho —, 122 Pac. Rep. 859.

mitted, and every reasonable inference from any fact should be regarded as proved; and, if all the facts and permissible inferences would sustain a verdict for the plaintiff, the motion should be denied. It is only proper to sustain such a motion for a nonsuit or directed verdict for the defendant, where the Court would be compelled to set aside a verdict if rendered for the plaintiff. In cases where reasonable men might differ in their conclusions, it is improper for the Court to take the case away from the jury.¹

In their verdict, the jury must determine the liability of the defendant; and, if they find against him, they must assess the damages which the plaintiff has sustained.²

§ 1696. Judgments—Measure of damages.—The judgment in an action for damages must be entered on the verdict of the jury, or the decision of the Court, in accordance with the practice of the jurisdiction where the action was tried.¹

¹ "It is only where the facts are such that a verdict for plaintiff would compel the Court to set it aside that a nonsuit is properly granted." *Paolini v. Fresno etc. Co.*, 9 Cal. App. 1, 97 Pac. Rep. 1130.

"In a case where reasonable men might, upon deliberation, differ in their conclusions, it would be improper for the Court to interfere with the verdict." *Chidester v. Consolidated D. Co.*, 59 Cal. 197.

In an action for damages against a railroad company for injury from changing the course of plaintiff's irrigation ditch, a verdict for \$600 held to be not excessive nor a result of passion or prejudice. *Denver etc. R. Co. v. Heckman*, 45 Colo. 470, 101 Pac. Rep. 976.

² For measure of damages, see Secs. 1696-1702.

¹ A judgment for a specified amount, and costs, is not void as to the costs because the amount thereof is left blank, since it may be afterward inserted by the clerk. *Big Goose*

etc. Co. v. Morrow, 8 Wyo. 537, 59 Pac. Rep. 159, 80 Am. St. Rep. 955.

Where plaintiff notified defendant not to take water from his premises and that he would demand \$50 for every day the notice was violated, and afterward obtained a decree restraining defendant from taking the water, the taking of the water after the notice was held not an acceptance of a proposition to sell at that specified price. *Wright v. Sonoma County*, 156 Cal. 475, 105 Pac. Rep. 409, 134 Am. St. Rep. 140.

See, also, *Sommerville v. Idaho Irr. Co.*, — Idaho —, 123 Pac. Rep. 302, where an irrigation company entered into a contract with a settler to furnish such settler with water and it was unable to furnish such water for the settler's tract of land, it was held that the correct measure of damages included such damages as the settler had sustained by reason of the expense incurred, labor performed, or any outlay of time which he had made under the contracts, and which he had

In actions where the jury find for the plaintiff, the jury may assess the compensatory damages against the defendant, which the plaintiff has actually sustained, and which are the direct and proximate result of the defendant's unlawful act.² And, in certain cases, they may assess nominal damages,³ or punitive or exemplary damages.⁴ In our discussion of the measure of compensatory damages, we will discuss the subject under the heads of damages for injury to lands, both for the total or partial destruction thereof;⁵ damages for the loss of stock;⁶ and damages for the loss of crops by reason of the failure of a company, under public duty or contract to furnish a consumer with water, or for the unlawful diversion of the water by another. In this connection, we will add here, that as far as compensatory damages are concerned, it makes no difference as to whether the plaintiff's failure to get the water to which he was entitled was the result of the violation of a duty either imposed by statute or contract, or was the result of the unlawful diversion of the water by the defendant. In any case, the plaintiff is entitled to complete and full compensation for the injuries sustained by him as the direct result of the unlawful act of the defendant.

As is the case in all actions at law, costs are usually awarded to the prevailing party. But in mixed actions at law and in equity the costs may be apportioned between the respective parties as may to the Court seem just and equitable.⁷

§ 1697. Compensatory damages—Measure of damages for injuries to lands.—The measure of compensatory damages for injuries to land depends, of course, upon the value of the land before the injury, and the nature and extent of the injuries thereto, that

suffered by reason of the failure of the company to comply with the terms of the same, and in addition thereto all payments on the land and water right, with interest thereon.

See, also, *Reinking v. Goodell*, — Iowa —, 133 N. W. Rep. 774; *Fairbanks etc. Co. v. Stites*, — Tex. Civ. App. —, 125 S. W. Rep. 636.

² For compensatory damages, see Secs. 1697-1701.

³ See Sec. 1703.

⁴ See Sec. 1702.

⁵ See Sec. 1697.

⁶ See Sec. 1699.

⁷ For costs in equitable actions, see Sec. 1562.

See, also, *Hoyt v. Hart*, 149 Cal. 722, 87 Pac. Rep. 569; *Big Goose etc. Co. v. Morrow*, 8 Wyo. 537, 59 Pac. Rep. 159, 80 Am. St. Rep. 955; *Hill v. Standard M. Co.*, 12 Idaho 223, 85 Pac. Rep. 907.

is to say, whether there has been a total or only a partial destruction, and whether the injuries are permanent or only temporary.

A total destruction of land may be illustrated by a case where there is a permanent dam or other obstruction constructed in a stream which permanently backs up or overflows the lands of the plaintiff. In such a case, as far as the owner is concerned, there is a total destruction of the land, and the measure of damages is the actual value of the land permanently submerged by the works of the defendant just before the injury occurred, and the depreciation of the value of the remainder of the plaintiff's land by reason of said flowage.¹

Lands may also be permanently injured by the acts of the defendant, but still there may not be a total destruction of the value thereof to the plaintiff. Such is the case where there is an injury to the land from the seepage of water from an irrigation ditch which is a permanent structure and properly constructed, and where, although the land affected can not be used for the raising of crops, it may be used for pasture or for some other purpose. Again, lands may be permanently injured but not totally destroyed by the sudden breaking out of the water from a ditch, canal, or reservoir, which results in covering the land of the plaintiff with sediment and debris, or the washing off of the soil, or the cutting of gullies therein. In such a case the measure of damages for the injury to the land is the difference between the value of the land immediately

¹ The measure of damages for permanently overflowing plaintiff's land is the value of the land submerged, and the depreciation in the value of the remainder of the land by reason thereof. *Hall v. Austin*, 20 Tex. Civ. App. 59, 48 S. W. Rep. 53; *Missouri etc. Co. v. Graham*, 12 Tex. Civ. App. 54, 33 S. W. Rep. 576; *Sweeney v. Montana Cent. R. Co.*, 25 Mont. 543, 65 Pac. Rep. 912; *Watson v. Colusa-Parrot etc. Co.*, 31 Mont. 513, 79 Pac. Rep. 14; *Town of Norman v. Ince*, 8 Okla. 412, 58 Pac. Rep. 632.

The measure of damages for the permanent destruction of an irrigation ditch is held in Colorado to be the difference between the values of

the land irrigated with and without the ditch. *Denver etc. Co. v. Dotson*, 20 Colo. 304, 38 Pac. Rep. 322.

See, also, *Sacramento etc. Co. v. Heilbron*, 156 Cal. 408, 104 Pac. Rep. 979, where it is held that the measure of damages for land taken by condemnation is its market value in view of all the purposes to which it is adapted, and while evidence that it is valuable for particular purposes is admissible, its money value for any particular purposes, as for nursery purposes, can not be shown in determining its market value.

See, also, *Pick v. Rubicon Hydraulic Co.*, 27 Wis. 433.

before and immediately after the injury accrued.² But in the measure of damages a distinction must be made between the permanent destruction of the land in question, and for the permanent or temporary injury to it.³ Again, where there is a permanent destruction of the land, or a permanent injury to the land, it constitutes but one cause of action, and all the damages must be assessed in one action. There can be no second recovery in such a case where the permanent damages have been once assessed in a previous suit.⁴

² The seepage and leakage being a necessary result of the character of the soil, the injury arising therefrom was a permanent one, and the measure of damages was the diminished value of the land. *Consolidated etc. Co. v. Hamlin*, 6 Colo. App. 341, 40 Pac. Rep. 582.

The measure of damages for injury to land, by its being covered with sediment and debris by being flooded by the breaking of a reservoir, is the difference between the value of the land before and immediately after the injury, and not the reasonable cost of clearing the land, though evidence of such cost would be admissible to aid in determining such difference in the value of the land. *Mustang etc. Co. v. Hissman*, 49 Colo. 308, 112 Pac. Rep. 800.

If the land is permanently injured but not totally destroyed, the owner will be entitled to recover the difference between the actual cash value of the land at any time immediately preceding the consummation of the injury and the actual cash value of the land in the condition it was immediately after the injury, with legal interest thereon to the time of trial. *Young v. Extension D. Co.*, 13 Idaho 174, 89 Pac. Rep. 296.

See, also, *Middlekamp v. Bessemer Irr. Co.*, 46 Colo. 102, 103 Pac. Rep. 280, 23 L. R. A., N. S., 795; *Old-*

enburg v. Oregon Sugar Co., 39 Ore. 564, 65 Pac. Rep. 869; *Shurtliff v. Extension D. Co.*, 14 Idaho 416, 94 Pac. Rep. 575; *French v. West Seattle etc. Co.*, 50 Wash. 257, 97 Pac. Rep. 60; *Missouri etc. R. Co. v. Graham*, 12 Tex. Civ. App. 54, 33 S. W. Rep. 576; *Watson v. Colusa-Parrot etc. Co.*, 31 Mont. 513, 79 Pac. Rep. 14; *San Antonio v. Horkan*, — Tex. Civ. App. —, 45 S. W. Rep. 391; *Texas C. R. Co. v. Brown*, — Tex. —, 86 S. W. Rep. 659; *Barrows v. Fox (Cal.)*, 30 Pac. Rep. 768; *Id.*, 98 Cal. 63, 32 Pac. Rep. 811; *Pallett v. Murphy*, 131 Cal. 192, 63 Pac. Rep. 366; *Crow v. San Joaquin etc. Co.*, 130 Cal. 309, 62 Pac. Rep. 562, 1058.

See, also, *Colorado Springs etc. Co. v. Albrecht*, — Colo. App. —, 123 Pac. Rep. 957, where it is held that the amount of damages to real estate by flooding or overflow is fixed by the difference in the value of the property before and after the injury.

³ *Shurtliff v. Extension D. Co.*, 14 Idaho, 416, 94 Pac. Rep. 574; *Young v. Extension D. Co.*, 13 Idaho 174, 89 Pac. Rep. 296.

⁴ "When the structure itself is permanent, and is the cause of the injury, the injury is permanent, and all damages are to be recovered in one action, the right to which accrued with the beginning of the injury." *Middlekamp v. Bessemer Irr. D. Co.*, 46

Again, the injuries to the land may not be permanent, but may be temporary or comparatively slight in character. Such would be the case where the water broke out from a ditch, or canal, or reservoir, and caused erosion on the plaintiff's land, but not to such an extent but that the land, with small expense, could be restored to its former condition. In such a case the plaintiff is entitled to recover the amount necessary to repair the injury and put the land in the condition that it was in immediately preceding the injury.⁵

The measure of damages in an action for breach of contract for failing to keep the plaintiff's ditch in repair is the money paid by the plaintiff for such repairs.⁶ And, where on account of such temporary injuries to the land, the plaintiff was prevented from raising a crop, the difference between the rental value of the land immediately preceding the injury and the rental value immediately after the injury is the proper measure of damages.⁷

In a recent case in Nevada, where the fact was that a stand of alfalfa, which ordinarily would produce two crops per year for many years, was destroyed by the failure of the defendant company to furnish water for the same, the Court, although not very defi-

Colo. 102, 103 Pac. Rep. 280, 23 L. R. A., N. S., 795.

Having recovered damages for such permanent injury to the land, no further action, by reason of the continuance of the nuisance, will lie. Consolidated etc. Co. v. Hamlin, 6 Colo. App. 341, 40 Pac. Rep. 582.

See, also, Cumberland & Oxford Canal Co. v. Hitchings, 65 Me. 140; Van Hoozier v. Hannibal etc. R. Co., 70 Mo. 145.

⁵ If the land is temporarily but not permanently injured, the owner is entitled to recover the amount necessary to repair the injury, with legal interest thereon to the time of trial. Young v. Extension D. Co., 13 Idaho 174, 89 Pac. Rep. 296.

See, also, Sweeney v. Montana Cent. R. Co., 25 Mont. 543, 65 Pac. Rep. 912; Shurtliff v. Extension D. Co., 14 Idaho 416, 94 Pac. Rep. 574; Malm-

strom v. People's etc. Co., 32 Nev. 246, 107 Pac. Rep. 98.

⁶ Orr Water Ditch Co. v. Reno Water Co., 19 Nev. 60, 6 Pac. Rep. 72; Hayden v. Consolidated etc. Co., 3 Cal. App. 136, 84 Pac. Rep. 422; Denver etc. Co. v. Heckman, 45 Colo. 470, 101 Pac. Rep. 976.

But that this is not the measure of damages where the injury to the land is permanent, see Mustang etc. Co. v. Hissman, 49 Colo. 308, 112 Pac. Rep. 800.

⁷ "We think it is well established by the authorities that for temporary injuries to land, where one is simply prevented from raising a crop, the rental value is the proper measure of damages." Young v. Extension D. Co., 13 Idaho 174, 89 Pac. Rep. 296.

For measure of damages for injuries to crops, see Sec. 1698.

nite as to the measure of damages, held that the injury was to the realty itself, "and would amount at least to the value of the seed planted to produce the stand."⁸ It seems to us that the true measure of damages in this case was the full rental value of the land before the injury, during the full period of time that it took to replace the stand of alfalfa in practically the same condition that it was before the injury, as while this was being done the land could not be used for anything else.

In actions for damages which are temporary and recurring, the plaintiff is not limited to one action, but he may recover in successive actions damages which will compensate him for the actual injury which he has sustained in each case.⁹ He may, however, recover in one action all damages from recurring causes up to the time of the commencement of the action, which are not barred by the statute of limitations.¹⁰

§ 1698. Compensatory damages—Measure of damages for injuries to crops.—One of the most common causes of action for damages is that for the destruction of, or injury to, the crops of the plaintiff. The measure of compensatory damages, which the plaintiff in such an action is entitled to recover for the loss of or injury to crops is the same, and that, too, whether he bases his action upon the breach of a contract with a water company for the failure to furnish water as agreed, or upon the violation of a duty imposed upon such company as a quasi-public corporation,¹ or whether the action is based upon a tort, caused by the negligent construction, maintenance, or operation of the works of the defendant, so that the water overflows, breaks out, or seeps the lands of the plaintiff, and from which direct and proximate cause his crops are injured or destroyed. And, where the defendant is liable for such injuries, the plaintiff is entitled to recover an amount that will fully compensate him for all injuries sustained in this respect. But

⁸ Candler v. Washoe etc. Co., 28 Nev. 151, 80 Pac. Rep. 751.

⁹ Sulens v. Chicago etc. R. Co., 74 Iowa 659, 38 N. W. Rep. 545, 7 Am. St. Rep. 501; St. Louis etc. Co. v. Brown, 34 Ill. App. 552; Cobb v. Smith, 38 Wis. 21; Savannah etc. Co. v. Bourquin, 51 Ga. 378.

¹⁰ Goodrich v. Dorset Marble Co., 60 Vt. 280, 13 Atl. Rep. 636; Watson v. Colusa etc. M. Co., 31 Mont. 513, 79 Pac. Rep. 14.

¹ For ditch and canal companies as quasi-public corporations, and their duties, see Secs. 1493-1502.

the plaintiff is entitled to recover for only the injuries for which the defendant is directly liable. Therefore, in Hawaii, where, by decree, the plaintiffs were held to be entitled to a certain amount of water at certain times, and it appeared that the defendants diverted a portion of the plaintiffs' water, but as the plaintiffs had not upon their part complied with the order of the commissioners to clean out the water course, and had allowed the defendants to neglect to furnish the water on the designated days, it was held that the amount of the damages which the plaintiffs could recover was proportionately lessened.²

But, as to the method of the measurement of such damages, and the basis upon which they should be estimated, the authorities seem to differ somewhat. Some of the authorities hold that the proper basis for the estimation of damages for the loss of growing crops is the difference between the rental value of the land with the water and its rental value without it.³

Other authorities hold that the proper basis for the measurement of damages is the value of the crops that would have been produced under ordinary conditions, less the expense that would have been incurred in planting, raising, harvesting, and marketing.⁴

Both methods have their merits and their difficulties. It is certain that the full rental value of the land is not the proper measure of damages unless the owner thereof is deprived of the entire use of his land. And, when the owner's injury arises, not from being entirely deprived of the use of the land, but only from the impairment of its use, the allowance of the full rental value, without deducting the benefits derived from such use as he could make of it,

² *Mele v. Ahuna*, 6 Haw. 346.

See, also, *Lum Ah Læ v. Ah Suong*, 16 Haw. 163.

³ *Pallett v. Murphy*, 131 Cal. 192, 63 Pac. Rep. 366; *Ferrea v. Chabot*, 63 Cal. 564; *Id.*, 121 Cal. 233, 53 Pac. Rep. 689; *Crow v. San Joaquin etc. Co.*, 130 Cal. 309, 62 Pac. Rep. 562; *Young v. Extension D. Co.*, 13 Idaho 174, 89 Pac. Rep. 296; *Reisert v. New York*, 74 N. Y. Supp. 673, 69 App. Div. 302.

⁴ *Shotwell v. Dodge*, 8 Wash. 337, 36 Pac. Rep. 254; *Barstow Irr. Co.*

v. Cleghon, 41 Tex. Civ. App. 531, 93 S. W. Rep. 1020; *Knowles v. Leggett*, 7 Colo. App. 265, 43 Pac. Rep. 154; *Colorado Canal Co. v. Sims*, 42 Tex. Civ. App. 442, 94 S. W. Rep. 365; *Gulf etc. R. Co. v. Nicholson*, 25 S. W. Rep. 54; *Raywood etc. Co. v. Wells*, 32 Tex. Civ. App. 401, 77 S. W. Rep. 253; *Chicago etc. R. Co. v. Emmert*, 53 Neb. 237, 73 N. W. Rep. 540, 68 Am. St. Rep. 602; *Northern Colo. Irr. Co. v. Richards*, 22 Colo. 450, 45 Pac. Rep. 423.

would be manifestly unjust.⁵ Therefore, where the rental value is taken as the basis of computation, as stated by the California Court, it is: "The difference between the rental value of the land with the water and its rental value without it."⁶

In California it was held that the proper measure of damages for the refusal of a water company to furnish water either in accordance with the terms of a contract, or under its statutory duty to furnish the water upon proper application and a payment or tender of the legal rates, is the difference between the rental value of the land with the water and its rental value without it, after deducting the lawful price of the water; and that uncertain and speculative profits, from crops, which might or might not have been raised, and which might or might not have been realized had they been raised, can not be recovered in such actions.⁷ This rule for assessing damages may be proximately correct, where the land is planted or sown to annual crops. But, where the land is planted to perennial crops or to fruit trees there may be other damages which should be considered. It takes a number of years to bring fruit trees to the bearing point. Yet, after they have been brought to this point, by being deprived of the water for a single year, or even for a portion of a year, they may die, and the expense and labor of years be lost to the owner; or, again, their bearing capacity may be so impaired that it may take a number of years with sufficient water to bring them back to their former condition. There-

⁵ Northern Colo. Irr. Co. v. Richards, 22 Colo. 450, 45 Pac. Rep. 423.

⁶ Crow v. San Joaquin etc. Co., 130 Cal. 309, 62 Pac. Rep. 562.

⁷ "The measure of damages arising from a breach of contract or in tort is the detriment proximately caused thereby. . . . The proper measure of damages in a case like this is the difference between the rental value of the land with the water and its rental value without it, and the lawful price of the water should also be taken into consideration and deducted. . . . Conjectural profits of the kind sought here can not be recovered as damages in such cases. They must be damages

capable of ascertainment by proof to a reasonable certainty. Uncertain and speculative profits, which might or might not have been realized, are not recoverable in such action." Crow v. San Joaquin etc. Co., 130 Cal. 309, 62 Pac. Rep. 562.

"The evidence objected to and received by the Court was confined to the rental value of the land with and without water for irrigation. Evidence as to the value of a possible crop that might be grown with the use of water would be as purely speculative as could well be imagined." Pallett v. Murphy, 131 Cal. 192, 63 Pac. Rep. 366.

fore, damage to growing trees or to perennial crops is damage to the realty itself, for which a recovery may be had.⁸ So, the California Court has modified the above rule in assessing damages in cases of this nature, and holds that damages for injuries to fruit trees and growing crops are not too remote, and that such injuries may be assessed as special damages.⁹ But it seems to us that the Court could, with all propriety, have gone still further and still

⁸ "The Court found, because of the failure of the defendant to furnish water as agreed, that the stand of alfalfa and timothy was in the main killed out. The damage thus resulting was damage to the realty itself." *Candler v. Washoe etc. Co.*, 28 Nev. 151, 80 Pac. Rep. 751.

⁹ "As to the amount of damages: This only applies to the \$1,000, which the Court found the plaintiff had suffered to trees, and the fruit crop thereon, by reason of the defendant's failure to furnish the water as agreed. It is insisted by appellants that such damages are too remote and speculative. The Court found that, when the contract between the parties was made the defendants knew that the 10 inches of water contracted for had a peculiar value to the plaintiff, inasmuch as his land and orchard were of little value without it. The orchard was in bearing when the breach of the covenant was committed, and there was no other source from which the plaintiff could obtain water for irrigation. There is no question but what the amount of damages awarded was suffered, and we think that, under the facts as found, the Court was warranted in making the award." *Roberts v. Crafts*, 141 Cal. 20, 74 Pac. Rep. 281.

In a late action founded on tort for the flooding of plaintiff's land, the California Court held that the proper measure of damages was the value of

the crop in the condition it was in at the time and place of destruction. *Dennis v. Crocker-Huffman etc. Co.*, 6 Cal. App. 58, 91 Pac. Rep. 425.

See, also *Hewitt v. San Jacinto etc. Co.*, 124 Cal. 186, 56 Pac. Rep. 893; *Barrows v. Fox*, 30 Pac. Rep. 768; *Id.* 98 Cal. 63, 32 Pac. Rep. 811; *Thomas v. Bolsa Land Co.*, 1 Cal. App. 335, 82 Pac. Rep. 207; *Bacon v. Kearney Vineyard Syndicate*, 1 Cal. App. 275, 82 Pac. Rep. 84; *Williams v. Harter*, 121 Cal. 47, 53 Pac. Rep. 405; *Teller v. Bay Cities etc. Co.*, 151 Cal. 209, 90 Pac. Rep. 942, 12 L. R. A., N. S., 267; *Sacchi v. Bayside Lbr. Co.*, 13 Cal. App. 72, 108 Pac. Rep. 885; *Lester v. Highland Boy etc. Co.*, 27 Utah 470, 76 Pac. Rep. 341, 101 Am. St. Rep. 988, 1 Am. & Eng. Ann. Cas. 761.

Land prepared for alfalfa will produce several crops each year for several years without further care, except by way of irrigation, and the measure of damages of one who just having prepared his land for alfalfa, and cutting the first crop, was wrongfully denied water for irrigation by a water company, whereby he lost two additional crops, which, with irrigation, the land would have produced that year, and a reseedling was necessary, is the value of the two crops, less cost of irrigation, plus cost of reseedling. *Lowe v. Yolo County etc. Co.*, 157 Cal. 503, 108 Pac. Rep. 207; *affg. Id.* 8 Cal. App. 167, 96 Pac. Rep. 379.

have kept within the law, and have considered such injuries as permanent injuries to the land—at least where trees are destroyed there is a permanent injury to the land—and the Court might have held, under the general rule for the measure of such damages, that the true measure was the difference in the value of the land with the live, growing trees thereon, just prior to the injury and its value immediately after the trees were destroyed.¹⁰

The correct rule, as it seems to us, was held in a late Idaho case,¹¹ and is set forth as follows: "The measure of damages for destruction of apple trees planted and growing is what such destroyed trees were worth on the premises in their growing state, and the jury in determining this may consider the difference in the value of the land with and without such growing trees thereon at the time of destruction."

In Colorado the rule for the assessment of damages for the failure of a company to furnish water under its statutory duty, was held by the Court to be "the difference between the amount realized from the crops the land did produce without the water, and the amount that would have been realized therefrom had the water been furnished, less the added cost of raising, harvesting, and marketing the product, the loss of trees," and the loss of that portion of the owner's farm which he was thereby prevented from cultivating; but that he was not entitled to recover damages for permanent improvements, or for the depreciation in the value of live stock and farm implements, although the expenses for such were made on the faith of receiving the water for the succeeding season.¹² In Arizona the actual loss to plaintiff's crops is also held to be the true measure of damages, and are held not too "fanciful, speculative, or remote."¹³ The same rule for the measurement of such

¹⁰ For the measure of damages for permanent injuries to land, see Sec. 1697.

See, also, *Sacchi v. Bayside Lbr. Co.*, 13 Cal. App. 72, 108 Pac. Rep. 885.

¹¹ *Hanes v. Idaho Irr. Co.*, — Idaho —, 122 Pac. Rep. 859.

¹² *Northern Colo. Irr. Co. v. Richards*, 22 Colo. 450, 45 Pac. Rep. 423; *Colorado etc. Co. v. Hartman*, 5 Colo. App. 150, 38 Pac. Rep. 62; *Tubbs v. Roberts*, 40 Colo. 498, 92 Pac. Rep. 220.

Evidence merely as to the amount of crops which could have been raised if the proper amount of water had been furnished, together with evidence of the market value of such crops, is insufficient as a basis for recovery, without proof of the cost of raising and marketing the crops. *Knowles v. Leggett*, 7 Colo. App. 265, 43 Pac. Rep. 154.

¹³ *Miller v. Douglass*, 7 Ariz. 41, 60 Pac. Rep. 722.

damages is adopted by the courts of Nevada,¹⁴ Idaho,¹⁵ Montana,¹⁶ Nebraska,¹⁷ New Mexico,¹⁸ Texas,¹⁹ South Dakota,²⁰ Oregon,²¹ and also in Kansas, although it was there held that where the demand was not made until late in the season, the company was not liable for the entire loss for the year.²² In Utah it is held that, in a

¹⁴ The measure of damages for the total destruction, or nearly total destruction, of growing crops which would to a reasonable certainty have matured, except for the defendant's wrongful act, is the value of the probable yield of the crops under proper cultivation when matured and ready for the market, less the estimated expense of producing, harvesting, and marketing them, including the expense of irrigation, and the value of any portion of the crops that may have been saved. *Candler v. Washoe etc. Co.*, 28 Nev. 151, 80 Pac. Rep. 751.

The measure of damages for the total destruction of growing crops is the value of the probable yield of the crops under proper cultivation when matured and ready for the market, less the estimated expense of harvesting the same, including the expense necessary for irrigation, and the value of any portion of the crops that may have been saved. *Malmstrom v. People's etc. Co.*, 32 Nev. 246, 107 Pac. Rep. 98.

¹⁵ Where there was a total destruction of plaintiff's crops, an instruction to the jury that they should find for the plaintiff the reasonable value of the said crop at maturity, less the reasonable cost of irrigating, caring for, and harvesting the same, was held proper. *Rios v. Arcuenaaga*, 19 Idaho 739, 115 Pac. Rep. 922; see, also, *Risse v. Collins*, 12 Idaho 689, 87 Pac. Rep. 1006; *Gagnon v. Molden*, 15 Idaho 727, 99 Pac. Rep. 965.

¹⁶ The value of crops, and the expense of maturing, reaping, threshing,

and moving them to market, are competent facts to be considered in arriving at the measure of damages to crops by the overflowing of a stream, caused by negligence in driving logs. *Hopkins v. Butte etc. Co.*, 16 Mont. 356, 40 Pac. Rep. 865.

See, also, *Watson v. Colusa Parrot etc. Co.*, 31 Mont. 513, 79 Pac. Rep. 14; *Anderson v. Cook*, 25 Mont. 330, 64 Pac. Rep. 873, 65 Pac. Rep. 113, 66 Pac. Rep. 504; *Carron v. Wood*, 10 Mont. 500, 26 Pac. Rep. 388.

¹⁷ *Clague v. Tri-State Land Co.*, 84 Neb. 499, 121 N. W. Rep. 570, 133 Am. St. Rep. 637; *Chicago etc. R. Co. v. Emmert*, 53 Neb. 237, 73 N. W. Rep. 540, 68 Am. St. Rep. 602.

¹⁸ *Smith v. Hicks*, 14 N. M. 560, 98 Pac. Rep. 138.

¹⁹ *Barstow Irr. Co. v. Cleghon*, 41 Tex. Civ. App. 531, 93 S. W. Rep. 1020; *Colorado Canal Co. v. Sims*, 42 Tex. Civ. App. 442, 94 S. W. Rep. 365; *Gulf etc. R. Co. v. Nicholson*, 25 S. W. Rep. 54; *Raywood v. Wells*, 33 Tex. Civ. App. 545, 77 S. W. Rep. 253; *Lutcher v. Stoddard*, — Tex. Civ. App. —, 56 S. W. Rep. 608; *Gulf etc. Co. v. McGowan*, 73 Tex. 355, 11 S. W. Rep. 336; *San Antonio etc. Co. v. Kiersey*, — Tex. Civ. App. —, 81 S. W. Rep. 1045.

²⁰ *Nebraska etc. Co. v. Burris*, 10 S. D. 430, 73 N. W. Rep. 919.

²¹ *Anderson v. Adams*, 43 Ore. 621, 74 Pac. Rep. 215; see instruction given by the trial court.

²² *Western Irr. Co. v. Chapman*, 8 Kan. App. 778, 59 Pac. Rep. 1098.

suit for damages for flooding certain ice ponds used for putting up ice, the proper measure of damages is the value of the ice that might have been put up with reasonable diligence, less the cost of putting it in the ice house.²³ In Washington, in an action for injury to crops by defendant's refusal to furnish water, evidence that the net value of the plaintiff's crops raised in each of certain specified years was less than a stated sum than it would have been had plaintiff been furnished with the water as agreed was competent, and showed substantial damage from defendant's breach of contract, but judgment by the trial court for \$2,100 was modified to \$500 by the Supreme Court.²⁴

Interest prior to the recovery of judgment for damages for the failure to secure water should not be allowed, such damages being unliquidated and uncertain until the same shall have been adjudicated.²⁵

§ 1699. **Compensatory damages—Measure of damages for the loss of stock.**—Where the defendant is liable at all for the damages caused by the loss of live stock, he is liable for their full market value at the time of the loss.¹ And, it is held that a ditch company, with the right to maintain a ditch over the lands of another, is liable to the land owner for injury to his stock, which is caused by the negligence of the company, in not properly protecting the ditch from the cattle, or in permitting a dangerous washout to occur and remain a considerable time, into which cattle fell therein.² But it is held in Colorado that where the defendant con-

²³ *Farr v. Griffith*, 9 Utah 416, 35 Pac. Rep. 506.

See, also, *Lester v. Highland Boy etc. Co.*, 27 Utah 470, 76 Pac. Rep. 341, 101 Am. St. Rep. 988, 1 Am. & Eng. Ann. Cas. 761.

²⁴ *Hutchinson v. Mt. Vernon etc. Co.*, 49 Wash. 469, 95 Pac. Rep. 1023; *Shotwell v. Dodge*, 8 Wash. 337, 36 Pac. Rep. 254.

But see *Hayward v. Mason*, 54 Wash. 649, 104 Pac. Rep. 139; *Id.* 54 Wash. 653, 104 Pac. Rep. 141, where in each case it was held that there was no liability upon the part of the defendant.

See, also, *Ulrich v. Pateros W. Ditch Co.*, — Wash. —, 121 Pac. Rep. 818.

²⁵ *Ferrea v. Chabot*, 121 Cal. 233, 53 Pac. Rep. 689; *Anderson v. Adams*, 43 Ore. 621, 74 Pac. Rep. 215.

But see *Young v. Extension D. Co.*, 13 Idaho 174, 89 Pac. Rep. 296.

¹ *Big Goose etc. Co. v. Morrow*, 8 Wyo. 537, 59 Pac. Rep. 159, 80 Am. St. Rep. 955.

² *Big Goose etc. Co. v. Morrow*, 8 Wyo. 537, 59 Pac. Rep. 159, 80 Am. St. Rep. 955, wherein it is said: "It is an old and familiar maxim that one must so use his own property as not to

structed an irrigation ditch across land on which the plaintiff had a right of pasturage, and the plaintiff knew that the condition of the ditch was such that his stock were likely to become mired therein, he took the risk of such injury, and could not recover for such loss in an action against the ditch owner.³

§ 1700. Compensatory damages—Measure of damages for loss of power.—Compensatory damages may be recovered for the loss of power, where such loss is occasioned by the unlawful diversion of the water which generates such power. The measure of such damages is held to be the market value of the power actually taken.¹ Or, where other power is substituted, it is held that the measure of damages is the reasonable cost to the plaintiff of the substituted power.²

§ 1701. Compensatory damages—Measure of damages for loss of or injury to a water right.—Damages may also be recovered for the loss of or the injury to a water right, separate and apart from any considerations of the injury to the land,¹ or injuries to crops.² Such would be a case of a grantor conveying by warranty deed a water right for which he had no title. The measure of damages in an action for the breach of the warranty or contract is the value of the water right.³ So, also, where, after the lease of water to the plaintiff by the defendant, a third person was decreed to be

injure that of other persons—'*Sic utere tuo ut alienum non laedas*'—and, in our opinion, plaintiff in error is not exempt from its application."

See, also, *Hopkins v. Butte etc. Co.*, 16 Mont. 356, 40 Pac. Rep. 865.

³ *Messenger v. Gordon*, 15 Colo. App. 429, 62 Pac. Rep. 959.

See, also, *Heinlen v. Fresno etc. Co.*, 68 Cal. 35, 8 Pac. Rep. 513.

¹ *Green Bay etc. Co. v. Kaukauna etc. Co.*, 112 Wis. 323, 87 N. W. Rep. 864, 62 L. R. A. 579.

² The measure of damages for wrongfully preventing the use of a water power is the reasonable cost of the steam power used as a substitute during such time. *Hottell v. Farm-*

ers' etc. Assn., 25 Colo. 67, 53 Pac. Rep. 327, 71 Am. St. Rep. 109.

¹ For the measure of damages for injuries to land, see Sec. 1697.

² For measure of damages for injuries to crops, see Sec. 1698.

³ In a case involving damages for the failure of a vendor to furnish a certain number of inches of water to be furnished by a ditch company, under his warranty deed, and the company refused to furnish the water, it was held that no other measure of damages was competent than the value of the water. *Starbird v. Jacobs*, 46 Colo. 507, 105 Pac. Rep. 872, the Court saying: "The case at bar is not different in principle than it would be if

the owner of a part of the leased water right, so that the plaintiff was deprived of such part, the plaintiff is entitled to damages for the loss.⁴ But it is held in Washington that, where the owners of land contract to sell it together with certain water rights and are unable to transfer title to the water rights, the purchaser in a suit for damages can recover moneys paid on the purchase price and expenses legitimately incurred in pursuance of the contract, but is not entitled to damages for the loss of the bargain.⁵

§ 1702. Exemplary or punitive damages.—Under certain circumstances, exemplary or punitive damages may be awarded the plaintiff and against the defendant. This is true where the defendant has been guilty of oppression, fraud, or malice. So, a public service corporation guilty of fraud, oppression, or malice, in failing to furnish water, to the extent of its actual supply, is liable to

the question in dispute were as to the title of the land itself."

In Idaho, in an action for damages caused by reason of the failure of the defendant to comply with his contract "to convey and deliver to the second party," upon his land, "a water right of 100 inches of water," the Court held, that the proper measure of damages is the difference between the contract price for the water and the water right and its delivery upon the land, and the price it would cost to purchase a like water right and equal number of inches of water delivered upon the land at the time of the breach of the contract; and that, if however, it should appear that no water right could be purchased either at the time of the breach or at any time thereafter prior to the trial, evidence as to the value of the buildings and other improvements made by the owner of the land might be introduced in the case in order to arrive at the actual damages sustained through and on account of the breach of the contract. And, in this connection, that it would

be proper and necessary to prove how much the plaintiff had paid on the contract, "because, if he is not to receive the consideration, he should, among other things, receive the money paid by him on the contract." *Gagnon v. Molden*, 15 Idaho 727, 99 Pac. Rep. 965.

⁴ *Tilton v. Sterling etc. Co.*, 28 Utah 173, 77 Pac. Rep. 758, 107 Am. St. Rep. 689.

The measure of damages for the loss of the use of water by the wrongful acts of another is the value of the water in the market for irrigation purposes. *North Point etc. Co. v. Utah etc. Co.*, 23 Utah 199, 63 Pac. Rep. 812.

See, also, *Mack v. Jackson*, 9 Colo. 536, 13 Pac. Rep. 542; *Calkins v. Sorosis Fruit Co.*, 150 Cal. 426, 88 Pac. Rep. 1094; *Farmers' etc. Co. v. New Hampshire etc. Co.*, 40 Colo. 467, 92 Pac. Rep. 290.

But see *Stevens v. Wadleigh*, 5 Ariz. 90, 46 Pac. Rep. 70.

⁵ *Babcock-Cornish Co. v. Urquhart*, 53 Wash. 168, 101 Pac. Rep. 713.

exemplary damages within the California Civil Code, Section 3294, providing that in an action for the breach of an obligation not arising from contract exemplary damages may be recovered, where the defendant has been guilty of oppression, fraud, or malice. Therefore, in a case arising in California, where \$500, as exemplary damages, was awarded the plaintiff, in a case where it was proven that the defendant was guilty of malice and undue oppression in not furnishing the plaintiff with water, under its duty as a public service corporation, the Court of Appeals said: "We can see no good reason for holding that the appellant is an exception to the rule which imposes an additional penalty for fraud, oppression, or malice."¹ And the Supreme Court in affirming the judgment said: "As said before, there is in all this clearly sufficient support for the conclusion that the defendant was guilty of oppression and malice."² In order to have exemplary damages awarded, the pleadings and proof must show such a state of fraud, malice, or oppression, as to warrant such a judgment, and the plaintiff in his complaint must ask that they be awarded. The theory upon which they are granted is that the defendant has been guilty of such acts as deserve punishment, and that such a judgment will be an example to others to refrain from such acts. Under the proper pleadings and proof the question of exemplary damages is addressed to the discretion of the jury, or the Court trying the case without a jury, where the evidence legally warrants a judgment of such damages. Upon appeal, the Supreme Court will not ordinarily, at least, undertake to control that discretion by requiring the assessment of such damages.³ But, where the evidence does not show such a state of facts as above stated, such damages should not be awarded.⁴

¹ *Lowe v. Yolo County etc. Co.*, 8 Cal. App. 167, 96 Pac. Rep. 379, aff'd. 157 Cal. 503, 108 Pac. Rep. 297. facts are such as legally warrant them." ⁴ *Sutherland on Damages*, 1031.

² See, also, *Greenberg v. Western Turf Assn.*, 140 Cal. 358, 73 Pac. Rep. 1050; *Hagerman Irr. Co. v. McMurry*, 16 N. M. 172, 113 Pac. Rep. 823. *Hagerman Irr. Co. v. McMurry*, 16 N. M. 172, 113 Pac. Rep. 823.

³ "Such damages . . . are in the discretion of the jury, where the absence of evidence that it was done with the intent to injure plaintiff, or wantonly and in disregard of whether

§ 1703. **Nominal damages.**—In cases where there has been clearly an invasion of a right, but no actual damages are proven, nominal damages may be awarded.¹ So, it is held that a riparian owner who uses an unreasonable amount of the water is liable for at least nominal damages, in an action by another riparian owner lower down the stream whose riparian rights are affected.² But he can not recover damages for injury such a diversion does to his non-riparian lands.³

§ 1704. **New trial—Appeal.**—A motion for a new trial may be made upon the grounds as specified by the statute of the jurisdiction where the action was tried. In all motions for a new trial the statute must be strictly followed, as to time and procedure.¹

Usually these cases are appealed to some appellate court, and oftentimes to the court of last resort, as is witnessed by the many cases cited in the notes of the preceding sections of this chapter. The statute of the State where the action is tried must be strictly followed. The questions involved may be reviewed in the same manner by the Appellate Court that may be reviewed in other actions at law. If error is committed by the trial court, in the admission of testimony, or in its instructions to the jury, the usual practice is to reverse the judgment and remand the case to the trial court for a new trial. If, upon the other hand, the Appellate Court finds

it might work injury to her or not, no case is made out for exemplary damages." *Ladd v. Redle*, 12 Wyo. 362, 75 Pac. Rep. 691.

Mabb v. Stewart, 133 Cal. 556, 65 Pac. Rep. 1085; *Id.* 147 Cal. 413, 81 Pac. Rep. 1073.

¹ The evidence did not require a finding of any more than nominal damages for the plaintiff. *Hagerman Irr. Co. v. McMurry*, 16 N. M. 172, 113 Pac. Rep. 823.

See, also, *Rohwer v. Chadwick*, 7 Utah 385, 26 Pac. Rep. 1116; *Mack v. Jackson*, 9 Colo. 536, 13 Pac. Rep.

542; *Shotwell v. Dodge*, 8 Wash. 337, 36 Pac. Rep. 254; *Creighton v. Evans*, 53 Cal. 55, 8 Morr. Min. Rep. 123; *Ladd v. Redle*, 12 Wyo. 362, 75 Pac. Rep. 691.

² *Shotwell v. Dodge*, 8 Wash. 337, 36 Pac. Rep. 254; *Parker v. Griswold*, 17 Conn. 288.

³ *Heinlein v. Fresno etc. Co.*, 68 Cal. 35, 8 Pac. Rep. 513.

See, also, for injunctions without proof of damages, Sec. 1606.

¹ *Denver etc. R. Co. v. Heckman*, 45 Colo. 470, 101 Pac. Rep. 976.

no error which affects the substantial rights of the parties, the judgment of the trial court will be affirmed.²

² A judgment in favor of defendants will not be reversed where it appears that the plaintiff was merely entitled to nominal damages; the statute requiring a new trial to be granted for causes "affecting the substantial rights of a party." *Ladd v. Redle*, 12 Wyo. 362, 75 Pac. Rep. 691.

But see *Hagerman Irr. Co. v. McMurry*, 16 N. M. 174, 113 Pac. Rep. 823, where the judgment, as rendered by the trial court was corrected to include \$1, as nominal damages, in accordance with the findings of the trial court, and as corrected, the judgment was affirmed.

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